

Movants' Names: May Farms, Ltd.,
Sand Springs Ranch Partnership,
and Faulkner Land and Livestock Company

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Department of Water Resources

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 Nos. 36-00021, 36-00048A, 36-00049,
	)	36-00051A, 36-10283A and 36-15168
	)	
	)	CONSOLIDATED REPLY MEMORANDUM
	)	IN SUPPORT OF MOTIONS TO FILE
	)	LATE RESPONSES
	)	

DESCRIPTIVE SUMMARY

This Memorandum replies to issues raised in the Claimants' Consolidated Memorandum Opposing Intervention.

MEMORANDUM

I. INTRODUCTION.

On August 18, 1995 May Farms, Ltd., Faulkner Land and Livestock Company and Sand Springs Ranch Partnership (collectively the "Movants") submitted Motions to File Late Responses pursuant to the Court's order of July 28, 1995. The Court scheduled hearings for November 22, 1995. The evening before the scheduled November 22, 1995 hearing, Counsel for the Movants received by telecopy the Claimants' Consolidated Memorandum Opposing Intervention, along with other documents. At the hearing, counsel for the Movants reserved the

**CONSOLIDATED REPLY MEMORANDUM IN SUPPORT OF
MOTIONS TO FILE LATE RESPONSES - 1**

right to submit this Reply Memorandum due to the late filing of the Claimants' Memorandum and other pleadings.

This Reply Memorandum addresses the legal standard for the Special Master to evaluate the Motions to File Late Responses. The legal standard arises from the Court's Order of July 28, 1995. The SRBA Court recognized that "removal of IDWR and the Director as a party to the SRBA and all subcases necessitates special consideration," and therefore provided a 21-day window for parties to move to participate in subcases due to the removal of the Director and IDWR as a party. See July 28, 1995 Order Granting in Part, and Denying in Part, Joint Motions for Amendment of Administrative Order 1 (hereinafter the "July 28, 1995 Order"). The July 28, 1995 Order indicates that these motions will be reviewed under Rule 55(c), I.R.C.P. criteria, that is "good cause" and the existence of a "meritorious position." Counsel for Gisler, McFadden, Mildren, Ya-Ta-Hay and the Hagerman Water Users Association (collectively the "Claimants") argues that the Movants have not satisfied the good cause and meritorious defense criteria of the July 28, 1995 Order. However, the Claimants' position misconstrues the operative standard. Both the Court's language and the operative Rule 55(c) case law entitle Movants to file late responses.

II. THIS IS A RULE 55(C) PROCEEDING, NOT A RULE 60(B) PROCEEDING.

The Court's July 28, 1995 Order explicitly provides that motions filed during the 21-day window will be reviewed under the Rule 55(c) criteria. The Court emphasizes this by specifically referring to the Rule 55(c) criteria: good cause and the existence of a meritorious position. Even though the July 28, 1995 Order states that Rule 55(c) is the operative rule and that its associated criteria (good cause and meritorious position) apply, the Claimants invoke Rule 60(b) criteria and a new standard asserting, without legal support, that there should be some showing of "cognitive deliberation."

Idaho has rejected the position that the good cause standard in Rule 55(c) coincides with the standard for setting aside a default judgment under Rule 60(b). McFarland v. Curtis, 123 Idaho 931, 935-36, 854 P.2d 274, 278-79 (Ct. App. 1993). Idaho's Court of Appeals distinguishes the Rule 55(c) "good cause" standard for setting aside entry of default from the

Rule 60(b) standard for setting aside default judgment, explaining that the Rule 55(c) standard is more lenient. Id. Idaho has adopted the position that the wording of Rule 55(c) requires only good cause and a meritorious defense while the Rule 60(b) requirements also include a showing of "mistake, inadvertence, surprise or excusable neglect." Id. at 935, 854 P.2d at 278. Idaho's approach is consistent with the policy that cases generally should be decided on their merits and that at the earlier stage of entry of default where there has been no judgment, "a liberal approach is less likely to create unfair prejudice to the nonmoving party or disrupt the Court's calendar." Id. at 936, 854 P.2d at 279.

The Claimants' brief and oral argument attempt to apply the Rule 60(b) standard and associated case law to these Motions to File Late Responses. In so doing, the Claimants' incorrectly fold the Rule 60(b) criteria into the Court's enunciated good cause standard. The Rule 60(b) case, Clear Springs Trout Company v. Anthony, 123 Idaho 141, 845 P.2d 559 (1992), is referred to in the Claimants' Memorandum as providing the appropriate standard. However, McFarland explains that Clear Springs Trout was decided as a Rule 60(b) case and does not apply in the Rule 55(c) context: "We do not feel bound by the analysis in *Clear Springs Trout Co.* because the issue presented to us was not presented to the Supreme Court in that case." McFarland at 935, 854 P.2d at 278.

Judge Hurlbutt's reference in the July 28, 1995 Order to Rule 55(c) alone and to its good cause standard was deliberate. Had he intended to incorporate the Rule 60(b) criteria, that Rule and its criteria also would have been referenced in the Order. The Judge's decision to rely on Rule 55(c) alone is consistent with his stated intention that there be liberality in providing parties the opportunity to get into subcases where the Director and IDWR no longer are a party:

I think this way I intend to see that there be some liberality in parties having the opportunity to get in these cases, at the same time giving the parties to the subcases a fair opportunity to resist what, upon examination, might be a meritless attempt to get into the case. In other words, if you got something to say, I suspect you'll be in. If you don't, we're not going to waste anybody's time.

In Re SRBA, Reporter's Transcript (July 18, 1995) at 25 (copy attached as Exhibit A hereto). As explained below, the Movants in this case most definitely "have something to say."

