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**DEPARTMENT OF
WATER RESOURCES**

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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 No: 63-03618

Case No. 39576

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

On or about March 10, 2003, the United States of America ("U.S.") filed a Notice of Claim to a Water Right, Claim No. 63-03618 ("Notice of Claim"). The Notice of Claim asserts storage rights for both irrigation and stream flow maintenance for the Boise River starting at Lucky Peak Dam and ending at the confluence with the Snake River through existing Idaho Department of Water Resources ("IDWR") Water Right License No. 63-03618.

Objections to the Notice of Claim were filed by Pioneer Irrigation District, Settlers Irrigation District, Eureka Water Company, Ballentyne Ditch Company, Eagle Island Water

Users Association, Thurman Mill Ditch Company, Boise Valley Irrigation Ditch Company, South Boise Water Company, Nampa & Meridian Irrigation District, New Dry Creek Ditch Company, Boise Project Board of Control, Farmers Union Ditch Company, Canyon County Water Company, Middleton Mill Ditch Company, and Middleton Irrigation Association (collectively, the "Objectors"). It appears that the State of Idaho Department of Fish & Game is a participating party but did not file an objection.

The maintenance of adequate stream flow in the Boise River, the heart of the City of Boise ("City"), is of serious import to the City for many obvious reasons. The Boise River provides the City with significant aesthetic, economic, recreation, cultural, wildlife and tourism values. Further, the City relies on statistical seasonal historic flow values in the Boise River for the proper operation of the City's treatment plants. These treatment plants are subject to Clean Water Act National Pollutant Discharge and Elimination System ("NPDES") permits authorizing discharge of treated water into the Boise River. If Boise River operations should change, the operation of the City's treatment facilities may be compromised and affect the City's NPDES permits. Such scenario could come at a significant cost to the City and the taxpayers that support it.

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 has asserted ownership of rights to the use of water within the State of Idaho, specifically in Basin 63 as evidence by

the City's existing permits and the filing of various Notices of Claims in the SRBA.¹ 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 an important water right in the waters of the Boise River. The City claims several interests 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. Although the U.S. and the City are generally aligned regarding rights asserted in the Notice of Claim, the U.S. is not necessarily obliged to protect the aesthetic, economic, recreation, cultural, wildlife and tourism values that the Boise River provides to the City. In addition, it is inappropriate for the U.S. to represent the City's interests in the context of Clean Water Act NPDES permitting requirements. The Objectors assert that the U.S. is not entitled to the amount claimed in the waters at issue. Consequently, the claimed interests of

¹ *See, e.g.* subcase nos. 63-08599B, 63-12312, 63-32598, 63-31040, 63-7179, 63-5254, 63-5354, and 63-00164A.

the Objectors are adverse to the City and have the potential to cause serious harm to the City and its residents. The City's significant interest in the Boise River 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. The Court just recently issued a scheduling order for trial and other proceedings on August 3, 2007. The City will cooperate with the parties to comply with this and any subsequent scheduling orders, and the City's participation will not unduly delay these proceedings. Since there are common issues of law or fact and this application is timely, 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: August 7, 2007.

PERKINS COIE LLP

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

CERTIFICATE OF MAILING

I certify that on August 7, 2007, I mailed the original and copies of this Motion to Participate, to the following persons:

1. Original to:

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2. Copies to:

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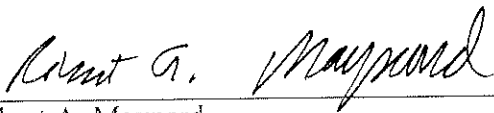
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