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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

) Subcase no. 74-10146

)

) **UNITED STATES' MOTION TO  
PARTICIPATE AND SUPPORTING  
MEMORANDUM**

)

)

The United States of America ("United States"), moves to participate in the above-captioned proceeding. This Motion to Participate is filed pursuant to SRBA Administrative Order #1 ("AO1") § 10(k) and IRCP 24(b).

## INTRODUCTION

The United States has objected to numerous claims in the Lemhi basin, in part because a prior adjudication of the basin did not include the claims in its decree. These subcases, the “Lemhi high flow subcases,” are in the process of being resolved through discovery, legal briefing and, if necessary, trial.

In this subcase, the Department of Water Resources recommended the underlying claim disallowed because it also was not included in the Lemhi adjudication’s decree. The Special Master in this subcase has raised the issue of whether the underlying claim is a “high flow” claim. The Presiding Judge has recommitted this subcase to the Special Master for determination of that issue and whether the claim can be decreed in light of the Lemhi adjudication.

This issue is the same as that raised by the United States’ objections in the Lemhi high flow cases – whether the previous decree in the Lemhi Basin bars water right claims not decreed in that adjudication. Accordingly, because the objections by the United States in the Lemhi high flow subcases raise the same issue as that to be resolved in this subcase, and because participation by the United States will not delay these proceedings or prejudice any of the parties, the United States should be allowed to participate in resolution of this subcase.

## FACTUAL AND PROCEDURAL BACKGROUND

This subcase has been remanded by the SRBA Presiding Judge to the Special Master to make specific findings regarding whether this claim is barred by the doctrine of res judicata based on the Lemhi Adjudication. *Order of Recommitment To Special Master For Specific Findings*, subcase nos. 74-50A *et al.* (January 12, 2009) (“*Order of Recommitment*”). One of the

issues to be considered on remand is whether the claim at issue is a “high flow” claim. *Order of Recommitment* at 6.

As the Court is aware, the United States is involved in a number of other subcases which raise the issue of the res judicata effect of the Lemhi Adjudication on claims presented as “high flow” claims in the SRBA. *See* subcase nos. 74-15051 *et al.* (“Lemhi high flow subcases”). The Lemhi River basin was adjudicated in proceedings which commenced on August 13, 1970. As part of that adjudication, potential water right claimants were informed by the court that they must file claims for any water right they might have. *See generally United States’ Response to Notice of Hearing For Motions For Summary Judgment and Request Pursuant to Rule 56(f) to Allow Discovery to Proceed Before Responding to Motions*, subcase nos. 74-15051 *et al.* (March 5, 2009) (“*U.S. Response*”).

The Lemhi high flow subcases include 288 separate subcase. Each subcase purportedly includes a claim for “high flow” or “excess water,” although the purpose of use of each claim is “irrigation.” The claims generally are for quantities much larger than related irrigation rights decreed for the same place of use. *See id.*

The United States’ objections to the Lemhi high flow claims assert, in part, that because the claims were not decreed by the Lemhi decree they should not be recognized. *See, e.g., Standard Form 1 Objection* by United States, subcase no. 74-15051 (“This water use claim should have been made in the Lemhi Adjudication and is thus barred.”). The State, along with several water right claimants, assert that these claims were not required to be claimed in or decreed by the Lemhi Adjudication. *See generally United States’ Response.*

These parties also argue that the Presiding Judge's *Order of Recommitment* in this case must be considered in ruling on the legal arguments yet to be heard in the Lemhi high flow subcases. *See, e.g., Lemhi Irrigation District's Memorandum in Support of Partial Summary Judgment*, subcase 74-15051 *et al.* (January 29, 2009) at 2 (Relying on the *Order of Recommitment*, Movant argues that "the United States argument that the present water right claims are barred by the Lemhi Adjudication or 'should not exist' fail as a matter of law.").

## **ARGUMENT**

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

SRBA Administrative Order 1 ("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(a).

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. IRCP 24(b). 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. *Id.*

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. Participation should be granted pursuant to IRCP 24(b).**

The United States requests that it be allowed to participate in this subcase pursuant to the permissive intervention standard of IRCP 24(b).

a. The issue recommitment to the Special Master is the same as one of the issues raised by the United States' objections to the Lemhi high flow claims.

