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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 No: 63-29716

MOTION TO PARTICIPATE

The City of Boise ("City"), by and through its attorney, Perkins Coie LLP, and pursuant to SRBA Administrative Order 1 ("AO1"), § 10(K), moves for an order allowing the City to participate in the above-entitled subcase.

I. BACKGROUND

The City is a user of geothermal aquifer water within the Boise Front Low Temperature Geothermal Resource Ground Water Management Area ("BFGMA") through existing Idaho Department of Water Resources ("IDWR") water right Permit Nos. 63-9138 and 63-9139 (the "City Permits").¹ Pursuant to the City Permits, the City operates a geothermal heating system serving private and public buildings in the downtown Boise area.

¹ Pursuant to I.C. §§ 42-1409(4) and 42-1420(1)(c), the City was not required to and therefore did not file notices of claim in the SRBA with respect to the City Permits, but has filed other notices of claim in Basin 63.

The maximum diversion or well pumping rates under the City Permits total 20 cubic feet per second (cfs).

On or about March 25, 1993, the United States of America (“U.S.”) filed a Notice of Claim to a Water Right Reserved Under Federal Law, Claim No. 63-29716 (the “Notice of Claim”). The Notice of Claim asserts a federal reserved water right in the waters of the BFGMA for the purpose of heating buildings on the Fort Boise Site, with a priority date of April 9, 1873. The U.S. contemporaneously filed three other claims for geothermal heating in the BFGMA (Claim Nos. 63-29710, 63-29713 and 63-29715). In the aggregate, the U.S. asserts reserved rights in the BFGMA for the future use of up to 7 cfs in addition to an existing use of 1.93 cfs.

Objections to the Notice of Claim were filed by the Boise Warm Springs Water District, The Terteling Company, Inc., Edwards Family, LLC and the State of Idaho (collectively, the “Objectors”). The Objectors assert several grounds for denial of the Notice of Claim, including the lack of an implied or express reservation of the ground water use alleged.

II. LEGAL STANDARD

Pursuant to I.C. § 42-1412(2), “any party may intervene in any objection proceeding in accordance with rules of practice and procedure established by the district court.” AO1, § 10(K), provides that “[a]ny party to the adjudication who is not a party to a subcase may seek leave to participate in a subcase by filing a timely *Motion to Participate*. A *Motion to Participate* shall be treated like a motion to intervene under I.R.C.P. 24 and shall be decided by the Presiding Judge or the assigned Special Master.” (emphasis original).

A party may intervene as a matter of right if it meets the criteria of I.R.C.P. 24(a), which provides:

Upon timely application anyone shall be permitted to intervene in an action . . . 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).

Permissive intervention is permitted under I.R.C.P. 24(b) "[u]pon timely application" and "when an applicant's claim or defense in the main action has a question of law or fact in common." I.R.C.P. 24(b). A district court's decision to grant or deny permissive intervention is reviewed under an abuse of discretion standard. *American Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Resources*, 2007 W.L. 677947, *20 (2007). The district court acts within its discretion if it perceives the issue as discretionary, acts within the outer boundaries of its discretion and consistently with applicable legal standards, and reaches its decision by an exercise of reason. *Id.*

III. ARGUMENT

A. The City is entitled to intervention as a matter of right under AO1, § 10(K) and I.R.C.P. 24(a).

AO1, § 10(K) permits any "party" to the adjudication who is not a party to a subcase to seek leave to participate. Pursuant to Idaho Code § 42-1401(A)(6), the term party includes any "claimant." A claimant is defined as "any person asserting ownership of rights to the use of water within the State of Idaho." I.C. § 42-1401(A)(1). The City Permits grant the City a right to put certain waters to beneficial use. *See, Hardy v. Higginson*, 123 Idaho 485, 490, 849 P.2d 946, 951 (1993). As the owner of a right to put water to beneficial use, the City is a "claimant" and therefore a "party to the adjudication" under AO1, § 10(K).

As a party to the adjudication, the City may seek leave to intervene under I.R.C.P. 24(a). This Rule provides that a party may intervene when the applicant claims an interest

relating to the subject matter of the action and the applicant is so situated that the disposition of the action may impair the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties. I.R.C.P. 24(a). In this case, the U.S. claims a very senior federal reserve water right in the geothermal waters of BFGMA. The City claims an interest in the same waters and therefore the requirement under I.R.C.P. 24(a) that the applicant claim an interest relating to the subject of the action is satisfied. *See, Independent Irr. Co. v. Baldwin*, 43 Idaho 371, 252 P. 489 (1926) (owners of a water right had an interest in maintaining stream flows and were therefore entitled to present their claims as intervenors).

Furthermore, the City's interest will not be adequately represented by the existing parties. The U.S. and the Objectors all claim senior or distinct interests in the waters at issue. Consequently, the interests of the existing parties are potentially adverse to the City. The City's interest therefore cannot be adequately represented by the existing parties.

B. The City is also entitled to permissive intervention under I.R.C.P. 24(b).

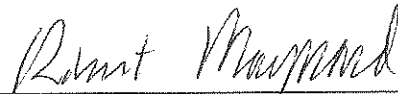
I.R.C.P. 24(b) provides that intervention is permitted when the applicant's claim or defense and the main action have a question of law or fact in common. In this case, the City and the U.S. both claim interests in the same waters. The claims and defenses therefore have common questions of law and fact. The City's application to participate in this Subcase is timely. This Subcase remains in its early stages with the initial status conference scheduled for May 1, 2007. The City will coordinate and cooperate with the U.S. and other parties to avoid undue delay in the proceeding. As a result, the City is entitled to permissive intervention.

IV. CONCLUSION

Based on the foregoing, the City respectfully requests leave to participate in the above-entitled subcase.

DATED: April 13, 2007.

PERKINS COIE LLP

By: 
Robert Maynard, Of the Firm
Attorneys for City of Boise

CERTIFICATE OF MAILING

I certify that on April 13, 2007, I mailed the original and copies of this Motion to Participate, to the following persons:

1. Original to:

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

2. Copies to:

Boise Warm Springs Water Dist.
c/o Bruce M. Smith
950 W. Bannock, Ste. 520
Boise, ID 83702

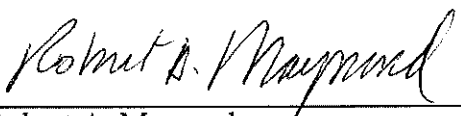
The Terteling Co., Inc.
c/o Charles L. Honsinger
455 S. Third St.
P.O. Box 2773
Boise, ID 83701-2773

Edwards Family, LLC
c/o Dana L. Hofstetter
608 W. Franklin St.
Boise, ID 83702

State of Idaho
c/o Natural Resources Div. Chief
Attorney General's Office
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