At the July 18, 1995 hearing at which Judge Hurlbutt announced the decision that ultimately would be documented in the July 28, 1995 Order, counsel for the Claimants' specifically asked the Court about its interpretation of the good cause standard. The Court explained that it was intended to be a liberal standard where "absent clear factors to the contrary, removal of the Director is tantamount to good cause":

THE COURT: Mr. Brown, any questions?

MR. BROWN: No, Your Honor, other than the obvious one which I think will come up immediately after this hearing; and that is whether the court could give us some indication whether good cause is established by removal of the director alone.

THE COURT: As a general matter, I would say that does establish good cause; but I can conceive of a number of situations where there may be objective criteria in a subcase which would require a different result.

So when I say I want to view this process liberally, it is that as a general proposition, absent clear factors to the contrary, removal of the director is tantamount to good cause. You may have taken actions in a subcase previously that would not allow you to get in under this rule.

In Re SRBA, Reporter's Transcript (July 18, 1995) at 27 (attached as Exhibit A hereto) (emphasis added).

The Rule 55(c) good cause standard has been described as including considerations of "whether the default was willful, whether setting aside the default would prejudice the opponent, and whether a meritorious defense has been presented." McFarland at 936, 854 P.2d at 279. The standard alternatively has been described as requiring the Movant to show "some excuse for failure to answer, that a meritorious defense exists, and the policy of deciding cases on the merits should be recognized." Id. In the SRBA Court's own words, "absent clear factors to the contrary, removal of the director is tantamount to good cause." Reporter's Transcript (July 18, 1995) at 270. The SRBA Court has indicated that "clear factors to the contrary" involves previous actions in a subcase that would preclude later claims of good cause. Id.

Despite the clear guidance on the meaning of the good cause standard, the Claimants' continue to apply the Rule 60(b) criterion. Further, without any case law or other legal support,

the Claimants create a "cognitive deliberation" criterion, asserting there must be a showing that originally the Movants made "an informed decision not to participate in the subcase in question." The 60(b) criteria and the newly fashioned cognitive deliberation requirement are "red herring" issues not relevant to the pending Motions. It is the good cause standard, as interpreted by the case law and the SRBA Court, that is the designated yard stick here.

In summary, the good cause standard enunciated by the court intends for liberal grants of leave to file late objections and responses as a result of IDWR's change in status. The Court has indicated that unless a party has taken specific actions in a subcase that would preclude a claim of good cause, "removal of the director is tantamount to good cause." These pending Motions to File Late Responses are exactly what the July 28, 1995 Order attempts to address. With the removal of IDWR as a party, the need has arisen for parties to step into IDWR's shoes to protect their interests. The Movants have good cause to participate in these subcases and to ensure that these subcases are decided on the merits.

III. GOOD CAUSE EXISTS TO PERMIT THE LATE RESPONSES.

The Movants' justification for seeking leave to file the late responses falls well within the good cause standard of Rule 55(c) and the July 28, 1995 Order. An initial response by the Movants was unnecessary due to IDWR's previous involvement as a party litigant. With the removal of IDWR as a party, concerns arose about whether these spring rights, determined to be excessive by IDWR, could be adequately scrutinized without the Department's participation as a party. At that time, the Movants sought to provide the necessary advocacy to these proceedings.

There is ample evidence before the Court establishing that the Movants are seeking to file their late responses due to the removal of IDWR and the Director as a party. The Affidavits of Ralph May, Mike Faulkner and Tom Ambrose all explain that their motions to file late responses are based on the Director's and IDWR's elimination as a party. Initially, they had no need to respond in these subcases because there was a general belief that IDWR was handling these matters. However, with the removal of IDWR as a litigant, they realized that participation was necessary to protect their own interests.

The Claimants in their motions to strike have challenged certain of the Movants' affidavits alleging that they are inadequate in certain respects. The grounds stated in the motions to strike are not sufficient for excluding the affidavits in whole or in part and the Movants opposed these motions at hearing. Also, the Movants have objected to the Claimants' motions to strike which were filed on the eve of the hearing and over three months after the affidavits originally were served. Without waiving these objections, the Movants' note that even if the affidavits were struck, sufficient other evidence exists on the record to allow filing of the late responses. The Director's Report is a matter of record in this case and substantiates the Movants' claims that IDWR after due investigation has recommended substantially less water than claimed. The Affidavit of Josephine P. Beeman (not subject to a motion to strike) submits the IDWR files for these subcases, including the IDWR field investigation report on which the Director's Report recommendations are based. The IDWR records substantiate the reasons for the Director's decision to recommend substantially reduced quantities of water in these subcases.

The Movants' deposition transcripts (not yet signed by the deponents) which were submitted to the Court along with the Affidavits of Patrick D. Brown, also confirm that the Movants sought leave to file late responses because of the removal of IDWR as a party:¹

A. The fact that the Water Resources had examined the water rights in the Hagerman Valley, made recommendations that were significantly lower than what were - than the rights that were claimed. The Hagerman Water Users then objected to their findings; and at that point, why - well, at the point then later, the director was taken out of the process and no longer was a party to - within that. So that's the issue that we saw, is that then there was - that with the director out, there was a void that we felt we needed to step in and fill.

Q. So you believe it's necessary to become involved because the director is no longer a party, is that correct?

A. That is correct.

Deposition of Ralph May, p. 19, ll. 6-21 (Submitted by Affidavit of Patrick D. Brown).

Q. Is it your position that the Department of Water Resources, when

¹ The Movants do not waive the right to review and sign the deposition transcripts.

they filed their director's report and you were a party to this subcase, would adequately represent Sand Springs' interests?

A. Adequately in that we did not feel we needed to do take any action other than what they took.

Q. So it's your testimony that you were relying on the Department of Water Resources to protect or preserve Sand Springs' interests?

A. Sand Springs' interests were protected by the Department reducing the water under the licenses or permits of the Hagerman people, thus reducing our obligation to mitigate.

