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DEPARTMENT OF
WATER RESOURCES

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Collectively: American Falls Spaceholders

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. 01-02017, 01-02032, 01-
	)	02046, 01-10382, 01-10383, 01-10384, 01-
<u>CASE NO. 39576</u>	)	10531 and 01-10532
	)	(American Falls Hydropower Natural Flow
	)	Subcases)
	)	
	)	Subcase Nos. 01-10485, 01-10486, 01-
	)	10487, 01-02064
	)	(American Falls Hydropower Storage
	)	Subcases)
	)	
	)	
	)	AMERICAN FALLS SPACEHOLDERS
	)	MOTION TO PARTICIPATE &
	)	MOTION TO FILE A LATE
	)	OBJECTION
	)	

COMES NOW Aberdeen Springfield Canal Company, together with the following Upper Valley American Falls Spaceholders, namely: Blackfoot Canal Company, Burgess Canal Company, Butte & Market Lake Canal Company, Corbett Slough Ditch Company, Dilts Irrigation Company, Enterprise Canal Company, Enterprise Irrigation District, Harrison Canal Company, Idaho Irrigation District, Lenroot Canal Company, New Sweden Irrigation District, Osgood Canal Company, Peoples Canal & Irrigation Company, Poplar, Progressive Irrigation District, Reid Canal Company, Rudy Irrigation Company, Snake River Valley Irrigation District, Trego Ditch Company, and Woodville Canal Company, hereinafter collectively the “American Falls Spaceholders,” and by and through counsel, respectfully move the Court pursuant to Idaho Rules of Civil Procedure 7, 24(a), and 55(c), and Administrative Order 1 (“AO1”) Sections 4 and 10, and hereby files this Motion to Participate and Motion to File Late Objection to water rights nos. 01-02017, 01-02032, 01-02046, 01-10382, 01-10383, 01-10384, and 01-10531 (the American Falls Hydropower Natural Flow Subcases), and 01-10485, 01-10486, 01-10487, and 01-02064 (the American Falls Hydropower Storage Subcases.) This motion is supported by the Affidavit of Jerry R. Rigby.

MEMORANDUM IN SUPPORT OF MOTION

**I.
INTRODUCTION**

Hundreds of water users rely on the storage capacity of American Falls Reservoir to supply water for agricultural purposes in the event of shortage or drought. In promoting and expanding its hydropower operations on the Snake River over the last century, Idaho Power has consistently and continuously represented to water users for irrigation that its entire system of hydropower facilities were to be considered secondary to water uses for irrigation. The support

of irrigators was an absolute necessity for the Company's continued growth and prosperity; without it, many of Idaho Power's hydropower installations would not exist today. The irrigators' acquiescence to Idaho Power's facilities at Hells Canyon, Twin Falls, and American Falls was conditioned entirely upon the Company's repeated assurances that its hydropower rights would be subordinate to irrigation. The only exception to that promise of subordination was a recognized storage right at American Falls Reservoir totaling approximately 45,000 acre-feet, or 2.65% of the Reservoir's total capacity.

Idaho Power's current effort to claim ownership of 300,000 acre-feet, fully 17% of the storage capacity of the American Falls Reservoir, constitutes an outright betrayal of the Company's solemn promise to irrigators that the Company's operations would not threaten agriculture in Southern Idaho. With repeated promises, Idaho Power induced the Spaceholders and other water users to pledge their support of the Company's efforts to expand its power operations on the Snake River. Idaho Power's current position is a complete reversal of its prior position as represented to irrigators, state officials and the United States Congress regarding the Company's rights at American Falls and is impermissible under principles of equitable estoppel and quasi-estoppel. The American Falls Spaceholders have relied in good faith upon Idaho Power's pledge and file this motion and supporting memorandum in defense of the promises made by Idaho Power that its right to generate power at American Falls is subordinate to water uses for irrigation and that its right to demand releases of water from American Falls Reservoir is limited to 45,000 acre-feet.

II. ARGUMENT

A. Motion to Participate

The Movants' Motion to Participate meets the standards of AO1 and I.R.C.P. 24 for motions to intervene. Administrative Order No. 1 (A.O.1) § 10(k), provides:

Any party to the adjudication 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 shall be treated like a motion to intervene under I.R.C.P. 24 and shall be decided by the Presiding Judge or the assigned Special Master. . . .

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). Furthermore, statutes providing for intervention should be given a liberal construction as they were intended to shorten trials, avoid technicalities, and promote the administration of justice. *Herzog v. City of Pocatello*, 82 Idaho 505, 509, 356 P.2d 54, 55 (1960).

1. The Motion to Participate is Timely

The Movants motion is timely. To determine the timeliness of a motion to intervene, the court considers the stage of the proceeding at which an applicant seeks to intervene, the prejudice to the other parties, and the reason for the length of the delay. *Farrell v. Board of Comm'rs, Lemhi County*, 138 Idaho 378, 390, 64 P.3d 304, 316 (2002). The present matters dealing with the specific issue of the administration of the water rights listed above are in

the initial stages of litigation with no dates for filing of dispositive motions having yet expired. Thus, because of the procedural posture of the case, no party has relied to its detriment on the Movants' lack of participation to date.

2. The Applicant Claims an Interest that Relates to the Property or Transaction
which is the Subject of the Action

The Movants own an interest which relates directly to the subject of this action, i.e. direct impact to their water rights should Idaho Power's present position prevail. Although the State of Idaho and the United States are certainly involved in this matter on the side of Movants, only after the recent extensive historical discoveries made by the State of Idaho has the past representations by Idaho Power been so clearly defined and should Idaho Power's present claims be allowed, the outcome would be so very contrary to said representations and historical practices of the river, Water District 01 and previous agreements. To date, the water rights listed above have not been administered in the manner Idaho Power now desires them to be administered. Finally, as a major group of water users NOT presently participating in this matter, Movants have a significant interest in the present adjudication of the Idaho Power claims. No other party to this consolidated subcase adequately directly represents the Movants' interests, hence the Movants meet the standards for intervention as of right under Rule 24(a).

