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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	)	Subcase Nos. See Exhibit A
	)	
Case No. 39576	)	MOTION TO FILE LATE RESPONSES
	)	OR ALTERNATIVELY TO PARTICIPATE
_____	)	

COMES NOW, the COMMITTEE OF NINE¹, by and through counsel of record, and pursuant to SRBA Administrative Order #1 ("AO1") and the Idaho Rules of Civil Procedure, and moves this Court for an Order Granting this Motion to File Late Responses, or alternatively, for an Order Granting this Motion to Participate in the above-entitled subcases.

¹ The Committee of Nine serves as the statutorily designated advisory committee to Water District 01 pursuant to Idaho Code § 42-605.

Counsel for the Committee of Nine has contacted counsel for the Objectors Shoshone-Bannock Tribes and the United States regarding their consent to the late responses and/or participation by the Committee of Nine in this matter. As of the filing of this motion the Objectors have not responded. The reasons for the motion are set forth below.

INTRODUCTION

The Shoshone-Bannock Tribes, the State of Idaho, the United States, and Certain Idaho Water Users entered into the *1990 Fort Hall Indian Water Rights Agreement* on July 10, 1990 to settle certain of the Tribes' water right claims in the Snake River Basin Adjudication ("SRBA"). The Committee of Nine, the advisory committee to Water District 01, was a signatory party to the Agreement.

On November 11, 2005, IDWR filed its Director's Report with the Court for claims in Basin 27, Part 1. The Sho-Ban Tribes and the United States filed similar objections to these claims, alleging that certain administrative provisions are necessary for these claims, as well as raising various quantity issues. Importantly, the United States specifically seeks a total annual diversion volume assigned for each claim, with a "6.0 acre-feet per acre and 5.3 acre-feet per acre in the lower and upper areas, respectively, of Basin 27." *See generally*, Attachment to United States Objections. The objections on their face raise issues relevant to the interpretation and implementation of the Fort Hall Agreement. Accordingly, the State of Idaho, a party to the Fort Hall Agreement, filed responses to these objections in April 2006. The subcases have proceeded before the Special Master, yet no substantive matters have been taken up, and a scheduling conference has been set for September 10, 2008.

As the only party to the Agreement not presently participating in this matter, the Committee of Nine has a significant interest in the present adjudication of the above-referenced

Basin 27 subcases, particularly the resolution of the objections filed by the Tribes and the United States. The interpretation and implementation of the Fort Hall Agreement in these subcases raise important legal and factual issues that concern all parties to the Agreement, including the Committee of Nine. Therefore, the Committee meets the standard to file late responses, or alternatively, to participate in these subcases as provided by AO1 and the Idaho Rules of Civil Procedure. For the reasons discussed below the Court should grant the Committee of Nine's motion.

STANDARD OF REVIEW MOTION TO FILE LATE RESPONSES

The SRBA Court's procedural rules do not identify a standard to be applied when evaluating motions to file late responses. *See Order Granting Motion to File Late Responses*, Subcase No. 27-12002 (February 23, 2007). However, the Court has found that motions to file late responses are similar to motions to file a late answer and therefore have been reviewed under the same criteria provided by I.R.C.P. 55(c). *See id.* 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 under I.R.C.P. 55(c):

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*”). The above standard applies to the Committee of Nine’s present motion to file late responses and as described below, the Committee meets the relevant criteria for purposes of responding to the Sho-Ban Tribes’ and United States’ objections.

REASONS SUPPORTING MOTION TO FILE LATE RESPONSES

The Committee of Nine’s Motion to File Late Responses is supported by good cause and a meritorious position, hence it meets the above standard used by the SRBA Court. First, the Committee did not file timely responses to the Tribes’ and the United States’ objections because of the uncertainty surrounding the issues of implementation of the Fort Hall Agreement at that time and whether or not the interpretation of the Agreement was at issue. While the Committee now recognizes and understands that the total annual volume issue is listed in the stated objections, the Committee had no reason to conclude that the “equitable adjustment” provision for the Blackfoot River Basin was implicated at that point. In other words, there was no reason to conclude, based upon the review of individual Director’s Reports for the above-referenced Basin 27 subcases and the objections that were filed, that the diversions from the Blackfoot River were more than the 45,000 acre-feet estimate provided in the Fort Hall Agreement. Since

that time, information has surfaced to the Committee's attention that warrants its participation in the subcases now. Specifically, given the recent data and information provided in the *Governmental Parties' Joint Status Report* filed with the Court on February 29, 2008, it is now obvious that the Objectors appear to claim for the first time that an "Equitable Adjustment assessment is required". See *Governmental Parties' Joint Status Report at Exhibit B, p. 1*. That report further provides information related to a measurement program that was conducted in the middle and upper portions of the Blackfoot River watershed in 2007, a time period well after the objection and response period for these subcases expired. While the parties have apparently collected water measurement data to review some of the subject claims this past irrigation season, that information was not available during the original objection and response period, hence the Committee had no reason to file a response or participate at that time.