As noted above, 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. The exact issue implicated by this subcase – whether so-called “high flow” claims are barred or limited by the Lemhi Adjudication – is raised by the United States' objections in the Lemhi high flow subcases. *See, e.g., Standard Form 1 Objection* by United States, subcase no. 74-15051 (“This water use claim should have been made in the Lemhi Adjudication and is thus barred.”).

This similarity is highlighted by the position taken by the claimants in the Lemhi high flow subcases. They argue that the Presiding Judge's *Order of Recommitment* in this case controls the legal arguments yet to be heard in the Lemhi high flow subcases. *See Lemhi Irrigation District's Memorandum in Support of Partial Summary Judgment*, subcase 74-15051 et al. (January 29, 2009) at 2. Relying on the *Order of Recommitment*, the Movant asserts that “the United States argument that the present water right claims are barred by the Lemhi Adjudication or ‘should not exist’ fail as a matter of law.” *Id.* The United States should, therefore, have an opportunity to present its position in this subcase.

b. In light of the history of this subcase, the United States Motion is timely.

When it objected to the Lemhi high flow subcases, the United States did not file an objection to this claim or a response to the claimant's objection because there was no indication that it was being claimed as a "high flow" or that it might implicate any issues related to "high flows." As the claim is described in the Special Master's *Report and Order Setting Deadline For Objections* (September 24, 2008) ("*Report*"), it appears this claim has none of the attributes of what is typically presented as a "high flow" claim.

The *Report* recommends a water right decree with the following elements: A purpose of use of irrigation, stockwater and domestic; a priority date of March 15, 1927; and a quantity of 0.40 cfs for irrigation of 158 acres. In its *Supplemental Director's Report Regarding Subcase Nos. 74-15051 et al.* ("*Supplemental Report*"), IDWR stated that each of the "high flow water rights" received the same priority date, March 15, 1966, an identical subordination remark, and another remark stating that "the high flow right was supplemental to water rights senior to March 15, 1966." *Supplemental Report* at 10. In addition, the "high flow" rights examined by the Department in its *Supplemental Report* all list only "irrigation" as the purpose of use and all claim quantities ranging from 2.0 cfs to 34.0 cfs. *Id.* at 10-17.

With a different priority date, additional purposes of use, and a claimed quantity well below even a typical duty of water, and lacking the subordination and supplemental remarks included in all of the other "high flow" claims, there is nothing in the claim at bar to indicate that it is a "high flow." The claimant's *Objection* likewise contains no indication that the claimant considered the claim a "high flow" claim or that the claim has any connection to the Lemhi

Decree's high flow provision. *See Report* at 1. Similarly, the claimant's *Pre-Trial Memorandum* (July 11, 2008) also makes no assertion that the claim is a "high flow."

There simply was no reason for the United States to file an objection or a response. It was only the Special Master's *Report*, and the Presiding Judge's *Order of Recommitment*, which even raised the possibility that "high flow" issues might be implicated. Now that such issues are implicated, the United States is moving to participate.

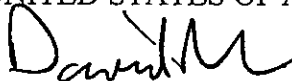
Furthermore, the United States' participation in this subcase will not unduly delay the proceedings nor prejudice any of the parties. The only proceeding scheduled in this case is a status conference on April 16. As such, it is clear that no delay or prejudice will result from the United States' participation.

### CONCLUSION

The Lemhi high flow subcases and this subcase raise the same issue – whether the Lemhi Adjudication bars water right claims not decreed as a result of the adjudication. Rule 24(b) provides for permissive intervention in exactly this circumstance. Participation by the United States will not delay the proceedings or prejudice any of the parties. Therefore, the United States' Motion to Participate should be granted.

DATED this 1<sup>st</sup> day of April, 2009.

UNITED STATES OF AMERICA



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## CERTIFICATE OF SERVICE

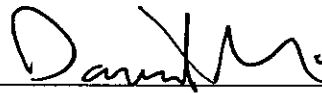
I HEREBY CERTIFY that on this 1<sup>st</sup> day of April, 2009, I served a true and correct copy of the foregoing UNITED STATES' MOTION TO PARTICIPATE AND SUPPORTING MEMORANDUM by depositing a copy thereof in the U.S. mail, postage prepaid, or by other service where indicated, upon the following:

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