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OFFICE OF THE
ATTORNEY GENERAL

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. 35976

Case No. 36-00003B

BUCKEYE FARMS' MEMORANDUM
IN SUPPORT OF MOTION TO FILE
LATE RESPONSE; ALTERNATIVE
MOTION TO PARTICIPATE

DESCRIPTIVE SUMMARY

This is the Memorandum of Buckeye Farms in support of the Motion to File Late Response; Alternative Motion to Participate in Subcase No. 36-00003B.

BACKGROUND

Robert and Barbara Gardner originally filed a Notice of Claim to a Water Right Acquired Under State Law, No. 36-00003B. As a part of the claim the Gardners claimed a fish propagation use for 7.16 cfs. Under the remarks section to the claim submitted, the following explanation was provided:

UNDER THE 1932 DECREE, WE ARE CLAIMING FISH PROP. AS ANOTHER USE UNDER THE ORIGINAL PRIORITY DATE FOR IRRIGATION. PONDS WERE DEVELOPED IN THE 1920'S FOR RECREATION USE. COMMERCIAL TROUT PRODUCTION STARTED IN THE EARLY 1970'S.

The director examined the claim and as part of the recommendation did not recommend the fish propagation use. The claimant filed an April 29, 1993 objection by

checking boxes 3.a, 7, 8, 10, 11 & 14. As to Box 7(**Purpose(s) of Use**) the claimant asserted that water was "beneficially used for purposes set forth in notice claim." As to Box 8(**Period of Year**) the claimant asserted that the period of use recommended was less than the decreed and/or beneficially used period.

The director filed a response to the objection stating in part that the fish propagation claim "was found to constitute an expansion of use to which neither Idaho Code section 42-1416 nor 42-1416A apply." The director further stated, "By identifying in the objection wildlife preservation as an additional use that the claimant did not list on the notice of claim, the claimant improperly seeks to use the objection process to amend the claim." Following the response period no settlement conferences or status conferences have been held. The subcase has not been set for trial or hearing.

I. GOOD CAUSE EXISTS TO GRANT THE MOVANT'S LEAVE TO FILE A LATE RESPONSE.

The decision to set aside an entry of default or a default judgment, to allow a late notice of claim to be filed, and presumably, to allow a late response to be filed, is within the sound discretion of the court. Clear Springs Trout Co. v. Anthony, 123 Idaho 141,143 (1992). In making the "good cause" determination required by the court, the relevant considerations are whether the failure to file a response was wilful, whether allowing a late response to be filed would prejudice the opponent and whether a meritorious response has been presented. Gro-Mor, Inc. v. Butts, 109 Idaho 1020, 1024 (Ct.App. 1985). Buckeye Farms asserts that the considerations have been met and the motion should be granted.

A. Failure to File a Response was not Wilful.

In October of 1992 Robert & Barbara Gardner filed an Application for Permit for the use of certain water out of the Buckeye Ditch. (See Exhibit "A") Under Section 12 of the Application the Applicants submitted in part the following:

12. Remarks: Ponds were developed in the early 1970's or before under Rt. 36-00003B, but have been disallowed under the SRBA. Applicants wish to obtain a legal right for the existing development.

In response Buckeye Farms filed a timely protest to the Application. (See Exhibit "B"). Upon filing of the Application by the Gardners, Buckeye Farms believed that the applicants acknowledged that no legal right to the use of the water existed and any right to the use of water for the purposes depicted in the application would carry a 1992 priority date, the date of the application. Further, such a right, if established, would be done so administratively, not in the SRBA Court.

Recently, Buckeye Farms learned that despite the administrative filing, the Gardners or their successors are pursuing the uses at issue in the SRBA. Gardner's objection to IDWR's recommendation of 36-00003B was filed approximately three months after Buckeye filed its Administrative protest and alleges a priority date of approximately twenty (20) to one hundred & ten (110) years prior to the permit application date. If validated, an expanded use with the early priority date would severely impact the Buckeye ditch users and in particular, Buckeye Farms.

Upon reviewing the objection and the director's response Buckeye immediately began preparing the necessary documents for filing of a late response. Buckeye Farms' failure to file a timely response was not wilful.

