

JUL 25 2008

DEPARTMENT OF
WATER RESOURCES

James S. Lochhead
 Michael A. Gheleta
 Mark J. Mathews
 Michelle C. Kales
 BROWNSTEIN HYATT FARBER SCHRECK, LLP
 410 Seventeenth Street, Suite 2200
 Denver, CO 80202
 (303) 223-1100 – Telephone
 (303) 223-1111 – Facsimile

John K. Simpson, ISB No. 4242
 Shelley M. Davis, ISB No. 6788
 BARKER RSHOLT & SIMPSON LLP
 205 North Tenth St., Suite 520
 P.O. Box 2139
 Boise, ID 83701-2139
 (208) 336-0700 – Telephone
 (208) 344-6034 – Facsimile

James C. Tucker, ISB No. 2038
 Senior Attorney
 IDAHO POWER COMPANY
 1221 West Idaho Street
 Boise, ID 83702-5627
 (208) 388-2112 – Telephone
 (208) 388-6935 – Facsimile

Attorneys for Plaintiff Idaho Power Company

IN THE DISTRICT COURT FOR THE FIFTH JUDICIAL DISTRICT
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	)	
Case No. 39576	)	
_____	)	Consolidated Subcase No. 00-92023
IDAHO POWER COMPANY,	)	
Plaintiff,	)	
v.	)	IDAHO POWER COMPANY'S
	)	RESPONSE TO JOINT MOTION TO
STATE OF IDAHO; C.L. "BUTCH" OTTER,	)	PARTICIPATE & MEMORANDUM
Governor of the State of Idaho; LAWRENCE G.	)	IN SUPPORT
WASDEN, Attorney General of the State of	)	
Idaho; IDAHO DEPARTMENT OF WATER	)	
RESOURCES; and DAVID TUTHILL, Director,	)	
Idaho Department of Water Resources,	)	
Defendants.	)	
_____	)	

Idaho Power Company ("Idaho Power"), by and through its counsel, hereby files this Response to the Joint Motion to Participate & Memorandum in Support ("Motion to Participate") filed in this matter.

INTRODUCTION

A Motion to Participate in this consolidated subcase, which has been ongoing for well over a year and is well-known among those active in the SRBA, has just been filed by a group of Movants, including Fremont Madison Irrigation District, Egin Bench Canals, Inc., Idaho Irrigation District, New Sweden Irrigation District, United Canal Company, and Aberdeen-Springfield Canal Company. The Movants describe themselves as irrigation entities who are members of Water District 01, have water rights which are diverted above American Falls Reservoir and used above Milner Dam, and have claims in the adjudication including "rights of recharge in various manners." However, the Movants do not identify their claims, provide any description of them, or identify how they are related to the Swan Falls Agreement, the interpretation and application of which is the focal point of this consolidated subcase.

The Court should deny the Motion to Participate, since the Movants do not meet the applicable standards for participation or intervention in this matter. The Movants do not allege a sufficient interest or claim having an issue in common with those properly included in this action. Moreover, the apparent interests of the Movants are adequately represented by the State as trustee for the people of the State of Idaho under the present law of the case. Finally, even if the issues sought to be raised by the Movants were within the scope of this proceeding, their attempt to participate is not timely, as it would further delay discovery and the overall case schedule of this longstanding litigation now proceeding with the resolution of remaining issues and looking toward trial in early 2009.

ARGUMENT

BECAUSE THE MOVANTS DO NOT MEET THE STANDARDS FOR PARTICIPATION OR INTERVENTION, THE COURT SHOULD DENY THE MOTION TO PARTICIPATE

Pursuant to Administrative Order No. 1 (A.O.1), Section 10(k), "[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," which "shall be treated like a motion to intervene under I.R.C.P. 24." Under I.R.C.P. 24(a), absent a statutory right to intervene, an applicant has the right to intervene if: (1) the motion is timely, (2) the applicant claims an interest relating to the property or the transaction which is the subject of the action, (3) 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, and (4) the applicant's interest is not adequately represented by existing parties. Under I.R.C.P. 24(b), an applicant may be permitted to intervene if: (1) the motion is timely, and (2) the applicant's claim or defense and the main action have a question of law or fact in common. A court's decision to grant or deny permissive intervention is a matter of discretion. *American Falls Reservoir District No. 2 v. IDWR*, 143 Idaho 862, 154 P.3d 433,453 (2007) (upholding trial court's exercise of discretion denying permissive intervention). Because the Movants do not meet the standards for participation or intervention, as demonstrated below, the Court should deny the Motion to Participate.