Consequently, this new information, which was only filed with the Court a little over a month ago; provides a basis for the Committee of Nine's present Motion to File Late Responses. Whereas the Committee did not possess this information and knowledge regarding the Objections at the time the response period expired, it does so now. As indicated above, since the Tribes' and the United States' Objections raise issues that concern the interpretation and implementation of the Fort Hall Agreement, as expressly evidenced by the recent status report, the Committee of Nine, as a party to that Agreement, must be present to protect its interests in the resolution of these subcases. As the only party to the Agreement that is currently not represented in these proceedings, the Committee of Nine should be allowed to respond to protect its interests.

Applying the Rule 55(c) standard to the Committee's motion it is clear that: (1) the failure to file timely responses was not willful; (2) allowing the late responses would not

prejudice the Tribes or the United States; and (3) the Committee has a meritorious position (party status to the Fort Hall Agreement). *McFarland v. Curtis*, 123 Idaho 931, 935 (Ct. App. 1993). The Court should therefore grant the Committee of Nine's Motion to File Late Responses.

STANDARD OF REVIEW / REASONS SUPPORTING MOTION TO PARTICIPATE

Alternatively, the Coalition's Motion to Participate meets the standards of AO1 and I.R.C.P. 24 for motions to intervene.² See AO#1, Sec. 10.k ("[a] *Motion to Participate* shall be treated like a motion to intervene under I.R.C.P. 24"). Under Rule 24(a), an applicant has the right to intervene if: (1) the motion is timely; (2) the applicant claims an interest that relates to the property or transaction which is the subject of the action; (3) the applicant is situated so that the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest; and (4) the applicant's interest is not adequately represented by the existing parties. Parties to the SRBA may intervene in a subcase as a matter of right if they meet the criteria of Rule 24(a). *State v. United States*, 134 Idaho 106, 110 (2000).

The Committee of Nine meets the standards set forth above. First, the motion is timely. The subject Basin 27 subcases are in the initial stages of litigation and the scheduling conference will not be until later this year (September 2008). The Committee claims an interest that relates to the subject of this action, i.e. party status to the Fort Hall Agreement, under which the Objectors have alleged the "equitable adjustment" has been triggered by the various water rights at issue in these subcases and the proposed volumes claimed by the Objectors. The disposition of these subcases may, as a practical matter, impair or impede the Committee's ability with

² The Committee of Nine further likely meets the standard for joinder under Rules 19(a)(1) and (2) since as a signatory to the Fort Hall Agreement the Committee claims an interest relating to the subject of the action and is so situated that the disposition of the action in the Committee's absence may as a practical matter impair or impeded the Committee's ability to protect that interest.

respect to interpretation and implementation of certain provisions of the Fort Hall Agreement, namely the “equitable adjustment” provision referenced by the Objectors in the recent status report to the Court. Finally, as an independent party to the Fort Hall Agreement, no other party to these subcases adequately represents the Committee of Nine’s interests, hence the Committee meets the standards for intervention as of right under Rule 24(a).

Alternatively, the Committee’s motion meets the requirements of Rule 24(b) which provides: “Upon timely application anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant’s claim or defense and the main action have a question of law or fact in common”. I.R.C.P. 24(b). The decision to grant permissive intervention rests upon the discretion of the trial court. *See AFRD #2 v. IDWR*, 154 P.3d 433, 453 (2007).

With respect to permissive intervention, the Committee’s interests in the interpretation and the implementation of the Fort Hall Agreement are the same as stated above. In addition, allowing the Committee’s late responses or participation in this matter will not unduly delay or prejudice the adjudication of the claims at issue in these subcases. No trial or any other substantive proceeding in these subcases has been held so far, and a scheduling conference will not be held until later this year. *See Duff v. Draper*, 96 Idaho 299, 527 P.2d 1257 (1974); *Herzog v. City of Pocatello*, 82 Idaho 505, 356 P.2d 54 (1960) (motion for intervention timely when filed before trial). Therefore, the Committee’s motion is timely and no party will be prejudiced by its intervention at this state.

