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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. 36-00192

**IDAHO DEPARTMENT OF
FISH AND GAME'S MOTION
TO FILE LATE RESPONSE, OR
IN THE ALTERNATIVE,
MOTION TO PARTICIPATE**

DESCRIPTIVE SUMMARY

This motion of the Idaho Department of Fish and Game (Fish and Game) requests the Special Master to allow Fish and Game to file a late response to the objections filed by Big Bend Irrigation and Mining Co. (Big Bend) in the above-referenced subcase. In the alternative, Fish and Game seeks leave to participate in the above-referenced subcase.

MOTION TO FILE LATE RESPONSE

The Idaho Department of Fish and Game, by and through Rinda Just, Deputy Attorney General, moves the Special Master to allow Fish and Game to file a late response to the objections filed by Big Bend on April 20, 1993, and the United States on April 29, 1993, and in support of the Director's Report dated November 2, 1992. This motion is made pursuant to the court's July 28, 1995 *Order Granting In Part, and Denying In Part, Joint Motions for Amendment of Administrative Order 1*. The grounds for the motion are as follows:

1. As evidenced in the affidavit and supporting documents attached, Fish and Game is a shareholder in the Big Bend Irrigation and Mining Co. (Big Bend), and as a shareholder claims a right to use Big Bend water from Upper (Large) Tucker Springs on a year-round basis for wildlife purposes. When Big Bend filed its claims (36-00133 and 36-00192) in the Snake River Basin Adjudication (SRBA), it did not include wildlife uses as a part of its claims. After consultation with staff of the Department of Water Resources (Water Resources), Fish and Game filed its own claim (36-00133A) for its portion of Big Bend water used in the Hagerman Wildlife Management Area (WMA). The Fish and Game claim was disallowed for the reason that it

represented water included in Big Bend's claim no. 36-00133 and was subsumed in that claim filed by Big Bend. The Director's Report recommendations for Big Bend claim no. 36-00133 included water for wildlife with a 1903 priority date and in a quantity and for a season of use acceptable to Fish and Game. Big Bend and the United States did file objections to the Director's Report. Big Bend did not object to Fish and Game's priority date, nature of use, quantity, or season of use. The United States objected to including non-irrigation uses under 36-00133 and recommended they be included in 36-00192. Fish and Game filed no response to the objections or in support of the Director's Report because it had no disagreement with elements of the recommended Fish and Game uses. Further, Fish and Game reasonably expected that the Water Resources Director (Director), as party to the adjudication, would participate in defense of its recommendations. Investigation of the objections by Water Resources, however, led that department to the conclusion that it had made an error in its recommendation, and Water Resources attached a proposed revised recommendation when it filed its response to the objections. The response and its attachments were provided to Big Bend and the United States, but not to Fish and Game. The amended proposed recommendation directly impacts Fish and Game's claimed rights because it limits the season of use to the irrigation season only, and attaches Fish and Game's use to Big Bend's claim no. 36-00192 with a 1906 priority date.

2. As stated in the attached affidavit of Cynthia Robertson, Fish and Game only became aware of the proposed revisions to the recommendation affecting its water rights during a discussion with Water Resource's staff on August 15, 1995. Until August 15, 1995, Fish and Game had reasonably relied on the only information which it had received, the initial

recommendation, with which it had no quarrel, and which it expected the Director to defend. In that this issue came to light only recently, this motion is timely under the Idaho Rules of Civil Procedure and SRBA Administrative Orders.

3. Fish and Game comes within the provisions of I.R.C.P. 55(c) and the July 28 , 1995 *Order*. The July 28, 1995 *Order* provides that motions to file a late response will be reviewed under the same criteria as an entry of default under I.R.C.P. 55(c), and must show both good cause for untimeliness and the existence of a meritorious position. Fish and Game can demonstrate good cause for its failure to file a response to the objections filed by Big Bend and the United States. It was not until long past the time for filing responses to the Director's Report that Fish and Game learned that elements of its claimed right were directly at issue. The circumstance in which Fish and Game now finds itself arises through no fault of its own. Fish and Game, as a shareholder in Big Bend, originally filed its separate claim for wildlife use when Big Bend failed to include those uses in its claim. When the Fish and Game claim (36-00133A) was disallowed and included as a part of the Big Bend claim no. 36-00133, Fish and Game received notice, through the Director's Report, that its claim had been recommended as a part of the Big Bend claim with a 1903 priority date, and in a quantity and for a season of use that was acceptable. Fish and Game reviewed a summary of the objections filed by Big Bend and the United States, none of which appeared to affect the Fish and Game claim. Further, Fish and Game reasonably expected that the recommendations made by the Director would be defended by the Director in the adjudication. Clearly, Fish and Game could not have known that it needed to file a response to the Director's Report until Water Resources filed its responses to the

objections of Big Bend and the United States. Fish and Game received no notice of the proposed revisions to the recommendation, and files this motion as quickly as possible following its fortuitous discovery of the amended recommendation. A copy of IDWR Adjudication Claim Profile Report, dated August 15, 1995, still clearly shows year-round wildlife use as part of the recommendation.

