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DEPARTMENT OF
WATER RESOURCES

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Attorneys for City of Pocatello

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re SRBA	)	Subcase Nos. 29-00271, et al. (see attached Exhibit A)
	)	
	)	
Case No. 39576	)	CITY OF POCATELLO'S RESPONSE TO
_____	)	SURFACE WATER COALITION'S
	)	JOINT MOTION TO PARTICIPATE

The City of Pocatello (Pocatello or the City), by and through its undersigned counsel, responds to the March 2, 2006 Joint Motion to Participate and Memorandum in Support thereof (Motion) filed by the American Falls Reservoir District #2, A & B Irrigation District, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company (collectively the Coalition).

INTRODUCTION

In its Motion, the Coalition alleges that it meets the requirements of a motion to participate under SRBA Administrative Order No. 1, section 10(k) (AO1 § 10(k)) by satisfying the requirements for both intervention as of right and permissive intervention.¹ In support, the Coalition identifies an interest in one legal issue, namely whether Pocatello's "separate streams" and "separate administration" objections at the SRBA Court comport with principles of Idaho water law.

Pocatello does not contest that the Coalition's intervention is timely but the Coalition's argument is premised on a single legal issue and its participation should be so limited. Pocatello respectfully requests that if the Special Master grants the Coalition's motion, that the Coalition be limited to intervening in only those subcases where the City's SRBA claims are junior to the Coalition's claimed water rights and then only as to the objected issue of separate streams and separate administration.

POCATELLO'S BASIN 29 CLAIMS

The City's SRBA claims were filed originally in April of 1990 and amended in April 2003.² When the Idaho Department of Water Resources (IDWR) filed recommendations for the City's state law claims at the SRBA Court in July 2003, Pocatello filed the only Objections to

1. Although the technical term under the SRBA Administrative Order is a "motion to participate", Pocatello notes that the standards for participation and intervention are indistinguishable. Thus, the terms may be used interchangeably throughout this brief.

2. The Coalition's motion to participate in Pocatello's SRBA subcases was filed three years after Pocatello revised its SRBA claims, more than two years after Pocatello filed the SRBA objections initiating these subcases, and scarcely two months before a four week hearing at IDWR on the Coalition's delivery call. Pocatello is an active party in the IDWR proceeding.

these IDWR recommendations; the State of Idaho and the United States filed Responses, supporting the IDWR recommendations on some or all of Pocatello's objected matters.

With the exception of its two senior surface water rights, Pocatello diverts its municipal water supplies from a series of wells mainly in the Lower Portneuf River Valley Aquifer (LPRVA)³; however, some of Pocatello's wells divert from the Eastern Snake Plain Aquifer (ESPA). Currently, the LPRVA wells are not subject to administration with other ESPA wells by IDWR because the tools do not yet exist: the LPRVA has not been integrated into the ground water model, which is used to administer ESPA wells and which formed the basis of IDWR curtailment orders in May of 2005.

STANDARD OF REVIEW

Pocatello agrees with the standard of review as set out by the Surface Water Coalition.

ARGUMENT

It is axiomatic that intervention as of right requires a showing of timeliness, interest, impairment, and inadequate representation, and that permissive intervention requires a showing of a claim or defense of the would-be intervenor that has a question of law or fact in common with the proceeding in which intervention is sought. It also is axiomatic that a decision on a motion to intervene lies squarely within the Court's discretion and exercise of reason. *See State v. United States*, 134 Idaho 106, 110-11, 996 P.2d 806, 810-11 (2000) (based on timing of motion to participate, canal companies could participate only as amici). Thus, upon a motion to intervene, the Court may tailor its approach to the case in which intervention is sought. For example, in addition to simply granting or denying the motion, the Court may grant the motion

3. Pocatello also has a Bureau of Reclamation contract for storage in Palisades Reservoir. That contract is not before the Special Master in these subcases.

with limitations, including limitations on the issues that may be raised, *see id.*; or grant the motion but provide the moving party some limited status (like that of an amicus). *See id.*

A. INTERVENTION AS OF RIGHT

Here, under the standards for intervention as of right, Pocatello does not contest that the Motion was timely or whether it identified an interest, protection of its senior water rights, under the standards for intervention. It also does not contest that the State of Idaho and United States do not adequately represent the Coalition's interests. However, for the following reasons the City requests the Special Master limit the Coalition's participation to litigating the City's separate streams and separate administration objections.

Although it may appear that little prejudice could accrue from the Coalition's intervention at this point in these subcases, in fact the issues have been narrowed significantly through the City's discussions with IDWR and the parties. The procedural posture of the case is perhaps the most important thing to consider, because Pocatello is the only party to have filed objections; the United States and the State of Idaho have filed Responses and have indicated they will support the IDWR recommendations. As described in *State v. United States*, 134 Idaho 106, 996 P.2d 806 (2000), limiting the scope of participation of an intervenor to avoid prejudice to existing parties is within the Special Master's discretion.