B. The Filing of the Response Will Not Prejudice the Claimant.

A review of the 36-00003B Docket indicates that no Scheduling or Settlement Conferences have been held. Previously, a Scheduling Conference was set in July of 1994. That conference was vacated. Likewise a January, 1996 Settlement Conference was vacated. These conferences have not been reset. The Claimant recently filed an I.R.E. 706 Motion requesting that the IDWR file expert opinions. No hearing was requested. This subcase has not progressed to the point where the Claimant would be prejudiced.

Moreover, the resolution issues involved in the SRBA claim and the corresponding administrative action will not prejudice the Claimant, but will instead bring final resolution to the uses of the water claimed under 36-00003B. Allowing the filing of Buckeye Farms' response will provide for the full development of the factual and legal issues.

Additionally, as to the issue of prejudice, Buckeye Farms believes the Court should consider the issue of prejudice to the other parties in the SRBA in the event that common issues involving the claimant's objection and application for permit are not resolved jointly. Here, the Claimant is simply attempting to by-pass the administrative process by expanding the SRBA claim. The director has identified the expansion and creation of new uses in its recommendation and response. Buckeye Farms agrees with the director and further, adds the issues raised in its protest to the application. If Buckeye Farms is not allowed to participate as a party in the subcase and the purposes as claimed are validated by the Court, Buckeye Farms' administrative protest will be moot. Allowing the filing of the response will resolve this problem and allow the Gardner's claim to be fully and fairly determined on its merits.

C. Buckeye Farms' Response is Meritorious.

The Buckeye Farms response and the Exhibits attached hereto provide the Court with meritorious reasons supporting the director's recommendation. If confirmed, these facts would support the disallowance of the uses and quantities not recommended by the director.

II. IN THE ALTERNATIVE, THE MOTION FOR LEAVE TO PARTICIPATE SHOULD BE GRANTED.

If the Special Master or presiding Judge rules that the Motion for Leave to File a Late Response should not be granted, Buckeye Farms would move the Court for an order allowing for participation in Subcase No. 36-00003B as a full participant, entitled to file and respond to pleadings, conduct discovery, participate in hearings and trial and all other matters as a party would be entitled to do.

Pursuant to Administrative Order 1, Section 6.g. a Motion to Participate is to be treated like a Motion to Intervene. For the reasons set forth below, Buckeye Farms qualifies for intervention under an analysis of I.R.C.P. 24 and should be allowed to participate as a party in Subcase No. 36-00003B.

A. Buckeye Farms has a Right to Participate Pursuant to I.R.C.P. 24(a).

Upon timely application, intervention of right exists:

. . .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.

I.R.C.P. 24(a).

On the issue of interest in the matter, the test is whether the interest of the applicant is "of such a direct and immediate character that [the applicant] will either gain or lose by the direct legal operation and effect of the judgment." People ex rel. Glidden v. Green, 1 Idaho 235, 240 (1869); Pittock v. Buck, 15 Idaho 47, 54 (1908).

Clearly, Buckeye Farms' interest fits the above-quoted test. The validation of the expansion of the Gardner claim, 36-00003B, will directly impact Buckeye's ability to fulfill its rights on the Buckeye Ditch. As previously noted, the Buckeye Ditch is the conveyance system for both the Gardner and Buckeye Farms water out of Billingsley Creek. The alleged priority dates for the expansive uses claimed by Gardner predate Buckeye's fish propagation right.¹ Further, the legal question of whether a party can expand a water right as the claimant has claimed, is of direct interest to Buckeye Farms.

Under the present circumstances, it is clear that Buckeye Farms' interest is "of such direct and immediate character. . . ." Id. Therefore, the disposition of the subcase "may as a practical matter impair or impede" Buckeye Farms' ability to protect their interests. I.R.C.P. 24(a).

Furthermore, Buckeye Farms' interests are not adequately represented by the existing parties. On this question, it is enough to show that representation as to Buckeye Farms "may" be inadequate. Duff v. Draper, 96 Idaho 299, 302 (1974), aff'd, 98 Idaho 379 (1978). This circumstance exists here where Gardner is the only party now that IDWR was statutorily removed as a party. While IDWR may still participate, the extent of that participation, if any, is unknown. Further, to allow full development of the legal and factual

¹ As argued in Buckeye's Protest to the Gardner's Application for Permit, the claimed uses are also in violation of Idaho Code Section 42-203.

issues Buckeye Farms' participation is imperative. To deny participation would prejudice Buckeye Farms' rights.