4. Fish and Game's position with regard to its claimed water right is clearly meritorious. No other claimant objected to any portion of the Fish and Game claim and the Director's Report initially recommended it as a portion of Big Bend's claim no. 36-00133. The Idaho courts have long recognized the policy that cases should be decided upon their merits, and thus has imposed a more lenient standard for setting aside an entry of default. (McFarland v. Curtis, 123 Idaho 931, 936, 854 P.2d 274, 279 (Ct. App. 1993)). Certainly, Fish and Game should be given an opportunity to argue the validity of the initial Director's Report on its merits, since the response to objections issued by Water Resources strikes at the very heart of the Fish and Game claim by limiting the use of water to the irrigation season and changing the priority date. Following the removal of the Director of the Department of Water Resources as a party to the adjudication on July 23, 1995, Fish and Game is permitted to represent its interests in the adjudication. Fish and Game now finds itself at odds with Water Resources concerning the use of water for wildlife outside the irrigation season. It is clear that Fish and Game cannot rely on Big Bend to represent its interests, Big Bend having failed even to notify its shareholders that their claimed rights could be at issue. Surely, Fish and Game is in the best position to represent

its interests regarding its claimed water rights and should be allowed to argue its position on its merits.

5. In McFarland v. Curtis, *id.*, the Idaho Court of Appeals discussed the possibility that setting aside a default judgment could cause prejudice to the non-moving party. The Court noted that this was not a serious problem at the relatively early stage of setting aside an entry of default, but that the court should consider whether setting aside the default would cause injury to the non-movant. Allowing Fish and Game to file a late response in this matter prejudices no one, as there have been no proceedings in this subcase other than the filing of objections and responses. Nor does it appear that granting this motion would be unduly disruptive to the court's calendar.

6. In the absence of objections to this motion, Fish and Game is willing to submit the matter to the Special Master for decision without a hearing.

MOTION TO PARTICIPATE

SRBA Administrative Order 1, as amended, provides at section 6.g. that:

[a]ny party to the adjudication who is not a party to a subcase may, by timely motion, seek leave to participate in a subcase. The motion shall be titled "Motion to Participate." A *Motion to Participate* shall be treated like a *Motion to Intervene* (I.R.C.P. 24) and shall be decided by the Presiding Judge or the assigned special master.

The grounds for this motion are as follows:

1. Intervention as of Right. I.R.C.P. 24(a) provides:

"Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter

impair or impede applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

In support of Fish and Game's position that this motion is timely under I.R.C.P. 24(a) and SRBA Administrative Order 1, Fish and Game reasserts the facts contained in paragraphs 1, 2, and 3 of the Motion to File Late Response, above. As stated in the attached Affidavit of Cynthia Robertson, Fish and Game did not learn that its interests were at issue in this subcase until August 15, 1995.

If Big Bend's water rights are decreed as set out in Water Resource's Response to Objections, Fish and Game will be directly impacted as it will lose its ability to use Big Bend water for wildlife on a year-round basis. Clearly, Fish and Game has an interest relating to the water rights at issue, and its interest could be substantially affected by the outcome of the subcase. As set out in paragraph 4 of the Motion to File Late Response, above, Fish and Game clearly cannot rely on the other parties to this proceeding to represent its interests.

Fish and Game clearly meets the four-part test for intervention set out in Sierra Club v. U.S. Environmental Protection Agency, 995 F.2d 1478, 1481 (9th Cir., 1993). See also, Scotts Valley Band of Pomo Indians of the Sugar Bowl Rancheria v. United States, 921 F.2d 924, 925. The rule governing intervention as of right is to be broadly construed in favor of the applicants for intervention. *id.*

Because Fish and Game meets all of the criteria for intervention as of right under I.R.C.P. 24(a), it should be allowed to participate in subcase no. 36-00192.

2. Permissive Intervention. I.R.C.P. 24(b) provides:

“Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant’s claim or defense and the main action have a question of law or fact in common.”

As set out in paragraphs 1 through 5 of the preceding Motion to File Late Response, this subcase concerns a resolution of disputes concerning the water rights of a number of users for the eventual purpose of issuing a final decree concerning those rights. As one of the water users whose rights will be decreed, Fish and Game’s claims have questions of fact and law in common with the original parties to the subcase.

CONCLUSION

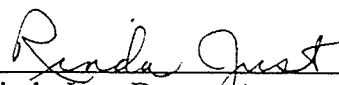
Because Fish and Game comes within the provisions of the administrative orders of the SRBA court governing the filing of late responses, and meets the standards of I.R.C.P. 55(c) as to the setting aside of an entry of default, it should be allowed to file a Late Response in subcase no. 36-00192.

In the alternative, Fish and Game should be allowed to participate in subcase no. 36-00192 because it meets the standards set out in SRBA Administrative Order 1, as amended, and I.R.C.P. 24 for the granting of intervention as of right or permissive intervention.

DATED this ¹⁸/₁₇th day of August, 1995.

Respectfully submitted,

ALAN G. LANCE
ATTORNEY GENERAL



Rinda Just, Deputy Attorney General
Natural Resources Division