As an intervenor, the Coalition must take the case as it finds it. *Anderson v. Ferguson*, 56 Idaho 554, 57 P.2d 325 (1936). If the Coalition is allowed to file objections it will expand the issues to be litigated in the case and delay the City's resolution of its SRBA claims. Thus, and although the Coalition did not attach a responsive pleading as required by Idaho Rule of Civil Procedure 24(c), if allowed to intervene the Coalition should be limited to filing a Response to

Pocatello's unresolved Objections. Many of the City's objections already have been resolved by documents on file at IDWR and/or the SRBA Court.

Further, because Pocatello has proposed that the schedule in these subcases be modified to avoid conflicts with the Surface Water Coalition's delivery call hearing before IDWR, any Coalition Response should be limited to the only issues it identified in its Motion, separate streams and separate administration. If the Coalition intervenes on any and all issues, the schedule will have to be further extended into the future to allow for significant litigation on the technical matters in this case.

B. PERMISSIVE INTERVENTION

Under a claim for permissive intervention, as described above, the moving party must show that it has a claim or defense with a question of law or fact in common with the proceeding in which intervention is sought. Here, the only issues the Coalition raised were separate administration and separate streams. In doing so, it can be assumed that these issues are the only issues upon which the Coalition premises its motion. Thus, if the only issues of fact or law Pocatello and the Coalition have in common are the separate streams and separate administration issues, the Court would be within its discretion to limit intervention to those issues under the permissive intervention standard.

PRAYER FOR RELIEF

Wherefore, Pocatello respectfully requests that if this Court grants the Coalition's Motion either as of right or permissively, the Court should limit the Coalition's participation to the single issue raised in its Motion, namely, whether Pocatello's claim for separate administration of its water rights in Basin 29 – as expressed in the City's objections – comports with principles of

Idaho water law. In support of this request, a proposed order has been provided for the Court's convenience.

DATED this 5th day of April 2006.

BEEMAN & ASSOCIATES, P.C.
Attorneys for the City of Pocatello

By Josephine P. Beeman
Josephine P. Beeman

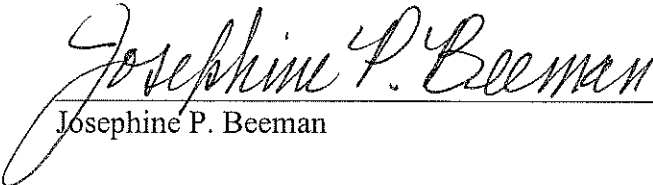
White & Jankowski, LLP
Attorneys for the City of Pocatello

By Josephine P. Beeman
(for) Sarah A. Klahn

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of April 2006, I caused a true copy of the foregoing **CITY OF POCA TELLO'S RESPONSE TO SURFACE WATER COALITION'S JOINT MOTION TO PARTICIPATE** to be served on the following by U.S. First Class Mail unless indicated as faxed or hand delivered:

UNITED STATES OF AMERICA REPRESENTED BY: US DEPARTMENT OF JUSTICE ENVIRONMENT & NAT'L RESOURCES 550 WEST FORT STREET, MSC 033 BOISE, ID 83724	C. TOM ARKOOSH ARKOOSH LAW OFFICES, CHTD. PO BOX 32 GOODING, IDAHO 83330
STATE OF IDAHO REPRESENTED BY: NATURAL RESOURCES DIV CHIEF STATE OF IDAHO ATTORNEY GENERAL'S OFFICE PO BOX 44449 BOISE, ID 83711-4449	W. KENT FLETCHER FLETCHER LAW OFFICE PO BOX 248 BURLEY, IDAHO 83318
DIRECTOR OF IDWR PO BOX 83720 BOISE, ID 83720-0098	ROGER D. LING LING ROBINSON & WALKER PO BOX 396 RUPERT, IDAHO 83350
	JOHN A. ROSHOLT TRAVIS L. THOMPSON BARKER ROSHOLT & SIMPSON 113 MAIN AVE. WEST, SUITE 303 TWIN FALLS, IDAHO 83301-6167


Josephine P. Beeman

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EXHIBIT A

Subcase Numbers

29-00271
29-00272
29-00273
29-02274
29-02338
29-02354
29-02382
29-02401
29-02499
29-04221
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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 Nos. 29-00271, et al. (see attached Exhibit A)
	)	
	)	ORDER GRANTING SURFACE WATER
Case No. 39576	)	COALITION'S JOINT MOTION TO PARTICIPATE
_____	)	

This Court having considered the Coalition's Joint Motion to Participate in these 38 subcases, and this Court having considered Pocatello Response thereto, and good cause appearing therefore:

IT IS HEREBY ORDERED that the Coalition's Joint Motion to Participate is GRANTED. The Coalition's participation is limited to the single issue raised in its joint motion, namely, whether Pocatello's claim for separate administration of its water rights in Basin 29 – as expressed in the City's SRBA objections – comports with principles of Idaho water law.

ENTERED this _____ day of April 2006.

Brigette Bilyeu
SRBA Special Master
SRBA Court

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the _____ day of _____ 2006, I caused a true copy of the foregoing to be served on the following by U.S. First Class Mail unless indicated as faxed or hand delivered:

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Deputy Clerk of Court

EXHIBIT A

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