Finally, the motion to participate is timely filed.² As noted no conferences or hearings have been held in this subcase. The only motion pending is a Motion for I.R.E. 706 Report filed with the Court on March 27, 1996. The instant motion will not unduly delay the Court's consideration of that motion.

By satisfying the Rule 24(a) criteria, Buckeye Farms' Motion to Participate should be granted pursuant to Administrative Order 1, Section 6.g.

B. In the Alternative, Permissive Participation should be Granted to Buckeye Farms.

In the alternative, the motion to participate should be granted under the criteria for permissive intervention, as set forth in Rule 24(b). In the court discretion and upon timely application, permissive intervention may be granted "when an applicant's claim or defense and the main action have a question of law or fact in common." I.C.R.P. 24(b).

Buckeye Farms believes that the factual and legal reasons asserted by IDWR in denying a portion of the claim are common legally and factually to the arguments set forth in this motion and previously articulated in the Protest to the Gardner's Application for Permit. Buckeye Farms' participation will facilitate the resolution of the subcase.

As a result, the criteria for permissive intervention have been met and the Alternative Motion to Participate should be granted.

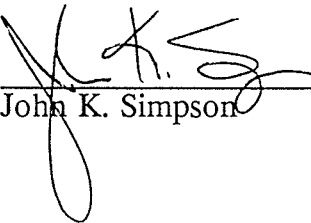
² See Anderson v. Ferguson, 56 Idaho 554 (1936)(petition to intervene timely when filed before trial); Duff v. Draper, 96 Idaho 299 (1974), aff'd, 98 Idaho 379 (1978)(motion for intervention timely when made the day before trial).

CONCLUSION

For the foregoing reasons, Buckeye Farms' Motion to File Late Response in Subcase No. 36-00003B should be granted; or in the alternative Buckeye Farms' should be granted participation pursuant to I.R.C.P. 24 and Administrative Order 1, Section 6.g.

RESPECTFULLY SUBMITTED This 23rd day of April, 1996.

ROSHOLT, ROBERTSON & TUCKER



John K. Simpson

CERTIFICATE OF MAILING

I hereby certify that on the 23rd day of April, 1996, I mailed the original and copies of this response, including all attachments, to the following persons, by mailing the original and/or copies, postage prepaid and addressed as follows:

1. Original to:

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
P.O. Box 2707
Twin Falls, Idaho 83303-2707

2. One copy to the owner of the water right at the following address:

Name: Barbara Gardner & Robert B. Gardner
Address: P. O. Box 41, Hagerman, ID 83332

3. One copy to the party who filed the objection, or if represented by an attorney, to their attorney at the following address:

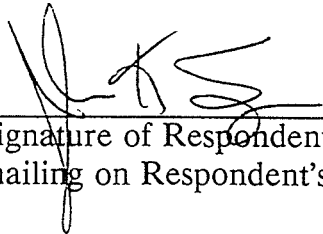
Name: Patrick D. Brown & Penelope Parker
Hepworth, Nungester & Lezamiz
Address: P. O. Box 389
Twin Falls, ID 83303

4. One copy to:

Chief, Natural Resource Division
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, Idaho 83711-4449

5. One copy to:

United States Department of Justice
Environmental and Natural Resource Division
550 West Fort Street, MSC 033
Boise, Idaho 83724



Signature of Respondent or attorney
mailing on Respondent's behalf

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STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
APPLICATION FOR PERMIT

