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DEPARTMENT OF  
WATER RESOURCES

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UNITED STATES OF AMERICA

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ISB# 6697

**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 45-10502 and 45-13669  
)  
)  
)  
) **MOTION TO PARTICIPATE**  
) **AND SUPPORTING MEMORANDUM**  
)  
)  
)

The United States of America, U.S. Department of Agriculture, Forest Service ("Forest Service"), moves to participate in the above captioned proceedings. This Motion to Participate is filed pursuant to SRBA Administrative Order #1 ("AO1") § 10(k) and IRCP 24. Specifically, the Forest Service moves that it be allowed participation solely as amicus curiae as to any dispositive motion, post-trial, and other legal briefings.

### **1. Motions to Participate in the SRBA**

AO1 § 10(k) provides that any party to the SRBA who is not a party to a subcase may seek leave to participate in a subcase by filing a timely Motion to Participate. A Motion to participate is treated like a motion to intervene under IRCP 24. AO1 § 10k.

IRCP 24(a) provides for intervention of right when the applicant claims an interest relating to the property or transaction which is the subject of the action and disposition of the action may impair or impede an applicant's ability to protect that interest, unless such interest is adequately represented by existing parties.

IRCP 24(b) provides for permissive intervention when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion in considering permissive intervention, a court must consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. IRCP 24(b).

Although a generalized interest in a SRBA subcase is insufficient to support intervention of right, it can support permissive intervention. *Idaho v. United States*, 996 P.2d 806, 809-11 (Idaho 2000). The decision whether to allow permissive intervention is discretionary with the trial judge. *Idaho*, 996 P.2d at 810.

## **2. Factual and procedural background**

Earl Warthen is the water right claimant in subcase numbers 45-13669 and 45-10502. In subcase number 45-13669, Mr. Warthen claimed a priority date of August 13, 1874, for irrigation from April 1 to October 31 and irrigation storage from November 1 to March 31. The claimed source was wastewater tributary to Howell Creek. The Idaho Department of Water Resources (“IDWR”) recommended that this claim be disallowed. Mr. Warthen objected to IDWR’s recommendation contending that his claim should be decreed as claimed, with minor changes to the claimed place of use. Mr. Warthen recently filed a motion to amend his claim to change the priority date to March 1, 1881, and the source to Spring Creek, a tributary to Howell Creek. Mr. Warthen appears to be pursuing a novel claim for “root zone storage” to support a season of use outside the irrigation season. *See attachments to Standard Form 4, Motion to File Amended Notice of Claim*, filed on January 18, 2006.

Subcase 45-10502 was reported by IDWR for irrigation from April 1 to October 31 with a priority date of May 26, 1964. The reported source is Spring Creek, a tributary to Howell Creek. Mr. Warthen objected to the priority date, claiming instead a priority date of August 31, 1874. Norman L. and Delores J. Smyer have been granted participant status in this subcase.

According to the Court’s register of actions, subcase numbers 45-13669 and 45-10502 presently are set for trial at the same time, along with three other subcases. Trial is scheduled for March 8, 2006, and dispositive motions are due February 3, 2006.

The Forest Service has water right claim numbers 45-13795 and 45-04114. These claims have been recommended by IDWR. Both of these claims, as with the Warthen claims, have

sources tributary to Howell Creek. Subcase number 45-13795 has a priority date of June 1, 1962, and a season of use of January 1 to December 31. Subcase number 45-04114 has a priority date of May 1, 1965, and a season of use of November 1 to April 30. Both water rights are used in connection with operations at Pomerelle ski area.

### **3. Forest Service interest in 45-13669 and 45-10502**

Because Mr. Warthen's claims and the Forest Service's claims share the same water source, Forest Service use of water could be negatively impacted if Mr. Warthen's objections to the IDWR recommendations prevail. Any decision by the SRBA Court that recognizes an earlier priority date or an extended period of use for Mr. Warthen's claims will impair or impede the Forest Service's ability to protect its interests in water right claims 45-13795 and 45-04114.

The Forest Service requests that it be allowed participation in these subcases solely as amicus curiae as to any dispositive motion, post-trial, and other legal briefings. Such limited participation will ensure that no undue delay or prejudice to the parties will result. Participation in this manner also is supported by prior decisions of the SRBA Court. The Court has recognized that, as to issues of law, there is little if any distinction between a party's participation in a subcase pursuant to AO1 § 10(k) and later participation via a motion to alter or amend under AO1 § 13. Consolidated subcase 91-63, *Order Granting Participation to Gene E. Bray, et al.* (November 4, 2003), at pp. 5-6. The Court reasoned that, because a party to the SRBA can participate in any SRBA subcase as a matter of right as to legal issues through a motion to alter or amend, it would make little sense to deny earlier participation as to legal issues under AO1 § 10(k). *Id.*

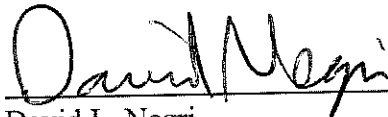
Accordingly, because the Forest Service water rights could be negatively impacted if Mr. Warthen's objections to the IDWR recommendations prevail, its Motion to Participate should be granted.<sup>1</sup>

#### 4. Conclusion

Because Mr. Warthen's water right claims and the Forest Service's water right claims share the same water source, the Forest Service's ability to protect its interests may be impaired or impeded by resolution of the subcases at bar. The Forest Service requests participation solely as to legal issues in these subcases. AO1 provides that the Forest Service may participate as a matter of right as to legal issues in these subcases at the motion to alter or amend stage. It therefore is in the interest of judicial economy to allow participation at this point. Accordingly, the Forest Service respectfully requests that this Motion to Participate be granted.

DATED this 27 day of January, 2006.

UNITED STATES OF AMERICA



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<sup>1</sup> By filing this Motion, the Forest Service in no way abandons its right to file timely objections in 45-13669 should Mr. Warthen's *Motion to File Amended Notice of Claim* be granted.

# CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27 day of January, 2006, I served a true and correct copy of the foregoing MOTION TO PARTICIPATE AND SUPPORTING MEMORANDUM by depositing a copy thereof in the U.S. mail, postage prepaid, or by other service where indicated, upon the following:

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