Deposition of Tom Ambrose, p. 33, ll. 17-25 to p. 34, ll. 1-5 (Submitted by Affidavit of Patrick D. Brown).

Q. Okay. Is it your position that Idaho Department of Water Resources would adequately represent your interests in the Snake River Basin Adjudication?

A. If they were allowed to be a party?

Q. Yes.

A. I believe so.

Q. And how is that?

A. I guess just from the experience in years of dealing with them, I guess.

Deposition of Mike Faulkner, p. 32, ll. 24-25 to p. 33, ll. 1-7 (Submitted by Affidavit of Patrick D. Brown).

The Movants brought these Motions as a direct result of IDWR's removal as a party. At the first opportunity, the Movants sought a way to step into the shoes of IDWR in these subcases, believing that their interests could not be adequately protected in a unilateral proceeding. This is exactly the kind of good cause envisioned by the July 28 Order.

In their brief, the Claimants' suggest that the Movants should have sought leave to intervene at the time the Musser case was decided in late February 1994. However, it was not the Musser decision that directly resulted in the Movants' desire to file the responses in these subcases. Rather, it was the final appellate decision confirming the legislation removing IDWR as a party that resulted in the pending Motions. Soon after that decision was issued by the Supreme Court, the Movants as participants in the Water Resource Coalition were among the parties filing the motions for amendment of Administrative Order 1 that resulted in the Court's

July 28 Order. See July 28 Order, n. 1. Thus, the Movants acted with diligence and speed to seek a way to participate in these subcases once it became clear that the Director and IDWR were out for good.

The Musser case does substantiate the Movants' interest in these subcases, although it was not the immediate cause of these Motions. Musser demonstrates that the Movants as ground water users in the Eastern Snake Plain Aquifer ("ESPA") are subject to potential curtailment to supply the Hagerman area spring users' rights. The newly issued IDWR conjunctive management rules provide the means for spring users to restrict the use of junior ground water users in the ESPA. The outcomes in these subcases, which all involve Hagerman area spring rights, could impact the Movants' ability to divert and use ground water from the ESPA.

Counsel for the Claimants have asserted that these grounds for standing are insufficient. Rather, the Claimants would require proof of actual hydrological connections between the springs and the ground water sources diverted by the Movants.² However, no specific data linking the Movants' wells to the Claimants' springs exists. Legally the ESPA has been declared a region where ground and surface waters are to be managed conjunctively. Thus, there is substantial evidence that these Movants may be subjected to a call for water by the Claimants in these subcases. There can be no denial that the Movants have a legal interest and more than sufficient standing in these subcases.

IV. A MERITORIOUS AND JUSTICIABLE CASE HAS BEEN PRESENTED.

In a Rule 55(c) case the moving party must allege facts constituting a meritorious defense. McFarland at 934, 54 P.2d at 277. The reason for this requirement is that it would be an idle exercise to set aside a default if there was "no real justiciable controversy." Id.

² If the spring users would provide a legally binding commitment to the Court and the Movants that no spring user ever will issue a call affecting any Movant because there is no hydrological connection between their waters, Movants would view the spring users' argument differently. In the absence of such assurance however, the Movants have stated sufficient claims to be within the zone of interests that confers standing. Standing does not require proof of eventual success on the merits, as the spring users' standards suggest, but only a claim of right within the zone of protected interests.

For example, one justiciable controversy asserted by the Movants is the discrepancy between the amounts of water claimed by the Claimants and the smaller amounts recommended in the Director's Report after IDWR's investigation. With the removal of IDWR, the Claimants have a unique opportunity to promote their claims in a proceeding in which these claims would be unchallenged by any other party. Understandably, they seek to exclude the Movants from these proceedings in an effort to avoid litigating the merits of IDWR's recommendations.

The IDWR records submitted to the Court along with the Affidavits of Josephine P. Beeman include IDWR reports prepared based on field examinations of the Claimants' water use practices. The ultimate Director's Report recommendations are based on the results of these field examinations in which the capacity of the diverting works, the acres irrigated, and other aspects of actual beneficial use are evaluated. After conducting these field examinations, IDWR recommended substantially less water than the claimants had claimed. The chart attached hereto as Exhibit B summarizes the differences between the amounts originally claimed by the Claimants and the amounts ultimately recommended in the Director's Report by IDWR.

At this stage, for the Movants to be granted leave to respond, they merely need to allege facts which, if true, would constitute a meritorious position. Where the State administrative agency charged with regulating water rights has conducted a field examination and determined after due evaluation that the amounts claimed were not justified, a meritorious claim has been established. One can hardly imagine better substantiated allegations of meritorious position than these.

The Claimants seem to suggest that because the Movants have no personal knowledge of their water use practices, the Movants cannot seek to respond in these subcases. The Movants who are not yet parties to this case have no grounds on which to obtain personal knowledge of the Claimants water use practices. They cannot conduct discovery and they cannot trespass on the Claimants' land to substantiate the IDWR findings. The Movants' personal knowledge is based on the administrative agency's investigations and its authority to gain access to the Claimants' properties.

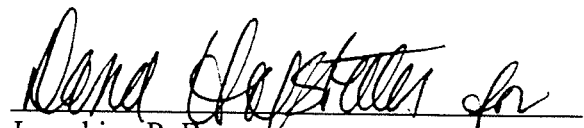
Inclusion of the Movants as parties in the subcases will allow the Director's recommendations to be fully advocated in a fair bipartisan proceeding. In a one-sided proceeding the Claimants would not be subject to cross-examination, to discovery or to the other basic attributes of our adversarial justice system. The Claimants' desire to promote their claims without opposition is understandable. However, it is not likely to lead to a fair outcome. The very legitimacy and credibility of the process is at issue. Will the Claimants be able to promote their excessive claims of water without a full and complete airing before the Court? Or, will the Movants be allowed the opportunity to require the Claimants to prove their facts as litigants in other proceedings normally are required to do?

