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DEPARTMENT OF
WATER RESOURCES

Attorneys for Olsen Livestock Consultants, Inc.

Scott L. Campbell, ISB No. 2251
Andrew J. Waldera, ISB No. 6608
Dylan B. Lawrence, ISB No. 7136
MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Floor
Post Office Box 829
Boise, Idaho 83701
Telephone (208) 345-2000
Facsimile (208) 385-5384
23091.0000

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. 37-00353G

**BRIEF IN SUPPORT OF MOTION TO FILE
LATE RESPONSE OR PARTICIPATE**

COMES NOW Olsen Livestock Consultants, Inc., by and through its undersigned counsel of record, Moffatt, Thomas, Barrett, Rock & Fields, Chartered, and pursuant to Idaho Rule of Civil Procedure 7 and Rules 1(a), 1(b), and 10(h) of this Court's Administrative Order 1 ("AO1"), hereby files this Brief in Support of Motion to File Late Response or Participate. This brief is supported by the Affidavit of Dylan B. Lawrence, filed contemporaneously herewith.

I. BACKGROUND

The movant Olsen owns Lot 2, Block 1, of the Dean Ranch Subdivision just south of Bellevue, Idaho. (Lawrence Aff. ¶ 2, Ex. A.) Olsen also owns water right 37-353J, which is appurtenant to that 10-acre tract of land. Olsen's water right derives from the Frost Decree that adjudicated many water rights in the Big Wood River basin. More specifically, the Frost Decree adjudicated a water right to James Johnson with a June 12, 1886, priority date, in the amount of 320 inches (6.4 cfs), for the irrigation of a 160-acre ranch. (Lawrence Aff. ¶ 3, Ex. B.) Consequently, each acre of the original 160-acre Johnson ranch received a proportionate 2-inch share of the underlying 320-inch right. That Johnson water right was later assigned the water right number 37-353.

The Johnson ranch eventually came under the unified ownership and control of M.D. Dean, who subdivided the 160-acre ranch in the mid-1970s. (*See* Lawrence Aff. ¶ 2, Ex. A.) Because no other provision was made for water right 37-353, that right was also legally subdivided along with the land, with a proportionate share of the water right appurtenant to, and conveyed with, each of the subdivided lots. Consequently, when Olsen purchased his 10-acre tract, he also purchased his proportionate share of water right 37-353, represented by the water right 37-353J. This water right has always entitled Olsen (and the previous owners of Lot 2, Block 1) to the diversion of up to 0.40 cfs of water, because 2 inches per acre x 10 acres = 20 inches, or 0.40 cfs, of water. This is a matter of simple mathematics that was specifically confirmed by IDWR when it issued an order in response to a delivery call initiated by Olsen in 1997. (Lawrence Aff. ¶ 4, Ex. C.)

However, when IDWR issued its recommendation for 37-353J in the SRBA, it reduced the diversion rate from 0.40 cfs to 0.32 cfs, and reduced the place of use from 10 acres

to 7.8 acres. (Lawrence Aff. ¶ 5, Ex. D.) IDWR made these reductions—not because of any conduct by Olsen or one of his predecessors-in-interest—but because the progeny rights to 37-353 have been over-claimed in the SRBA by other parties, and IDWR apparently reduced multiple progeny claims in response, so as not to exceed the original parameters of the Frost Decree and the parent right 37-353. (Lawrence Aff. ¶ 6, Ex. E.) Olsen timely objected to the recommendation on that basis. (Lawrence Aff. ¶ 7, Ex. F.) That objection is still pending in the SRBA.

Barbara Barry is the claimant of water right 37-353G in the SRBA—another progeny right to 37-353. IDWR recommended that right as disallowed in the SRBA. (Lawrence Aff. ¶ 8, Ex. G.) On March 18, 2009, this Court granted Barry leave to file a late objection to Olsen’s water right 37-353J. Critical to this motion is the basis of Barry’s objection. Barry has taken the position that Olsen has overclaimed water right 37-353J in the SRBA. In other words, Barry takes the position that the quantity and place of use elements of Olsen’s right 37-353J should be reduced, and that Barry’s right 37-353G should be commensurably increased by that reduction. (Lawrence Aff. ¶ 9, Ex. H.) Therefore, Olsen now has a direct interest in what happens in subcase 37-353G—an interest that only arose after Barry was granted leave to object to the recommendation of 37-353J. Prior to that time, Olsen had absolutely no interest in how subcase 37-353G was resolved.

As this brief will explain, this factual background certainly supports granting Olsen leave to file a response or to participate in subcase 37-353G.

