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AUG 24 2007

DEPARTMENT OF
WATER RESOURCES

GREG H. BOWER
ADA COUNTY PROSECUTING ATTORNEY

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WATER RESOURCES

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COPY

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
	)	
	)	MOTION TO PARTICIPATE
Case No. 39576	)	
_____	)	

Ada County and the Board of Ada County Commissioners, by and through their counsel of record, the Ada County Prosecuting Attorney's Office, Civil Division, move this Court for an order allowing Ada County to participate in Subcase No. 63-03618.

I. BACKGROUND

The United States Bureau of Reclamation ("BOR") filed Water Right Claim No. 63-03618 on March 10, 2003. The Director of the Department of Water Resources recommended that the BOR's claim be allowed. Objections to the BOR's claim were

made by several irrigation entities.¹ In June of 2003, the issue of ownership was separated and consolidated and the individual subcases were stayed pending resolution of the ownership issue. The Idaho Supreme Court issued a decision on the ownership issue in March of 2007 and the consolidated subcase on the ownership issue was dissolved. A scheduling and status conference was initiated for the remaining issues, including adequate instream flows, on July 17, 2007. Motions for summary judgment are due on September 10, 2007.

II. LEGAL STANDARD

“Any 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.” SRBA Administrative Order #1 (“AO1”) § 10k. Idaho Rule of Civil Procedure 24, intervention, governs a motion to participate. *Id.* Rule 24(a) allows intervention as a matter of right when there is a showing that disposition of an action will “impair or impede applicant’s ability to protect” its property interest. Intervention is also allowed under I.R.C.P. 24(b) when “an applicant’s claim . . . and the main action have a question of law or fact in common.”

¹ Pioneer Irrigation District (objection and amended objection); Settlers Irrigation District (objection and amended objection); Ballentyne Ditch Company; Thurman Mill Ditch Company; South Boise Water Company (withdrew part of objection that relates to the instream flow description and purpose of use elements); Nampa & Meridian Irrigation District; Boise Project Board of Control; Canyon County Water Company; Middleton Mill Ditch Company; Eureka Water Company; New Dry Creek Ditch Company; Boise Valley Irrigation Company; Middleton Irrigation Association; Eagle Island Water Users Association, Inc.; and Farmers Union Ditch Company.

III. ARGUMENT

- A. **Because Ada County's property cannot be operated without winter instream flows in the Boise River, Ada County should be allowed to intervene as a matter of right.**

Ada County meets the criteria for intervention in Subcase No. 63-03618 as a matter of right. Although Ada County is not a party to Subcase No. 63-03618, Ada County is a party to the adjudication. A party to the adjudication is a "person [claimant] asserting ownership rights to the use of water." Idaho Code § 42-1401A(1); *see also* Idaho Code § 42-1401A(6); AO1 § 2q. Ada County has made water right claims 63-10754, 63-10756, 63-10757, and 63-10758. In addition, pursuant to Ada County's lease agreement with its lessee and dam operator, license number 63-10028, for Barber Dam, is the property of Ada County.

Since Ada County is a party to the adjudication it "may seek leave to participate . . . by filing a timely Motion to Participate." AO1 § 10k. Timeliness is the threshold question on a motion to participate. *In Re SRBA Case No. 39576 Order Accepting, In Part, and Denying, In Part, Special Master's Report and Recommendation*, 4. Motions to participate, filed within the response period, are considered timely under I.R.C.P. 24(a). *State v. United States*, 134 Idaho 106, 110, 996 P.2d 806, 810 (2000). In addition, the SRBA Court appears to indicate that motions to participate filed before summary judgment are considered timely. *In Re SRBA Case No. 39576*, at 4; *State*, 134 Idaho at 110, 996 P.2d at 810. In this Subcase, motions for summary judgment are due to

be filed on September 10, 2007. Ada County's *Motion to Participate* is being filed before that deadline so is timely.

In addition to Ada County being a party and filing a timely motion, the disposition of Subcase No. 63-03618, without Ada County's participation will impair the County's ability to protect its interest in keeping the Barber Dam Project operational. Ada County is the owner of the Barber Dam Project and is the co-licensee of this power generating project. Ada County cannot operate its project and generate electricity without water flowing in the Boise River during the winter months. Ada County's interest is more than a generalized interest and therefore Ada County should be granted intervention as a matter of right.

B. Whether there should be winter instream flows in the Boise River is a question in common between Ada County and the parties to Subcase No. 63-03618 so Ada County should be allowed permissive intervention.

A court has the discretion to allow intervention if the motion is timely and "when an applicant's claim . . . and the main action have a question of law or fact in common." I.R.C.P. 24(b); see also *State*, 134 Idaho at 110, 996 P.2d at 810. In *State*, the Court found the lower court had appropriately exercised its discretion regarding timeliness because the question of manipulation of water levels was first raised in the summary judgment motions. *Id.* at 111, 811. In this instance, Ada County's *Motion to Participate* is being filed prior to any motions for summary judgment so should be considered timely.

The objectors to the BOR's claim are arguing that "the claimed purposes of use for streamflow maintenance storage or streamflow maintenance from storage should not be

decreed” and that “allowing wintertime releases” is not the purpose of the Lucky Peak Dam. Further that “the claimed purpose of use for recreation storage (inactive storage) is subordinate and subject to use of water for irrigation purposes.” Whether there should be instream flows in the Boise River is a common question between Ada County and the objectors to the BOR’s claim. Because Ada County’s *Motion* is timely and because there is a common question, Ada County meets the criteria for permissive intervention.

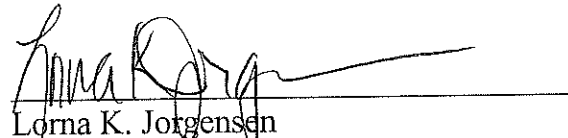
IV. CONCLUSION

Ada County meets the criteria for intervention under both I.R.C.P. 24(a) and 24(b), therefore, the County respectfully asks this Court to grant the County’s *Motion to Participate* in Subcase No. 63-03618.

DATED this 23rd day of August, 2007.

GREG H. BOWER
Ada County Prosecuting Attorney

By:


Lorna K. Jorgensen
Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23 day of August, 2007, I served a true and correct copy of the foregoing ***MOTION TO PARTICIPATE*** to the following persons by the following method:

Clerk of the District Court
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Twin Falls, Idaho 83303-2707

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State of Idaho
c/o Natural Resources Div. Chief
Attorney General's Office
P.O. Box 44449
Boise, ID 83711-4449

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☒ U.S. Mail
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