At this early stage of the proceedings where little progress has been made and virtually no discovery has occurred in these subcases, no prejudice to the Claimants would result if the Movants are allowed to participate. There are substantial grounds for granting the Movants' motions and few, if any, for denying them. The Movants have significant interests in the outcome of these subcases as their own ability to divert and use water may be impacted by the quantities ultimately decreed to these Claimants. The Movants should be given the opportunity to represent their interests in these proceedings and require that the Claimants adequately justify their claims.

CONCLUSION

For the foregoing reasons, May Farms, Ltd., Faulkner Land and Livestock Company and Sand Springs Ranch Partnership respectfully request that the Court grant their motions to file late responses.

RESPECTFULLY SUBMITTED this 1st day of December, 1995.


Josephine P. Beeman

CERTIFICATE OF SERVICE

I certify that on the 1st day of December, 1995, I caused a true and correct copy of the foregoing document to be served on the following person(s) in the manner designated:

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Josephine P. Beeman

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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	)	REPORTER'S TRANSCRIPT
	)	
Case No. 39576	)	
	)	

D-a-t-e: Tuesday, July 18, 1995

T-i-m-e: 1:33 P.M.

P-l-a-c-e: SRBA Courthouse, Twin Falls, Idaho

B-e-f-o-r-e: HON. DANIEL C. HURLBUTT, JR.
District Judge (without jury)

H-e-a-r-i-n-g: Status Conference; Motions for Late
Claims; Joint Motions for Amendment of
Administrative Order 1, Joint Motions for
Reconsideration of Order Striking General
Provisions; General Discussion

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1 COURTROOM OF THE DISTRICT COURT,
2 SNAKE RIVER BASIN ADJUDICATION
3 COURTHOUSE, 253 Third Avenue North,
4 Twin Falls, Idaho, Tuesday, July 18,
5 1995, 1:33 P.M.
6 *****

7 THE COURT: Good afternoon, ladies and
8 gentlemen. This is the District Court of the
9 Fifth Judicial District in and for the State of
10 Idaho. I'm Judge Hurlbutt.

11 This is the time and place set for the
12 monthly status conference in the Snake River
13 Basin Adjudication. We do have a number of
14 matters to take up this afternoon.

15 I'd like to begin with several motions that
16 are pending before the court. First, the motion
17 to file a late claim which has been filed by
18 Robert Quinly.

19 Is Mr. Quinly here?

20 MR. QUINLY: Yes, sir.

21 THE COURT: Mr. Quinly, good
22 afternoon.

23 MR. QUINLY: Good afternoon, sir.

24 THE COURT: I appreciate your coming
25 in. Mr. Quinly, I have reviewed your claim.

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1 There has been no opposition filed to it. Your
2 claim and check are attached.

3 Is there anyone on behalf of the State or
4 any other party that intends to object to this
5 late claim?

6 (NO RESPONSE)

7 THE COURT: Very well. Mr. Quinly, I
8 will accept your late claim; and we will see that
9 it is filed with the department of water
10 resources. And you'll receive communication from
11 them when they file an amended director's report
12 that will include your claim.

13 MR. QUINLY: Thank you, sir.

14 THE COURT: Thank you very much.

15 There's also a motion for a late claim
16 filed by William McKnight.

17 Is Mr. McKnight here?

18 (NO RESPONSE)

19 THE COURT: Counsel, ladies and
20 gentlemen, I've reviewed the motion. It is in
21 good order, and good cause has been stated. I
22 have the notice of claim and the accompanying
23 check.

24 Was there any party that intended to object
25 to this late claim?

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Duane J. Schneberger

1 (NO RESPONSE)

2 THE COURT: It will then be accepted,
3 and his request is granted.

4 Next I would like to take up the joint
5 motions for amendment of administrative order
6 No. 1.

7 Mr. Tucker — or who is going to address
8 the joint motion? Mr. Ling?

9 MR. LING: Thank you, Your Honor.

10 May it please the court —

11 THE COURT: Mr. Ling, let me begin by
12 asking: Is there anyone here who intends to
13 object or contest this joint motion?

14 MR. BROWN: Your Honor, we intend to
15 contest.

16 THE COURT: Mr. Monson?

17 MR. MONSON: We also have some
18 comments, Your Honor.

19 THE COURT: All right. Mr. Ling, why
20 don't you proceed.

21 MR. LING: Thank you, Your Honor.
22 Well, the motion is very short and
23 straightforward. And we aren't going to burden
24 the court with restating the motion as written
25 and submit it to the court.

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1 As the court knows and can see from the
2 motion, our concern is that by the legislature
3 allowing the director to remove himself from this
4 action as a party it appeared that his role in
5 the SRBA has changed to the extent that he will
6 not necessarily be in the subcases defending the
7 director's report.

8 Our concern is that because many of us
9 relied upon the director to support his report
10 and be an adversary in those subcases where a
11 person may have objected to his report and his
12 recommendations, and so nothing was done. Now
13 that he is not there, people are concerned that
14 we now should perhaps — when I say "we," other
15 claimants should have the opportunity to join in
16 that subcase and take the position that the
17 director has taken in his recommendations, and
18 actually support those recommendations.

19 At this time, as the court knows, under
20 general provision No. 1 the only method is to
21 file a motion to participate. That is a
22 burdensome, although certainly available, but is
23 not as readily available as what we are seeking
24 to have an amendment so that one could merely
25 file a notice of intent to participate, and then

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1 come in so long as it's in that narrow area and a
2 short window of opportunity. And that narrow
3 area is, of course, to participate in support of
4 the director's report.

5 We recognize that if in fact you had
6 objections to the director's report one would
7 have filed an objection or would seek to file a
8 late objection. We also know that if you are
9 going to respond you would have responded because
10 you felt the director could not or would not
11 support perhaps a recommendation.