Department of Water Resources
Southern Region Office

To appropriate the public waters of the State of Idaho

1. Name of applicant Robert B. &/or Barbara Gardner Phone 837-4902
Post office address P.O. Box 41, Hagerman, ID 83332
2. Source of water supply Billingsley Creek which is a tributary of Snake River
3. Location of point of diversion is SE $\frac{1}{4}$ of SE $\frac{1}{4}$ of NE $\frac{1}{4}$, Govt. Lot _____
Sec. 11 Township 7S Range 13E B.M. Fooding County; additional
points of diversion if any: P.R. From Buckeye Ditch is SE $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 27 T.7S R. 13E
4. Water will be used for the following purposes:
Amount 7.16 for Fish Prop. purposes from 1-1 to 12-31 (both dates inclusive)
(cfs or acre-feet per annum)
Amount 7.16 for Recreation purposes from 1-1 to 12-31 (both dates inclusive)
(cfs or acre-feet per annum)
Amount _____ for _____ purposes from _____ to _____ (both dates inclusive)
(cfs or acre-feet per annum)
Amount _____ for _____ purposes from _____ to _____ (both dates inclusive)
(cfs or acre-feet per annum)
5. Total quantity to be appropriated is (a) 7.16 and/or (b) _____
cubic feet per second acre feet per annum
6. Proposed diverting works:
 - a. Description of ditches, flumes, pumps, headgates, etc. Existing ~~dam~~ headgate & Buckeye Ditch.
Headgates in Buckeye Ditch, ⁴2 sets of dirt ponds, one recreational pond.
lower 2 pond sets & rec. pond are in channel of Buckeye Ditch
 - b. Height of storage dam _____ feet; active reservoir capacity _____ acre-feet; total
reservoir capacity _____ acre-feet; period of year when water will be diverted to storage:
_____ to _____ inclusive.
 - c. Proposed well diameter is _____ inches; proposed depth of well is _____ feet.
 - d. Is ground water with a temperature of greater than 90°F being sought? _____
7. Time required for the completion of the works and application of the water to the proposed beneficial use is
1 years (minimum 1 year).

EXHIBIT A

8. Description of proposed uses *if irrigation only, go to item 9*:

- Hydropower; show total feet of head and proposed capacity in KW. _____
- Stockwatering; list number and kind of livestock. _____
- Municipal; show name of municipality. _____
- Domestic; show number of households. _____
- Other; describe fully. Commercial trout production, One pond for private fishing, etc.

9. Description of place of use:

- If water is for irrigation, indicate acreage in each subdivision in the tabulation below.
- If water is used for other purposes, place a symbol of the use (*example: D for Domestic*) in the corresponding place of use below. See instructions for standard symbols.

TWP	RANGE	SEC.	NE¼				NW¼				SW¼				SE¼				TOTALS
			NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	
7S	13E	28			H	R H													
		27							H	H									

Total number of acres to be irrigated _____

10. Describe any other water rights used for the same purposes as described above. _____

None

11. a. Who owns the property at the point of diversion? Applicants

b. Who owns the land to be irrigated or place of use? "

c. If the property is owned by a person other than the applicant, describe the arrangement enabling the applicant to make this filing. _____

12. Remarks: Ponds were developed in the early 1970's or before under Rt. 36-000038, but have been disallowed under the SRRA. Applicants wish to obtain a legal right for the existing development.

There are 2 180'x 30'x 4' deep ponds, & 12 120'x 30'x 4' deep ponds. There is also a large recreational pond.

13. Map of proposed project: show clearly the proposed point of diversion, place of use, section number, township and range number.

[illegible]

Scale: 2 inches equal 1 mile.

BE IT KNOWN that the undersigned hereby makes application for permit to appropriate the public waters of the State of Idaho as herein set forth.

Barbara Gardner
(Applicant)

Received by JP Stanton Date 1-23-92 Time 11:10 am Prelim. y check by MTS
Fee \$ 185.00 Received by JP # SD/S/08 Date 10-23-92
Publication prepared by _____ Date _____ Published in _____
Publication approved _____ Date _____

ACTION OF THE DIRECTOR, DEPARTMENT OF WATER RESOURCES

This is to certify that I have examined Application for Permit to appropriate the public waters of the State of Idaho No. _____, and said application is hereby _____.

1. Approval of said application is subject to the following limitations and conditions:

a. SUBJECT TO ALL PRIOR WATER RIGHTS.

b. Proof of construction of works and application of water to beneficial use shall be submitted on or before _____, 19 ____.

c. The rate of diversion, if water is to be used for irrigation under this permit, when combined with all other water rights for the same land shall not exceed 0.02 cubic feet per second for each acre of land.

d. The water right acquired under this permit if for hydropower purposes shall be junior and subordinate to all rights to the use of water, other than hydropower, within the State of Idaho that are initiated later in time than the priority of this permit and shall not give rise to any right or claim against any future rights to the use of water, other than hydropower, within the State of Idaho initiated later in time than the priority of this permit.

e. Other:

