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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

Subcase No.: 37-22598

CASE NO. 39576

**UNITED STATES' MOTION TO
PARTICIPATE AND
MEMORANDUM IN SUPPORT**

MOTION

The United States of America on behalf of the Department of Interior, Bureau of Land Management ("BLM"), seeks permission to participate in this subcase as a full party for all purposes pursuant to Administrative Order No. 1 ("AO-1") § 10(k).

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

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be decided by the Presiding Judge or the assigned Special Master. A party to the adjudication who does not file an objection, a response or a timely Motion to Participate waives the right to be a party to the subcase

MEMORANDUM

The United States Is Entitled to Intervene As A Matter Of Right

Parties to the Snake River Basin Adjudication (“SRBA”) may intervene in a subcase as a matter of right if they meet the criteria of I.R.C.P. 24(a). *Idaho v. United States*, 134 Idaho 106, 110, 996 P.2d 806, 810 (2000). Under I.R.C.P. 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 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 existing parties. Rule 24 and its criteria for intervention should be liberally construed as the Rule is intended to shorten trials, avoid technicalities, and promote the administration of justice. *See Herzog v. City of Pocatello*, 82 Idaho 505, 509, 356 P.2d 54, 55 (1960) (citations omitted).

1. The United States’ Motion to Participate 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*, 138 Idaho 378, 390, 64 P.3d 304, 316 (2002) (citations omitted).¹

Intervention at this early stage of the litigation meets the timeliness requirements of

¹ *Farrell* addressed the timeliness standard under I.R.C.P. 24(b) rather than 24(a). Both sections of the Rule, however, contain identical references to a “timely application.”

I.R.C.P. 24. No substantive hearings have been held and no discovery has been conducted. The next setting in this case is a hearing on the claimants' motion for 706 report, scheduled for February 28, an indication that preliminary fact-finding is still occurring in this case. Although trial is scheduled for August 28, 2012, no discovery or motion deadlines have been set. Given this procedural posture, it is clear that other parties to this proceeding will not be prejudiced in any manner.

Furthermore, the BLM has been an active participant in these proceedings. The BLM filed an objection on May 31, 2011 to the Notice of Completed Administrative Proceeding and the Amended Director's Report which was filed with the Court on April 20, 2011. On June 10, 2011, the Idaho Department of Water Resources ("IDWR") filed its Spring 2011, Director's Report of Late Claims and Miscellaneous Claims for Irrigation and Other Water Rights ("Late Claim Report"), which "re-reported" this water right claim. Fish Creek Reservoir Co., Inc. /Fish Creek Irrigation District ("Fish Creek") filed an Objection (SF-1) on August 12, 2011. During the Initial Hearing on January 10, 2011, the BLM orally represented that it anticipated continuing involvement in these proceedings and noted that a Motion to Participate might be appropriate.²

The BLM did review the Late Claim Report and determined there was no need to object to the Director's Report recommendation because the new recommendation appeared to resolve

² The United States is unaware of any administrative activity or request from the Court to include this water right claim, which was already the subject of subcase proceedings, in the Late Claim Report. The authority for IDWR to "re-report" a water right claim already the subject of a subcase before the SRBA Court, without any administrative activity or request from the Court or the parties, is unclear. This does not appear to be a supplemental report as provided for by I.C. § 42-1412(2). Similarly, it is not clear that the United States is obligated to re-object in such a situation to remain a party. In any event, the United States files this Motion to clarify its party status.

the previously-filed BLM objection by removing federal land from the stockwater place of use. The objection filed by Fish Creek, however, concerns a separate aspect of this water right claim and asserts issues of non-use related to an irrigation reservoir located on federal land.

2. The United States has a direct and substantial interest in the determination of the issues raised by Fish Creek Irrigation District, and such interest may be impaired as a practical matter if intervention is denied.

As noted above, the current recommendation includes an irrigation reservoir located on federal land. Any right-of-way on federal land for the irrigation reservoir at issue is subject to forfeiture due to non-use. As such, the United States' has a direct and substantial interest in the water right claim at issue, in the objection filed by Fish Creek, and in ensuring that use of the irrigation reservoir complies with federal and state law. A decree of the water right claim without a proper federal authorization for the use of the reservoir would not comply with state or federal law and, accordingly, would negatively impact the United States' interest.

3. The United State's interest is not adequately represented by existing parties.

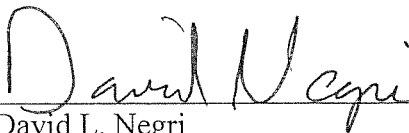
Although Fish Creek has raised the issue of non-use of the irrigation reservoir, its interest is not identical to the United States' interest as landowner. Without the participation of the United States, Fish Creek's objection could be resolved without consideration of the United States' interest as landowner. Because of this divergence in interests and the significantly different stakes in the outcome of the proceedings, the United States' interest is not adequately represented by Fish Creek.

Conclusion

Granting of this Motion will not in any way delay these proceedings or prejudice the other parties. The United States has an obvious interest in this water right claim to an irrigation

reservoir on federal land and in the resolution of the objection filed by Fish Creek. Because Fish Creek's interest is quite different than that of the United States, Fish Creek cannot be expected to adequately represent the interest of the United States. Accordingly, the United States respectfully requests that this Motion to Participate be granted.

Dated this 27th day of February, 2012.



David L. Negri
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Attorney for the United States of America

CERTIFICATE OF SERVICE

I certify that on 27, 2012, I served a true and correct copy of the foregoing **UNITED STATES' MOTION TO PARTICIPATE AND MEMORANDUM IN SUPPORT** as follows:

By facsimile 208-736-2121 to:

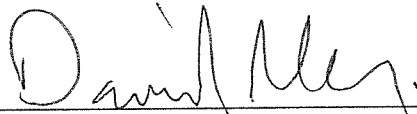
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A handwritten signature in black ink, appearing to read "David Meyer", is written over a horizontal line.

Signature of Attorney Serving Documents