12 But where the director is not there, it
13 seems those people who want to now assure that
14 the recommendations are properly presented and,
15 to the extent possible, confirmed by the
16 magistrate and ultimately this court, that they
17 should have some window of opportunity to appear
18 in those subcases. And that's what we're asking
19 for, that narrow window of opportunity.

20 THE COURT: Mr. Ling, as I read the
21 motion, it is to allow parties. I assume you
22 mean parties to the Snake River adjudication
23 under the current statute. Then that would
24 include the State or its various agencies.

25 MR. LING: I think that would be

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1 true. The State or any agency that is a claimant
2 could very well be a party.

3 And I, again, I suppose that would be -- we
4 had not anticipated necessarily the State being
5 the one that would come in; but I see some agency
6 who felt that there was a need to come in to
7 support the director's report and the director
8 wouldn't do that, they would have that
9 opportunity.

10 And then the other point that you make is
11 well taken. Obviously the State may have certain
12 provisions that I've heard them talk about that
13 they feel are of enough importance to the State
14 that they would want to be active in supporting
15 the director's recommendations. And that would
16 give them an opportunity and a method by which
17 they would then become a party and show that
18 they're going to be active in that rather than
19 merely appearing through an expert witness or a
20 witness being the director.

21 THE COURT: If called.

22 MR. LING: Yeah.

23 THE COURT: Thank you, Mr. Ling.

24 Mr. Ling, was there -- are you speaking entirely
25 on behalf of the joint movants here?

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1 MR. LING: Yes. I asked, I was asked
2 by all and I reluctantly agreed to present it,
3 telling them that it would be very short and
4 sweet. And anyone else who wanted to make
5 comments, I'm sure the court would be more than
6 happy to have them do that. But I agreed to
7 present both the motions.

8 THE COURT: Thank you. Mr. Monson,
9 did you want to address the motion on behalf of
10 the United States?

11 MR. MONSON: Briefly, Your Honor.
12 Thank you.

13 Your Honor, we have -- there was some
14 difficulty in getting a copy of the motion. And
15 we didn't get a copy until late yesterday; and so
16 we haven't had a chance to fully review it. We
17 didn't even know of its existence until we saw
18 the court's order granting expedited hearing.
19 But be that as it may, the motion isn't overly
20 complicated; and I think we have had an adequate
21 opportunity to respond.

22 Essentially we don't see a reason to amend
23 administrative order No. 1 simply because it
24 provides the relief that these parties seem to be
25 seeking in that rule 6.g. provides for the

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1 notices -- or motions to participate which are to
2 be treated similarly to a motion to intervene
3 under rule 24. And to the United States' point
4 of view, anyway, it seems like that's the
5 appropriate vehicle for parties to participate.

6 And if the concern is one of timeliness, I
7 think that we would not oppose the court
8 recognizing some liberality in giving people
9 latitude to file motions to participate now since
10 there has been a change in the role of the
11 director.

12 As a further discussion, we haven't seen
13 anywhere in the pleadings any statement of
14 exactly how the administrative order No. 1 would
15 be amended, what kind of language the court
16 should adopt. Nor do we see any particular
17 description of language which prohibits them from
18 filing motions to participate at this time.

19 So given that there is already in place a
20 vehicle for parties who want to participate to
21 defend a director's report, we think that
22 administrative order No. 1 need not be revised or
23 amended simply because it already provides the
24 relief that they seem to be seeking.

25 Thank you.

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1 THE COURT: That you, Mr. Monson.
 2 Mr. Brown.
 3 MR. BROWN: Your Honor, we oppose this
 4 motion; and we don't do so simply theoretically.
 5 We are presently involved in a case where certain
 6 ground water appropriators have attempted to
 7 intervene after being on notice for about three
 8 years.
 9 Now, I understand that the purpose of
 10 Mr. Ling and his fellow associates and other
 11 parties is to simply support the director's
 12 recommendation. I'm not sure what that means.
 13 My concerns are this: First of all, I
 14 don't think anyone is entitled to rely on a
 15 change in the director's role, especially when
 16 people such as Mr. Ling has already argued and
 17 the State has certainly always argued that they
 18 were -- the director was disinterested.
 19 What concerns me is my clients have
 20 proceeded only against the director knowing that
 21 he didn't have any information against their
 22 claims. And now they are faced with the
 23 proposition of opening up the proceedings, which
 24 is extremely expensive.
 25 To bring this matter home, I would like to

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1 just read to the court something that's going on
 2 in the present subcase. The ground water
 3 appropriators on April 28th filed a motion to
 4 participate. They state that they need to
 5 participate because, quote, the above issues
 6 derived from Candy's apparent -- Candys are the
 7 subcase -- apparent intent to assert the sanctity
 8 of a prior decree regardless of beneficial use,
 9 and thereby preserve the right to divert more
 10 water than the department has found can actually
 11 be applied to beneficial use.
 12 Now, the problem we have with this is those
 13 simply aren't the facts. The ground water
 14 appropriators attended the depositions and other
 15 discovery in this case which occurred about a
 16 month before this statement was written.
 17 During the discovery the department's
 18 expert was asked by me: "Do you have any
 19 opinions with respect to how much could be
 20 beneficially diverted by the Candys to irrigate
 21 36 acres on the ground?"

22 Answer, Mr. Jeff Peppersack, the
 23 department's expert: "I don't have anything to
 24 base the opinion on at this point, no."

25 I again asked Mr. Peppersack: "What's your

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1 understand of the issues?"
 2 "Only that the diversion rate in this
 3 particular case was based on an inch an acre, and
 4 that sprinkler systems in general, an inch an
 5 acre was probably adequate."
 6 "Is it adequate in this particular
 7 situation?"
 8 "I would need a little bit more
 9 information to make that determination."
 10 Finally, I say to Mr. Peppersack:
 11 "Mr. Peppersack, we're talking about beneficial
 12 use of water. What's the maximum beneficial use
 13 of water on the Candy's property in your
 14 opinion?"
 15 Answer: "I don't know what benefit" --
 16 Question: "In terms of flow rate."
 17 "I don't know what the maximum beneficial
 18 use is."
 19 The point is quite simple, Your Honor. The
 20 department has made no determination. Other
 21 parties have now filed motions to participate
 22 supposedly to defend the director's position,
 23 which they call a -- the director's determination
 24 of what can actually be beneficially applied.
 25 My clients are now being asked to be

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1 subjected to motions, discovery apparently from
 2 many other parties despite the fact that they
 3 have elected to proceed only against the
 4 director. They pursued appeals based on that.
 5 And the bottom line is if anyone is to now
 6 come in, they should come in subject to rule 11,
 7 first of all. In the subcase, that has not been
 8 required.

9 We are presently passed our discovery
 10 cutoff. And we have a hearing after this
 11 proceeding today in which the ground water
 12 appropriators through a gentleman named
 13 Mr. Taylor would like to intervene.

14 We've not been given the opportunity for
 15 discovery. The special master has created a
 16 system called a litigating amicus in which people
 17 could come in and do what I understand Mr. Ling
 18 is asking to be able to do, present evidence in
 19 support of the director's report.

20 First of all, we think it's untimely. And
 21 we don't think there's any excuse for the delay
 22 of several years.

23 In fact, in that case, as in the case of
 24 Mr. Ling and several of these other gentlemen, we
 25 filed a motion to designate basinwide issues in

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1 the summer of '93; and most of () gentlemen
2 responded by August of '93. They've had more
3 than a year before the stay was imposed to become
4 involved based on issues we identified; and no
5 one has done so to date. They've had substantial
6 time afterwards to become involved, and they've
7 not become involved.

8 It's a simple point, and I don't mean to
9 belabor it. But my clients have spent at this
10 point disputing about 14 inches of water, and
11 this does not include basinwide issues, just in
12 their case, they have spent close to \$25,000. I
13 submit on the open market that would have bought
14 their water right time and time and time again.

15 And they're entitled to have their trial
16 without everyone in this room now being allowed
17 to participate. The only denial of due process
18 is the delay that occurs, and none of these
19 people who appear today who now seek to
20 participate can claim that they've been denied
21 due process when they waived that right by not
22 moving to intervene.

23 Now, properly understood, the motion to
24 participate is necessary; and it's necessary not
25 just because there's a general concern about

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1 legal issues. Because as the court already
2 noted, legal issues will be renewed de novo based
3 on challenges to the director's recommendation --
4 or the master's recommendation.

5 So I suggest that we need to have a
6 requirement that anybody who wants to participate
7 signs, first of all, a pleading, which the
8 special master in the Candy case, anyway, has not
9 required, so we don't know what the litigating
10 amicus's position is. We need to, first of all,
11 have that party who wishes to participate state
12 their interest, state their position subject to
13 rule 11, and state it in terms of a factual
14 position.

15 I mean if the ground water appropriators
16 now want to come in in the Candy case and,
17 pursuant to rule 11, advocate that the director
18 has properly determined beneficial use despite
19 the fact that the director admits he made no such
20 determination, then that's fine. But we need to
21 protect the process. And we need to have the
22 court require some showing of inadvertence,
23 excuse or otherwise to become involved in the
24 factual issues before a recommendation is filed
25 with the district court.

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1 Having said that, Your Honor, I just urge
2 you to recognize, while many people have
3 purportedly relied on the director, the director
4 has always said he was disinterested. We've
5 never relied on the director; but we can't get
6 our water rights decreed. And we certainly can't
7 get it done economically. So we just urge the
8 court to keep the process closed, and to
9 recognize that no one is being denied anything
10 which they have not voluntarily waived.

11 Thank you.

12 THE COURT: Mr. Brown, do you agree
13 with Mr. Monson that the process to file a motion
14 to participate under administrative order 1 is
15 sufficient given your current concerns?

16 MR. BROWN: With the interpretation
17 we've had in the one case we've been involved in
18 before the master, I don't think it's sufficient
19 because it's analogous to a motion to intervene.
20 And the four criteria to a motion to intervene
21 are adequacy of representation -- an interest in
22 the proceedings. Everyone agrees that everybody
23 in this room has an interest in every proceeding
24 here. They wouldn't be parties to the
25 adjudication.

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1 What the restriction, I think, we need is
2 we need a showing of good cause for not filing an
3 objection or response, and a showing of prejudice
4 factually if that party is not allowed to
5 intervene. Otherwise we render the
6 objection-and-response deadlines meaningless.

7 THE COURT: Thank you, Mr. Brown.

8 Was there anyone else who wished to argue
9 in opposition to the motion?

10 (NO RESPONSE)

11 THE COURT: Mr. Fereday, you're
12 opposed to the motion?

13 MR. FEREDAY: Your Honor, I did not -- I
14 was not one of the movants. I am not opposed to
15 the result in the motion, although I have some
16 concerns about some of the language in it. But
17 in light of Mr. Brown's comments, I would like to
18 respond.

19 THE COURT: Well, I'm not going to
20 argue your subcase. Mr. Fereday, if you would
21 like to respond to the concerns you have about
22 language in the motion, you may take the podium.

23 MR. FEREDAY: Your Honor, the language
24 in the motion with which we had some concern was
25 language that indicated that administrative

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1 order 1 and the motion-to participate procedure
2 effectively bars or does bar people from getting
3 in. We believe it does not bar claimants from
4 getting into subcases, but we do agree that as it
5 has been implemented, particularly in this new
6 era, if you will, I think the issue is
7 presented.

8 We do agree with Mr. Monson that some -- if
9 this is what he said, I believe it is -- that
10 some liberality or some more liberal standard
11 should be applied at least for some period of
12 time, in our view, to allow that procedure to
13 work and for people to have an opportunity to
14 come into these subcases at this point.