II. LEGAL ARGUMENT IN SUPPORT OF MOTION TO FILE LATE RESPONSE

A. The Legal Standard For Filing A Late Response is Lenient

In light of the facts and circumstances of this case, Olsen seeks an order from the Court granting Olsen leave to file the response attached as Exhibit A to Olsen's motion in Subcase 37-353G. A motion to file a late response is evaluated under the criteria for setting aside a default judgment under Idaho Rule of Civil Procedure 55(c). *Order on Reconsideration of Motions to Strike Affidavits and Motions to File Late Responses*, Subcase Nos. 36-48A, *et al.* (S.M. Haemmerle, July 8, 1996). In his *Order on Motion to Set Aside Partial Decrees and File Late Objections*, Subcase Nos. 65-07267, *et al.* (Jan. 31, 2001) ("*A.L. Cattle*"), Presiding Judge Burdick succinctly explained the standards governing Rule 55(c) motions in the SRBA as follows:

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 since *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. *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 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 931, 935, 854 P.2d, 274 (1993). The I.R.C.P. 55(c) standard takes into account the following factors:

- 1) whether the default was willful;
- 2) whether setting aside the judgment would prejudice the opponent; and
- 3) as with a Rule 60(b) motion, whether a meritorious position has been presented.

A.L. Cattle at 6-7.

Importantly, this Court has significant discretion to grant a Rule 55(c) motion, and its decision will not be reversed on appeal unless an abuse of discretion clearly appears.

Memorandum Decision and Order on Challenge, Subcase Nos. 47-16433, *et al.*, at 9

(J. Melanson, Mar. 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.

A.L. Cattle at 8.

B. Olsen’s Motion Satisfies The Standards For Filing A Late Response

1. The Delay Is Not Willful

Olsen’s submission of its response after the original response deadline for Basin 37, Part III is not “willful,” as that term has been defined by this Court. This Court has stated that “willful” means “intentional, knowing, or voluntary.” *Bedke I* at 12. In addition, “willful” requires a higher degree of culpability than mere negligence or carelessness. *Id.*

Based upon these standards, Olsen’s motion simply does not involve any willful delay, assuming it involves any delay at all. As the brief has explained, Olsen had absolutely no interest in subcase 37-353G until Barry’s motion to file a late objection in subcase 37-353J was granted on March 18, 2009. That objection specifically seeks the reduction of Olsen’s right 37-353J, so that Barry’s right 37-353G can be increased by a commensurate amount. Therefore, the appropriate date against which to evaluate the “willful delay” factor is sometime well after March 18, 2009—*not* the original deadline for filing responses in Basin 37, Part III.

Simply put, Olsen argues that this motion does not involve any delay at all. To the extent there is any delay, it certainly does not rise to the level of “willful delay” as that phrase has been defined and applied by this Court. Notably, the Court granted Barry’s motion to file a late objection to Olsen’s water right. That motion was filed on December 18, 2008—*thirteen months* after the November 14, 2007 objection deadline for Basin 37, Part III. Under these

circumstances, there is simply no basis to argue or conclude that Olsen's motion involves "willful delay."

2. Allowing Olsen's Late Response Would Not Prejudice Barry

Any "delay" involved in allowing Olsen's response would not prejudice Barry. Critically, the inquiry under this prong of the Rule 55(c) analysis is *not* whether Barry would be prejudiced by the filing of the response itself. Rather, the relevant analysis is whether Barry would be prejudiced specifically by the *delay* in filing the response. Anecdotally, counsel for Olsen has observed that denials of motions to file late objections and responses in the SRBA have typically involved situations in which significant litigation had already occurred in the particular subcase at issue. An initial hearing has not even been scheduled or held yet in subcase 37-353G. Therefore, there can be no prejudice caused by any "delay" in filing Olsen's response.

3. Olsen Presents A Meritorious Position

As an initial matter, the "meritorious position" standard is a liberal one, particularly in the SRBA, and particularly for a "check-the-box" form such as the Standard Form 2 Response to Objection. And, as this brief has explained, Olsen is entitled to its proportionate share of the original Johnson water right adjudicated by the Frost Decree. IDWR's August 25, 1997, Amended Preliminary Order confirmed that Olsen is entitled to a quantity of 0.40 cfs and a place of use of 10 acres. (Lawrence Aff. ¶ 4, Ex. C.) In coming to this conclusion, IDWR specifically confirmed that no intervening transfers or conveyances had occurred affecting 37-353J. And, none have occurred since that time. As previously explained, it appears that IDWR has inappropriately reduced the quantity and place of use elements in its recommendation of 37-353J based upon the over-claiming of other Dean Ranch water rights by other claimants—not Olsen.

Despite this straightforward analysis, Barry now seeks to increase her own water right, *specifically at the expense of Olsen's right*. The Barry objection to Olsen's right has inextricably linked 37-353G and 37-353J. Olsen has clearly established a "meritorious position" as to its entitlement to the full proportionate share of the original Johnson right. It is also therefore a "meritorious position" as to Barry's arguments regarding the relationship between 37-353J and 37-353G.

III. LEGAL ARGUMENT IN SUPPORT OF MOTION TO PARTICIPATE

The statutes governing water right adjudications provide a conditional right for a non-party to intervene in a particular subcase:

In addition, any party may intervene in any objection proceeding in accordance with rules of practice and procedure established by the district court.

IDAHO CODE § 42-1412(2).

This is important, because the Idaho Supreme Court has specifically stated that a statute providing for intervention should be liberally construed. *Herzog v. City of Pocatello*, 82 Idaho 505, 509 (1960). Rule 10(k) of AO1 is the "rule of practice and procedure" implementing the statute governing intervention. It states in pertinent part:

Any party to the adjudication who is not a party to a subcase may seek leave to participate in a subcase by filing a timely¹ *Motion to Participate*. A *Motion to Participate* shall be treated like a motion

¹ To determine the timeliness of a Rule 24 motion, a court considers three factors: (1) the stage of the proceedings; (2) the prejudice to the other parties; and (3) the reason for and length of the delay. *Farrell v. Board of Comm'rs, Lemhi County*, 138 Idaho 378, 390 (2002). All three of these factors have already been discussed in the context of Olsen's motion to file late response. In summary, an initial hearing on 37-353G has not even been set yet, and any delay is minimal because Olsen's interest in subcase 37-353G only recently arose as a result of arguments asserted by Barry in her objection to Olsen's water right. Therefore, this is a timely application under AO1 Rule 10(k) and I.R.C.P. 24.

to intervene under I.R.C.P. 24 and shall be decided by the Presiding Judge or the assigned Special Master.

AO1 Rule 10(k) (emphasis in original).

Rule 24, in turn, provides two separate bases for intervening: intervention of right, and permissive intervention. Importantly, a court's decision on a Rule 24 motion is a matter of discretion. *See, e.g., American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 882 (2007).

As to intervention of right, Rule 24(a) states in pertinent part:

Upon timely application *anyone shall be permitted to intervene* in an action: . . . (2) when the applicant *claims an interest relating to* the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may *as a practical matter impair or impede* applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

I.R.C.P. 24(a) (emphasis added).

In other words, in order to intervene of right, Olsen must simply (i) "claim an interest relating to" Barry's water right 37-353G; and (ii) demonstrate how the proceedings in subcase 37-353G "may as a practical matter impair or impede" Olsen's ability to protect his claim to water right 37-353J. Based upon the facts previously set forth, Olsen's motion satisfies both of these requirements.

As to the first requirement, both Barry's right 37-353G and Olsen's right 37-353J are derived from splits of the original Johnson right 37353. Therefore, Olsen's right 37-353J certainly "relat[es] to" Barry's water right 37-353G. And, as has been explained, Barry seeks to augment her own water right, specifically at the expense of Olsen. Therefore, Barry's successful augmentation of her own water right would certainly "impair or impede" Olsen's ability to protect and maximize its water right. And, there are certainly not already any parties to

subcase 37-353G adequately representing Olsen's interests, because Barry is the only party thus far. Under these circumstances, Olsen is entitled to intervene of right in subcase 37-353G.

However, to the extent the Court disagrees with this analysis, Rule 24(b) provides Olsen with a separate basis for intervening. Rule 24(b) governing permissive intervention states in pertinent part:

Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a *question of law or fact in common* In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

I.R.C.P. 24(b) (emphasis added).

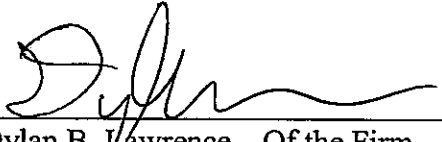
Again, both of these rights are derived from a split of 37-353, and Barry has inextricably linked subcases 37-353G and 37-353J by seeking to increase one of those rights at the expense of the other. And, the Idaho Supreme Court liberally construes Rule 24(b), having held that an applicant need not demonstrate a direct or pecuniary interest in order to intervene. *Herzog*, 82 Idaho at 509. Under these circumstances, these two subcases certainly have a sufficient "question of law or fact in common" to justify allowing Olsen to intervene in 37-353G.

IV. CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, Olsen respectfully requests that the Court grant Olsen leave to file the response attached as Exhibit A to Olsen's motion. Alternatively, Olsen respectfully requests that the Court allow Olsen to become a participant in this subcase.

DATED this 28th day of May, 2009.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By 
Dylan B. Lawrence – Of the Firm
Attorneys for Olsen Livestock
Consultants, Inc.

CERTIFICATE OF SERVICE

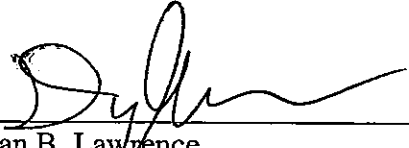
I HEREBY CERTIFY that on this 28th day of May, 2009, I caused a true and correct copy of the foregoing **BRIEF IN SUPPORT OF MOTION TO FILE LATE RESPONSE OR PARTICIPATE** to be served by the method indicated below, and addressed to the following:

Barbara A. Barry
Represented by:
Paul L. Arrington
BARKER RSHOLT & SIMPSON, LLP
113 Main Avenue West, Suite 303
P.O. Box 485
Twin Falls, Idaho 83303-0485
Fax: (208) 735-2444

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Director of IDWR
P.O. Box 83720
Boise, ID 83720-0098

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile



Dylan B. Lawrence