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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 Nos. 01-00004, et al. (See attached Exhibit A)
	)	
	)	
Case No. 39576	)	MEMORANDUM IN SUPPORT OF CITY OF
_____	)	POCATELLO's MOTION TO PARTICIPATE

COMES NOW, the City of Pocatello ("Pocatello"), by and through its undersigned attorneys of record, and hereby submit this *Memorandum in Support of Motion to Participate* in the above captioned subcase pursuant to this Court's Administrative Order No. 1 ("AO1") § 10(k) and Idaho Rule of Civil Procedure 24(c). The basis for Pocatello's motion is set forth below.

INTRODUCTION

Pocatello is a claimant in the SRBA under both federal and state law theories. It owns and operates ground and surface water rights that are both junior and senior to those claimed by the claimants in the captioned cases. Pocatello has an interest in these cases because its ground water rights have been subject to delivery calls by the claimants in these cases. Currently,

Pocatello is a party to the Surface Water Coalition's delivery call case, which will be heard by Hearing Officer Justice Gerald Schroeder beginning January 16, 2007. Pocatello has also filed an entry of appearance to participate in the A&B Delivery Call case currently scheduled to go to hearing beginning March 18, 2008.

As a junior ground water user, Pocatello is subject to delivery calls from the claimants in the captioned matter. As such, it has an important interest in litigating the nature and extent of the water rights claims made in these cases. Among the issues in dispute in these SRBA claims that may impact Pocatello's ability to operate its junior ground water rights are the volumes of water to be decreed and whether the acreages claimed are actually irrigated. Further the source of water is in dispute and conditions are required to avoid enlargement of the rights claimed. The claims that are the subject of these cases can be described as "junior direct flow rights", that is, water rights that historically (i.e., pre-ground water development) were not delivered except when the Snake River was transporting snowmelt and flood waters. The extent of the ability of the claimants to operate these water rights is critical to the ability of Pocatello to operate its ground water rights free from a delivery call. Because the outcome of these subcases will directly affect Pocatello's water rights, it submits its *Motion to Participate* and this *Memorandum in Support of its Motion to Participate* and respectfully requests this Court grant its motion.

LEGAL AUTHORITY FOR MOTION TO PARTICIPATE

The SRBA court Administrative Order 1 ("AO1") relies on Idaho Statutory provisions to provide that: "any party to the adjudication" is permitted to participate in a subcase. AO1 § 10(k) provides in relevant part:

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. 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 supplied. AO1 § 2(q) defines “party to the adjudication” as “any claimant as defined in I.C. §§ 42-1401A(1) and (6).” I.C. § 42-1401(1) defines claimant as “any person asserting ownership of rights to the use of water within the state of Idaho or on whose behalf ownership of rights to the use of water is asserted.” I.C. § 42-1401A(1). Pocatello is a claimant in the SRBA, and its claims in the SRBA to ground and surface water have been adjudicated before Special Master Bilyeu.¹

I.R.C.P. 24 provides for both intervention of right and permissive intervention. I.R.C.P. §§ 24(a) and (b). I.R.C.P. 24(a) provides for Intervention of Right and states:

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

- (1) when the state of Idaho confers an unconditional right to intervene; or
- (2) 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). I.R.C.P. § 24(b) provides for Permissive Intervention and states:

Upon timely application anyone may be permitted to intervene in an action:

- (1) when a statute confers a conditional right to intervene; or (2) when an applicant’s claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

I.R.C.P. § 24(b).

¹ Pocatello’s claim for a water right under federal law are presently on appeal to the Idaho Supreme Court.

As set forth below, Pocatello meets Rule 24 criteria for intervention, and thus meets this Court's standards for participation under AO1 § 10(k).

ARGUMENT

I. POCATELLO MEETS THE STANDARDS UNDER IDAHO RULE OF CIVIL PROCEDURE 24 FOR MANDATORY INTERVENTION.

Pocatello meets the standards outlined in I.R.C.P. 24(a)(2) for intervention in this case.

In relevant part, I.R.C.P. 24(a)(2) provides:

Upon timely application anyone *shall* be permitted to intervene in an action: (2) 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.

(emphasis added). To meet this requirement, an applicant must: 1) file a timely motion; 2) claim an interest in the property or transaction which is the subject of the action; 3) demonstrate that it is so situated that the outcome will impair or impede its ability to protect that interest; and 4) demonstrate that interest is not adequately represented by existing parties. Pocatello meets all four requirements of this test for intervention as of right. As such, Pocatello respectfully requests this Court grant Pocatello's *Motion to Participate*.