The Committee is submitting for filing together with this motion a proposed response (see Exhibit C), which comprise its claims and defenses in these matters for purposes of procedure under I.R.C.P. 24(c).

CONCLUSION

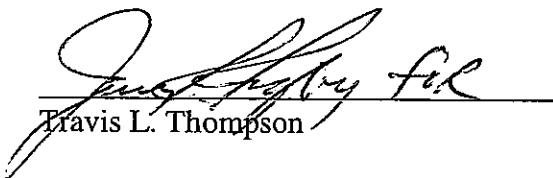
The Committee of Nine's Motion to File Late Responses meets the requisite standard used by the SRBA Court pursuant to Rule 55(c). Both "good cause" and a "meritorious position" have been identified by the Committee for purposes of filing late responses to the objections filed by the Shoshone-Bannock Tribes and the United States. Accordingly, the Committee's motion should be granted.

Alternatively, the Committee meets the standard to intervene as of right or by permission under Rule 24(a) and (b). As a party to the Fort Hall Agreement, the Committee has a right to participate in these subcases wherein the interpretation and implementation of provisions of that settlement are at issue. Accordingly, the Committee respectfully requests the right to participate as well.

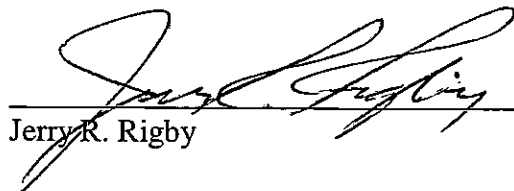
DATED this 17th day of April, 2008.

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A handwritten signature in cursive script, appearing to read "Travis L. Thompson", written over a horizontal line.

Attorneys for Committee of Nine

A handwritten signature in cursive script, appearing to read "Jerry R. Rigby", written over a horizontal line.

CERTIFICATE OF MAILING

I certify that on April 17, 2008, I mailed the original and copies of the foregoing motion, including all exhibits, to the following persons:

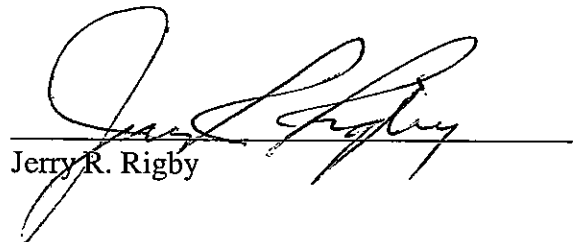
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See Attached Exhibit "B"



Jerry R. Rigby

Exhibit "A"

27-00001A	27-00028	27-02008	27-10452	27-11995
27-00001B	27-00029B	27-02015	27-10505	27-11997
27-00002A	27-00029C	27-02019A	27-10539	27-12006
27-00002B	27-00029E	27-02026	27-10545	27-12014
27-00003C	27-00035D	27-02041A	27-10550	27-12015
27-00003D	27-00037A	27-02041B	27-10552	27-12016
27-00003E	27-00037C	27-02043	27-10555	27-12017
27-00003G	27-00037E	27-02048	27-10557	27-12027
27-00004AC	27-00037F	27-02052	27-10657	27-12028
27-00004E	27-00037G	27-02054	27-10667	27-12029
27-00004H	27-00037H	27-02066	27-10728	27-12030
27-00004M	27-00037J	27-02078	27-10756	27-12031
27-00004S	27-00037L	27-02080A	27-10790	27-12032
27-00004Y	27-00037M	27-02080B	27-10844	27-12035
27-00004Z	27-00037N	27-02126	27-10847	27-12040
27-00005A	27-00038	27-02165	27-10878	27-12045
27-00005B	27-00039	27-04001	27-10943	27-12050
27-00012A	27-00040	27-04009	27-10944	27-12051
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27-00013A	27-00045	27-04058	27-11016	27-12068
27-00013B	27-00047	27-04068	27-11117	27-12069
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27-00014D	27-00051A	27-04079	27-11245	27-12108
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27-00017	27-00052	27-04097	27-11262	27-12115
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27-00021A	27-00055B	27-07089	27-11273	27-12136
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27-00025C	27-00104	27-10358	27-11946	
27-00026A	27-00105	27-10362	27-11966	
27-00026B	27-00106	27-10370	27-11988	
27-00026C	27-02001	27-10388	27-11989	
27-00026D	27-02003A	27-10390	27-11992	
27-00026B	27-02003B	27-10398	27-11994	

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Deanna Stecklein
La Verelle Stecklein
Scott Stecklein
757 W. Riverton Road
Blackfoot, ID 83221