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

As mentioned above, Movants are a group of irrigators who own space in American Falls Reservoir. Because the ability to store and use a water storage right is substantially affected by the water right's priority in relation to other rights, Idaho Power's new

claim to have priority over 300,000 acre feet of water stored in American Falls would clearly cause harm to Movant's ability to store and divert storage water as Idaho Power would have the ability to make a call for said water. As such, Movants are situated so that the disposition of this action may impair or impede Movant's ability to protect their interest in their water rights stored in American Falls Reservoir.

4. The Applicant's Interest is not Adequately Represented by Any Other Parties.

In this case, Movants are in a position where they may lose substantial control over their water rights. Movants, or the American Falls Spaceholders, are a group made up of irrigation districts & canal companies, and each of said entities is made up of individual irrigators. Only these irrigators and their irrigation entities can adequately defend their own water rights from Idaho Power's claim of priority over the individual water storage rights. As such, no other party to the case may adequately represent Movant's interest in the case, especially as to the past representations made by Idaho Power and the historical practices of storage within American Falls Reservoir.

Movants meet the standards of I.R.C.P. 24(a). As such, this Court should grant their Motion to Participate in the above named case.

B. Motion to File a Late Objection

In light of the facts and circumstances in this case, Movants seek an order from the Court granting them leave to file late objections to above mentioned claims by Idaho Power. 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 outlined the standard governing motions to file late objections 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 granted.

A.L. Cattle at 6-7.

This court has significant discretion to grant a motion to file a late objection, 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*”). Moreover, in doubtful cases, relief should be granted to reach a judgment on the merits. *Bedke I* at 10. This is a result of the fact that default judgments are disfavored. *A.L. Cattle* at 8.

Movants Motion to File a Late Objection Should be Granted

1. The Delay Is Not Willful

Movant’s submission of its objections after the deadline is not “willful,” as the term is 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.* In order to find that any delay on behalf of Movants was “willful,” this Court would be required to find that Movants had knowledge of all historical

evidence of Idaho Power's prior representations and that Movants purposefully failed to act. In this case, the Affidavit of Jerry R. Rigby clearly shows that Movant's delay in objecting to the recommendations of subject water rights was not willful. Movants had no reasonably means to undertake such a detailed investigation of Idaho Power's claims until recently.

2. Allowing Movant's Late Objections Would Not Prejudice Idaho Power

Idaho Power will not be prejudiced by the Court allowing Movant's motion to file a late objection. These claims are in the initial phases of litigation and no deadlines for the filing of dispositive motions have expired. Due to the fact that the case is in its early stages, Movant's motion to file a late objection will not amount to the prejudicial relitigation of the subject rights. *See, e.g., Order Granting Motions to File Late Objections in Subcases 51-11921, 51-11925, and 51-11936*, Subcase Nos. 51-11891, *et al.*, at 13 (Mar. 13, 2002). Further, this Court has held that some prejudice alone is not a sufficient basis to deny a late objection. *Bedke I* at 13-14. Thus, because of the procedural posture of the case, Idaho Power will not suffer any prejudice if the Court grants Movant's motion.

3. Movant's Objections Present Meritorious Positions

The grounds supporting Movant's objections are meritorious legal positions under Idaho water law. The "meritorious position" standard simply requires that the late objector allege sufficient facts that, if established, would allow objector to prevail. *See A.L. Cattle* at 6. At a minimum, Movant objects to the subject water rights on the basis that to allow Idaho Power to make a call on the 300,000 acre feet of water to which it is claiming priority would be devastating to Movants. Further, to allow this change would constitute a breach of an agreement reached between Idaho Power and Idaho storage irrigators relating to Idaho Powers subordination

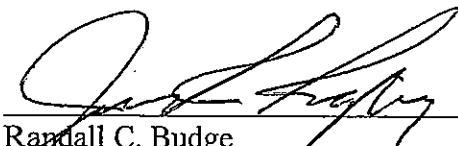
of their water rights to irrigation. These grounds for objection represent valid concerns that must be considered in order to properly adjudicate these water rights. Based on the valid objections set forth by Movants, and the supporting facts outlined in its proposed objections, Movants have presented meritorious positions for objecting to the above-referenced water rights because such facts, if proven, would require a denial of Idaho Powers claims of storage above 45,000 acre feet.

CONCLUSION

For the foregoing, Movants respectfully request that the Court grant Movant's Motions to Participate and to File a Late objection. Movants have met the standards both to intervene in a case and to file the late objection.

DATED this 8th day of December, 2009.


Jerry R. Rigby
On behalf of Upper Valley AF Spaceholders


Randall C. Budge
Thomas J. Budge
On behalf of Aberdeen Springfield CC

CERTIFICATE OF MAILING

I certify that on December 8, 2009, I mailed the original and copies of the Brief in Support of

Motion for Partial Summary Judgment including all attachments, to the following persons:

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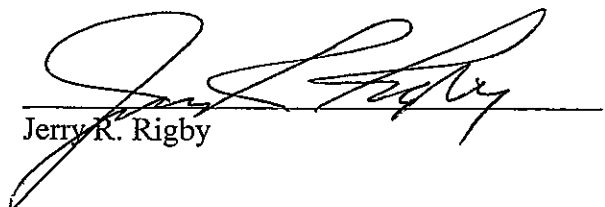
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