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DISTRICT COURT-SRBA  
 Fifth Judicial District  
 County of Twin Falls - State of Idaho

APR 11 2007

By \_\_\_\_\_ Clerk  
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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    | ) | Subcase No. 21-2154              |
|                | ) |                                  |
|                | ) | <b>MOTION TO PARTICIPATE AND</b> |
| Case No. 39576 | ) | <b>MEMORANDUM IN SUPPORT</b>     |
|                | ) |                                  |
|                | ) |                                  |

IDAHO GROUND WATER APPROPRIATORS, INC. ("IGWA") by and through the undersigned attorney, moves this Court pursuant to SRBA Administrative Order 1 10(k), and Idaho Rule of Civil Procedure 24(a) and in the alternative under I.R.C.P. 24(b), for an Order allowing IGWA to participate in the subcase listed above.

This motion is identical in substance to the Motion to Participate and Memorandum in Support filed on March 30, 2007, in several Basin 21 subcases. However, the March 30, 2007, motion included an Attachment A that contained errors and inadvertently omitted subcase 21-2154. A Notice of Amended Attachment A was submitted April 9, 2007, to the Court and counsel. However, because subcase 21-2154 was originally omitted from the March 30, 2007 motion and upon the Court's request to provide a copy of the Motion to Participate and Memorandum in Support for subcase 21-2154, IGWA is providing this motion to be filed in the above listed subcase.

The grounds for this Motion are:

1. IGWA is an Idaho non-profit corporation, organized to represent the interests of Idaho ground water users and to promote the efficient use and economic development of water resources.
2. IGWA's members include ground water districts, an irrigation district, various municipal water providers, and commercial and industrial entities, and individuals within the State of Idaho. IGWA's members hold water rights authorizing ground water diversions for irrigation of approximately 855,000 acres and for other authorized beneficial uses.
3. Many of IGWA's members' ground water rights are diverted from wells within the Eastern Snake Plain Aquifer ("ESPA").
4. IGWA's members include Aberdeen American Falls, Bingham, Bonneville-Jefferson, Madison, Magic Valley, and North Snake Ground Water Districts (collectively "the Ground Water Districts"). The Ground Water Districts are authorized by Idaho Code § 42-5224(6) to represent their members with respect to their individual water rights in legal and administrative proceedings.
5. Objections to the water right listed above were filed by various irrigation districts, canal companies and individuals to the following elements: source, priority date, and place of use.
6. The reasons supporting the objections allege that the source of water from various wells within the place of use should be considered recovered surface water in part and ground water in part.
7. The Idaho Department of Water Resources is implementing conjunctive administration of surface and ground water rights within the ESPA.

8. The issues involved in this and related subcases may result in a clarification of the definition of what constitutes ground water in the state of Idaho and whether or not recovered water is recognized in the state. These issues would directly affect IGWA's members and whether or not certain ground water users are subject to curtailment, affect mitigation plans and interests and conjunctive administration of the ESPA generally by IDWR.

#### MEMORANDUM IN SUPPORT

In the SRBA, Administrative Order 1 10(k) provides that "any party to the adjudication" is permitted to participate in a subcase. The motion shall be treated like a motion to intervene under I.R.C.P. 24.

Idaho Rule of Civil Procedure 24(a), intervention of right, specifically states that intervention is proper 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." To meet the requirements of I.R.C.P. 24(a)(2) the applicant must file a timely motion, claim an interest in the property or transaction subject to the action, demonstrate that it is so situated that the outcome will impair or impede its ability to protect that interest and show that the interest in the property or transaction is not adequately represented by the existing parties. IGWA meets these requirements and thus, the Motion to Participate should be granted.

As set forth above, IGWA's members own ground water rights and have an interest in what constitutes ground water in the state of Idaho, whether recovered water is recognized in the State and how that may affect ground water recharge interests, mitigation requirements and conjunctive administration. Although there are ground water users that are parties to these subcases and the State of Idaho is also participating, they do not represent IGWA's members and the broader issues involved in defining ground water and recovered water.

In the alternative, Idaho Rule of Civil Procedure 24(b), permissive intervention, allows an applicant to intervene when the applicant's claim or defense and the main action have a question of law or fact in common. In this case, the question of law and fact on what constitutes ground water and whether or not the State recognizes certain water withdrawn from wells as recovered water and its potential affect on recharge or conjunctive administration of the ESPA is a common question of law or fact.

Finally, the decision in *Gisler v. North Snake Ground Water Dist.*, 136 Idaho 747, 751, 40 P.3d 105, 109 (2002), requires any interested party to participate before the Special Master or be barred from participating in the appellate process. Thus, granting IGWA's Motion to Participate will allow IGWA to participate in this and related subcases to preserve any record that may be created, to participate in any legal decisions that may be made in the SRBA regarding the nature of ground water and recovered water and any effect that may have on recharge, mitigation and conjunctive administration of the ESPA.

Because this subcase and related subcases are only in their very initial stages before the SRBA District Court and are waiting for the objection and response periods to run in Basin 22 Part 2, and Basin 01 Part 2 later this year, this Motion should be considered timely. The only hearing set on this and related subcases is a scheduling conference in the subcases pending in Basins 21, 22 and 27 on August 22, 2007. Allowing IGWA to intervene will not cause undue delay or prejudice to the rights of the original parties to the action.

Finally, IGWA's counsel has spoken with Jerry Rigby, counsel for many of the claimants who have raised the issues involved in this and related subcases. Mr. Rigby indicates that he has no objection to IGWA's Motion to Participate.

Procedurally, the issues involved in the subcase listed above are related to issues in other subcases which are pending before two Special Masters: Special Master Bilyeu in Basins 21, 22

and 27 and Special Master Dolan in Basin 01. To promote efficiency, IGWA requests that this subcase and the subcases pending in Basin 21, 22 and 27 be set for hearing on the same day and time and that the subcases pending in Basin 01 be set as soon thereafter as possible.

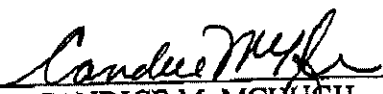
Oral argument is requested.

**PRAYER FOR RELIEF**

1. That the Court set this matter for hearing with the related subcases;
2. That the Court enter an Order that allows IGWA to participate in the above listed subcase as a matter of right or alternatively by permission; and
3. That the Court grant such other and further relief as the Court deems just and proper.

DATED this 11<sup>th</sup> day of April, 2007.

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**CERTIFICATE OF MAILING**

I certify that a true and correct copy of the **MOTION TO PARTICIPATE AND MEMORANDUM IN SUPPORT** was mailed on April 11, 2007, with sufficient first-class postage to the following:

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