15 We don't want to see the procedure closed
16 as Mr. Brown has indicated. We believe that a
17 proper interpretation of administrative order 1
18 is that there should be an effort to extend
19 justice to claimants who have legitimate reasons,
20 particularly now with the new status of the
21 director, for coming into these subcases.

22 Thank you.

23 THE COURT: All right. Thank you,
24 Mr. Fereday.

25 Mr. Ringert.

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1 MR. RINGERT: Might I express a brief
2 concern, Your Honor?

3 THE COURT: Please.

4 MR. RINGERT: If it please the court, I
5 don't believe this motion addresses our situation
6 in the Niagara Springs case. And I would hate to
7 see the settlement disturbed by filing notices to
8 participate in a matter where the settlement has
9 been approved by this court and would be at final
10 judgment, I think, were it not for the various
11 interpretations of the amnesty statutes.

12 So I hope the court, if the motion is
13 granted, will address that particular item.

14 Thank you, Your Honor.

15 THE COURT: Thank you, Mr. Ringert.

16 Any other movants want out from under the
17 rule or the request?

18 (NO RESPONSE)

19 THE COURT: Any other comments for or
20 against the motion, Mr. Ling?

21 MR. LING: Again, Your Honor, may it
22 please the court, I felt it necessary to respond
23 to Mr. Brown's remarks.

24 Number one, the director, to my knowledge,
25 has never said officially, and this court has

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1 never ruled, that he's a disinterested party. It
2 certainly did not occur until the legislature
3 changed his role.

4 Now, when we had the issue before this
5 court as a basinwide issue what the role of the
6 director was, I was one of those who raised the
7 issue that the director -- we should be able to
8 rely upon the director to defend his
9 recommendations; and it should not be necessary
10 for every claimant to come in and participate in
11 those subcases where his recommendations are
12 questioned if we agree with them.

13 And now we don't have that. The
14 legislature has made it clear that now he will
15 not necessarily be the party defending that.

16 So it's a new ballgame whether Mr. Brown
17 likes it or not. I didn't make the rules.

18 Certainly inadvertence and excuse, if
19 that's what we're saying, we have excuse. I'm
20 talking about a reliance upon the status as it
21 was when the time for filing objections was
22 there, or responses. Now that status has changed
23 because the director is no longer an adversary in
24 the adjudication.

25 So now -- and I'm not saying how many

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1 people will, but we need to have some
2 opportunity. And I need to talk to my clients
3 and express to them do you want to appear in a
4 particular subcase to defend the director's
5 report because the director may not necessarily
6 be doing that.

7 THE COURT: No, I think the director
8 will not be doing that.

9 MR. LING: I agree. Although maybe
10 the State could come in and want to assert the
11 position. And I -- of course, most of my clients
12 would not notice the distinction between the
13 State of Idaho and the director who is of an
14 agency.

15 But in any event, those people need to
16 know, well, what's it going to cost. And I don't
17 want to have to tell them, well, we have to file
18 a motion to participate; we have to follow
19 rule 24 similar to a motion to intervene; and I
20 don't know how much that's going to take; and I
21 don't know how difficult it's going to be to get
22 permission to intervene. Whereas if we had a
23 right to file an intent to participate, then, of
24 course, they would be able to get in without a
25 great deal of cost.

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1 Certainly I have enough faith in the
2 special masters that they are going to control
3 those proceedings. And if somebody comes in at a
4 time when there's already a settled agreement,
5 they are going to say, well, you can participate;
6 but there's nothing here to participate on any
7 more as far as that stage of the proceeding.
8 They don't have to reopen it; and I don't think
9 anybody anticipated that anything would be
10 reopened.

11 But we're merely asking a method -- and I
12 understand that Mr. Brown may not like to see
13 that. Because if I was in a position that I was
14 objecting to the director's report on an issue
15 and I only had the director as a party at one
16 time and now he's gone, I would love that
17 position. And I wouldn't want anybody else
18 getting involved because I would like to be able
19 to argue my position without anybody else
20 involved. And if somebody filed a motion to
21 participate, I would make strong arguments that
22 he shouldn't be allowed at that time if I was
23 trying to give my best to my client in that
24 situation.

25 But that doesn't mean that that provides

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1 some time or you were added as a party because
2 it's found that maybe you were indispensable.
3 The court certainly has the authority to decide
4 what involvement that new party is going to have
5 and whether or not any of the things that had
6 taken place needed to be revisited or not,
7 including discovery.

8 But I don't think it would be possible to
9 answer one way or the other without knowing the
10 facts of each case and the special master then
11 making that decision.

12 THE COURT: Thank you, Mr. Ling.

13 Counsel, I'd like to take a 10-minute
14 recess; and then I'm prepared to rule on the
15 motion. We'll be adjourned for 10 minutes.

16 (RECESS)

17 THE COURT: We'll go back on record.
18 Counsel, addressing the joint motion to amend
19 administrative order 1, I am going to rule as
20 follows: First, the -- I guess technically the
21 motion will be granted in part and denied in
22 part. Rather than amend administrative order 1,
23 I will order that parties to the Snake River
24 Basin Adjudication be granted the opportunity of
25 filing a motion to file a late objection or

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1 the other people due process with the least cost,
2 and that is a right to participate where the
3 director is not doing what they thought he might
4 be doing.

5 THE COURT: Mr. Ling, then, if what
6 you're suggesting is the opportunity of coming in
7 and, I think Mr. Tucker used the term, carry the
8 water for the department, are you suggesting that
9 the new participant or new party to the subcase
10 would not be allowed any additional discovery,
11 but would simply take that information which is
12 of public record and can be provided by the
13 department and go with it?

14 MR. LING: I would think the special
15 master would have to resolve that. I'd be
16 reluctant to say one way or the other.