A. The City of Pocatello's Motion to Participate is Timely

The subcase in this matter is in the initial stages of litigation; no decrees have been issued, no motions have been heard by the Court, and the status conference previously set for October 3, 2007, has been vacated for re-setting in April of 2008. A prior Motion to Participate was granted when filed "before the discovery cutoff, prior to the filing of summary judgment motions, and well in advance of the trial date." *Order Granting Motion to Participate*, Case No. 39576, Subcase No. 29-00271 et.

seq., April 25, 2006. Given the early stage of these proceedings, Pocatello's motion is timely. Further, Pocatello agrees to be limited to the issues raised by other parties to this matter. Thus Pocatello's participation will not prejudice existing parties to these sub-cases.

B. The City of Pocatello Claims an Interest in the Property of the Action.

To be permitted to intervene as a matter of right under I.R.C.P. 24(a), a party must show a generalized interest in a subcase. *Idaho v. United States*, 996 P.2d 806, 810 (Idaho 2000). By its terms, an adjudication involves the determination of rights to use water, a resource that is jointly owned by the people of Idaho. Because Pocatello's rights are derived from the same source or sources as the claimants in the captioned matters, its interests in this matter are more than generalized. It is entitled to participate in these cases to protect its junior water rights.

Further, Pocatello is a party in the ongoing administrative hearing before IDWR in which the Claimants' delivery calls are being resolved. In the last several years, Pocatello has either been potentially or actually subject to curtailment orders by IDWR in response to these calls. The source, acreage, volume and other determinations related to the claims made in these sub-cases will form the basis of future delivery calls by claimants in these matters, and as a result, Pocatello's water rights are affected by the nature of these determinations. An excessive decree will unduly limit Pocatello's ability to rely on its junior water rights, and increase its liability in the face of a delivery call.

C. The Outcome of This Subcase will Affect the City of Pocatello's Water Rights and No Party to This Subcase Adequately Represents Pocatello's Rights.

As described above, Pocatello's water rights will be affected by the determination of these claims. The Idaho Supreme Court has held that the petitioner in intervention is not required to show that it *is* bound by the judgment in the main action, but that it *may* be bound by a judgment in the action. *Duff v. Draper*, 527 P.2d 1257, 1260 (Idaho 1974)(emphasis added). However, because Pocatello's ground water is subject to administrative delivery calls made, *inter alia*, by claimants to these sub-cases, the disposition of this matter in terms of volume, source and acreage has the potential to impair or impede Pocatello's ability to protect its water rights.

Furthermore, there is no party to this subcase that can adequately represent Pocatello's rights. In *Duff*, the Idaho Supreme Court held that the petitioner in intervention is not required "to show that the [existing] representation 'is' inadequate...[it is] sufficient that the petitioner show that the representation 'may' be inadequate and that the applicant 'may' be bound by a judgment in the action." *Id.* No other party to the SRBA owns or operates Pocatello's water rights or has the duty to provide Pocatello's treated water customers with a water supply. As such, there is no party presently involved in this adjudication that can adequately represent Pocatello's rights.

II. ALTERNATIVELY, THE CITY OF POCATELLO SHOULD BE ALLOWED TO PERMISSIVELY INTERVENE PURSUANT TO I.R.C.P. 24(B).

Under I.R.C.P. 24(b), "[u]pon timely application anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common." The decision to allow permissive intervention is discretionary with the court and it must consider whether the

intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

I.R.C.P. 24(b); *see also Idaho v. United States*, 996 P.2d at 810.

Pocatello's ground water rights stand to be affected by the outcome of these subcases and this interest satisfies the commonality requirement of I.R.C.P. 24(b). Additionally, given the current stage of litigation in this subcase, Pocatello's intervention will not unduly delay nor prejudice the rights of any existing parties. As explained above, the Special Master has issued no substantive rulings of law or fact in this matter, no motions have been heard by the Court, and no trial date has been set. Accordingly, Pocatello's motion is timely and meets all requirements of permissive intervention under I.R.C.P. 24(b). Therefore, Pocatello respectfully requests that, in the alternative to granting its *Motion to Participate* as of right, this Court grant such permissively,

CONCLUSION

Pocatello respectfully requests this Court grant its *Motion to Participate* as a matter of right pursuant I.R.C.P. 24(a). Alternatively, Pocatello request permission to intervene pursuant to I.R.C.P. 24(b).

Dated this 14th day of November, 2007.

CITY OF POCATELLO ATTORNEY'S OFFICE

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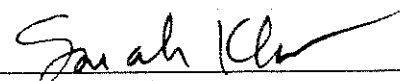
By 
Sarah A. Klahn

EXHIBIT A

Subcases Nos:

01-00004
01-00005
01-00006
01-00007
01-00008
01-00009
01-00010
01-00014
01-00016
01-00017
01-00212
01-00213
01-02050
01-02061
01-10034
01-10225
01-10237
01-10238
01-10240
01-10241
01-10482

CERTIFICATE OF MAILING

I hereby certify that on this 14th day of November, 2007, a true and correct copy of **Memorandum in Support of City of Pocatello's Motion to Participate** was served by U.S. Mail, postage pre-paid and addressed to the following:


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