Colleen R. Marriott
James M. Marriott
799 W. 200 S.
Blackfoot, ID 83221

Charles Brent Weaver
802 W. Riverton Rd.
Blackfoot, ID 83221

Gary L. Empey
Marva I. Empey
830 Riverton Rd.
Blackfoot, ID 83221

Naomi L. Christensen
845 E. 1000 N.
Shelley, ID 83274

Billie Reid
Paul Reid
875 Reid Rd.
Firth, ID 83236

John Warren
Lisa Warren
880 Riverton Rd.
Blackfoot, ID 83221

Christy J. Reid
Robert E. Reid
911 Reid Road
Firth, ID 83236

Alma Reid
Fred Reid
989 Reid Rd.
Firth, ID 83236

**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	)	A. Subcase No. Exhibit A
	)	
Case No. 39576	)	STANDARD FORM 2
	)	RESPONSE TO OBJECTION
_____	)	

B. NAME AND ADDRESS OF PERSON RESPONDING:

Name: Committee of Nine
Address: c/o Water District 01
900 N. Skyline Dr., Suite A
Idaho Falls, Idaho 83402-1718

Name and Address of Attorneys:

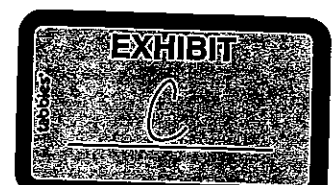
John A. Rosholt, ISB #1037
John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
Paul L. Arrington, ISB #7198
Barker Rosholt & Simpson LLP
113 Main Ave W., Suite 303
P.O. Box 485
Twin Falls, Idaho 83303-0485
Telephone: (208) 733-0700
Facsimile: (208) 735-2444

Ray W. Rigby, ISB #613
Jerry R. Rigby, ISB #2470
RIGBY ANDRUS & MOELLER Chtd.
P.O. Box 250
Rexburg, Idaho 83440
Telephone: (208) 356-3633
Facsimile: (208) 356-0768

**C. NAME AND ADDRESS OF PERSON(S) WHO FILED OBJECTION TO WHICH YOU
ARE RESPONDING:**

Name: United States of America
Address: c/o BIA, U.S. Dept. of Interior
911 NE 11th Ave.
Portland, Oregon 97232-4169

Shoshone-Bannock Tribes
P.O. Box 306
Fort Hall, Idaho 83203



D. I am responding to the objection(s) to the following elements:

1. ☐ Name and Address
2. ☐ Source
3. ☒ Quantity
4. ☐ Priority Date
5. ☐ Point(s) of Diversion
6. ☐ Instream Flow Description
7. ☐ Purpose(s) of Use
8. ☐ Period of Year
9. ☒ Place of Use
10. ☐ Claimant's Proposed General Provisions

11. Recommendation:

☐ This water right should not exist

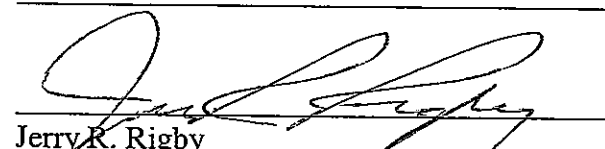
☐ This water right was not recommended, but should be recommended with the elements described above.

VERIFICATION

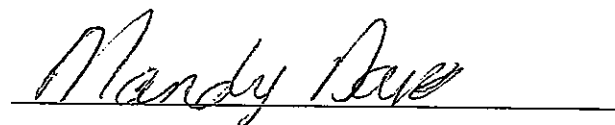
State of IDAHO)
) ss.
County of Madison)

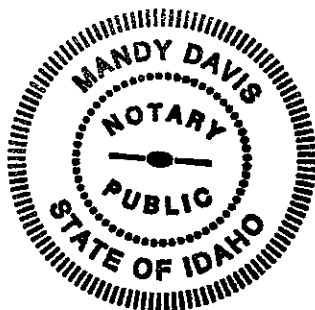
JERRY R. RIGBY, duly sworn, upon oath, deposes and says:

That I am the party/claimant filing this response, as defined by I.C. §§ 42-1401A(1) and (6) or that I am the attorney for the party/claimant responding, and that I have read this response, know its contents and believe that the statements are true to the best of my knowledge.


Jerry R. Rigby
Rigby Andrus & Moeller Chtd.
Attorneys for Respondents

Subscribed and sworn to before me on: April 17, 2008.


Notary Public for: Idaho
Residing at: St. Anthony
My Commission Expires: 6/24/2011



(seal)