17 It depends on what stage the proceedings
18 are in. I would think the special master
19 probably, depending on who has been involved in
20 discovery, would make a decision as to whether or
21 not additional discovery would be allowed or
22 not. And a lot of that would depend upon who may
23 have already been involved in that discovery.

24 No different than it was if you were to
25 intervene in a case that had been going on for

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1 response.

2 Now, what I'm trying to do is balance the
3 equities, the interests and the costs to the
4 various parties in these cases. And one rule
5 necessarily does not fit all. Essentially the
6 responsibility will be the special masters' in
7 the contested cases to determine the basis upon
8 which additional parties can be admitted in the
9 subcases.

10 Therefore, in order to get into a subcase
11 at this juncture, and only for the test basins, ~~a~~
12 ~~party to the adjudication will be required within~~
13 ~~21 days to file a motion to file a late objection~~
14 ~~or response.~~ Presumably if one was intended to
15 be aligned with the party already having filed an
16 objection, whether that's the claimant or someone
17 else, you would be seeking to file an objection.
18 Presumably if you were seeking to be aligned with
19 respondents or formerly the department, you would
20 file a response. You'll be required to submit
21 with your motion a completed standard objection
22 or response form.

23 The master will review the motion and
24 accept the late objection or a response on a
25 showing of good cause and a meritorious

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1 position. If a party sees to file a late
2 objection or response and fails to state a
3 meritorious position, it does not serve any
4 utility to clutter the proceedings in that
5 fashion.

6 The master will make the determination on
7 cause. The master will make the determination on
8 merit. And the master may grant the filing of
9 the late objection or response with such
10 limitations as are just and appropriate. Those
11 could include limitations on discovery,
12 scheduling, whatever may be necessary.

13 I think this way I intend to see that there
14 be some liberality in parties having the
15 opportunity to get in these cases, at the same
16 time giving the parties to the subcases a fair
17 opportunity to resist what, upon examination,
18 might be a meritless attempt to get into the
19 case. In other words, if you got something to
20 say, I suspect you'll be in. If you don't, we're
21 not going to waste anybody's time.

22 This will allow, too, with the filing of a
23 pleading, an objection or response, the special
24 master to very quickly align parties. If you're
25 aligned with another party, the special master

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1 certainly may appoint lead counsel. So simply
2 filing an objection, having it granted and being
3 in doesn't necessarily mean that you're going to
4 be saying very much other than through lead
5 counsel. So I will leave it to the masters to
6 manage the case.

7 Mr. Ling, any questions?

8 MR. LING: Just one, Your Honor. In
9 the objections that one may want to file, or
10 response, I assume that you are not allowing
11 anybody to open up new issues that are not
12 already raised. My concern is you didn't mention
13 that; and if you just allow objections to a
14 subcase, then parties may want to raise issues
15 that have never been raised before. And I assume
16 that is not your intent.

17 THE COURT: That is not my intent.
18 That was not the intent of the motion as I took
19 it.

20 MR. LING: Right.

21 THE COURT: So your objection and
22 response will be limited to the issues already
23 before the special master in the subcase.

24 But you will have to take a position under
25 rule 11. And you have 21 days in which to do it

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1 from the issuance of the order. That may be a
2 couple days, but — and that includes all parties
3 to the adjudication as that term is defined in
4 the new statute. And so I take that to mean all
5 state agencies or the State of Idaho.

6 Mr. Brown, any questions?

7 MR. BROWN: No, Your Honor, other than
8 the obvious one which I think will come up
9 immediately after this hearing; and that is
10 whether the court could give us some indication
11 whether good cause is established by removal of
12 the director alone.

13 THE COURT: As a general matter, I
14 would say that does establish good cause; but I
15 can conceive of a number of situations where
16 there may be objective criteria in a subcase
17 which would require a different result.

18 So when I say I want to view this process
19 liberally, it is that as a general proposition,
20 absent clear factors to the contrary, removal of
21 the director is tantamount to good cause. You
22 may have taken actions in a subcase previously
23 that would not allow you to get in under this
24 rule.

25 Mr. Monson?

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1 MR. MONSON: I have nothing.

2 THE COURT: Okay. Counsel, I'd like
3 to move to the next matter on the agenda. There
4 has been a motion to admit John Paul Kennedy as
5 counsel pro hac vice.

6 Mr. Hollifield, did you want to proceed
7 with that matter?

8 MR. HOLLIFIELD: Yes, Your Honor.

9 THE COURT: Mr. Hollifield.

10 MR. HOLLIFIELD: Thank you, Your Honor.
11 Your Honor, I have not received any objections to
12 the motion.

13 I would like to tell you a little bit about
14 John Paul Kennedy. He graduated from Harvard
15 University. He attended the Stanford University,
16 and he received his JD from that law school.

17 He's admitted to practice before the
18 Supreme Court of the United States and is
19 currently a member of the Utah Bar Association.
20 And he has been in private practice for 28
21 years.

22 And at this time, Your Honor, I would like
23 to introduce John Paul Kennedy to the court.

24 THE COURT: Mr. Kennedy, good
25 afternoon.

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NSPA Director seeking to file late response	Owner	Water Right No.	Claimed Acres	IDWR Acres	Claimed Flow cfs	IDWR Flow cfs	Claimed inches/acre	IDWR inches/acre *
Ambrose	HWUA	36-15168	493	334	36.2	7.43	3.7	1.11
Faulkner	Dan McFaddan	36-00048A	178.5	104	10.0	1.04	2.8	.50
Faulkner	Dan McFaddan	36-00049	178.5	175.5	9.7	4.04	2.7	1.15
Ambrose	Mildren	36-00051A	4	3	1.2	.12	15.0	2.00
May	YaTaHay	36-10283A	63	55	7.5	1.30	5.9	1.62
May	Gisler	36-00021	212	149	14.4	4.82	5.7	1.60

* includes transmission losses.