A. The Movants Do Not Claim an Interest in Common with the Issues Properly in this Consolidated Subcase, and Would Significantly Broaden the Scope of this Action

Under the Court's July 24, 2007 Order Consolidating Common Issues Into Consolidated Subcase ("Consolidation Order"), the Court ordered that "issues pertaining to **ownership and interpretation and/or application of the *Swan Falls Agreement*** in [specified subcases] shall be separated and consolidated" into a single consolidated subcase 92-23 for purposes of

resolution. (Bold emphasis added). The remaining issue in this case related to interpretation and/or application of the Swan Falls Agreement is whether the Swan Falls Agreement made the portion of Idaho Power's water rights subject to subordination, under Paragraph 7(B) of the Agreement, subordinate to "subsequent" uses of water for aquifer recharge.

The Movants do not have an interest in, or a question of law or fact in common with, the issues properly encompassed by this litigation. As an initial matter, it is uncertain whether the Movants (who do not specify the particulars of their water rights) have any interest at all that could be affected by the outcome of this proceeding. Idaho Power believes that some or all of the water rights claimed by the Movants may be senior to the priorities of Idaho Power's water rights for its Swan Falls facility.¹ Assuming this is the case, the Agreement's subordination provisions regarding "subsequent" uses would not be applicable to the water rights of the Movants, who would not need to conduct recharge operations with trust water if they are senior to Idaho Power's Swan Falls water rights.

The Movants do not confine themselves, however, to the "subordination to recharge issue," but rather seek to participate on the basis of their interest in interpreting, implementing or protecting what they describe as the "two source issue" or the "two rivers doctrine." Motion to Participate at 6. As discussed more fully in Idaho Power's Motion to Strike, or Alternatively, Motion in Limine re: Scope of State Motion for Summary Judgment ("Motion to Strike or in Limine"), at pp. 6-11, the issue of whether the Snake River should be administered as two separate sources above and below Milner is not properly before the SRBA Court in this consolidated subcase. Idaho Power incorporates by reference herein the relevant arguments in its Motion to Strike or in Limine for sake of brevity.

¹ Idaho Power reserves the right to undertake discovery from the Movants and other actions to investigate issues such as the identity of Movants' water rights, whether they are in fact utilized to conduct "recharge" operations, and their status in relation to Idaho Power's water rights encompassed by the Swan Falls Agreement.

Idaho Power observes here, however, that like the State, the Movants seek to inject into this case an entirely new issue of sweeping scope – the history, operation and reach of the State's administration of the Snake River as two separate sources or rivers above and below Milner. The separate source or two rivers concept relates not to whether a specific water right below Milner Dam is subordinated to all water rights above Milner Dam, but rather solely to how water rights, once decreed by this Court, should be administered pursuant to a statutory scheme, under which the legislature may now seek to provide for administration on the basis of separate sources, but in the future could provide for administration on some other basis. The Movants apparently seek to depart from the issues even further, referencing "historical practices of the river and previous agreements" which they claim are contrary to the Swan Falls Agreement. Motion to Participate at 5.

The only Agreement whose interpretation and application is encompassed by this consolidated subcase is the Swan Falls Agreement. Because the Movants have not demonstrated that they have an interest in, or a question of law or fact in common with, the issues properly encompassed by this litigation, the Motion to Participate should be denied.

B. The Movants' Interests Are Adequately Represented by the State

Even if the expanded issues sought to be injected by the Movants were properly in the case, which Idaho Power maintains they are not, the interests of the Movants are adequately represented by the State. There is no question that the State has vigorously litigated every aspect of the Swan Falls Agreement subordination. This has enabled other parties who (unlike the Movants) filed timely objections regarding Idaho Power's claims, including the ground water districts and the City of Pocatello, to largely monitor the proceedings while the State actively litigates. Under the present law of the case, the State holds the water rights subject to subordination under the Agreement in trust for the people of the State of Idaho, making it

unnecessary for the people, or districts and canal companies such as the Movants, to also participate in this litigation.

To the extent that some aspect of above-below Milner administration issues are allowed into this case, the State has the power and ability to litigate such issues without a host of other parties making duplicative arguments. In particular, the State can seek to introduce and argue the relevance of the 1986 Resolution of Water District 01 attached to the Motion to Participate. Indeed, it appears that the State is already making arguments based on this Resolution on behalf of the Movants, as several of the State's discovery requests are based directly on language from the Resolution, and the State has raised the Resolution in its response to Idaho Power's motion to strike or in limine (*see* pp. 43-44).² Because the Movants' interests are adequately represented by the State, the Motion to Participate should be denied on this ground as well. *See American Falls Reservoir District No. 2 v. IDWR*, 143 Idaho 862, 154 P.3d 433,453 (2007) (trial court properly denied intervention as of right under I.R.C.P. 24(a) upon determination that City's interests were adequately represented by others).

²For example, the State of Idaho's Third Set of Discovery Requests to Idaho Power Company (attached as **Exhibit 2** to Idaho Power's Motion to Strike or in Limine) includes the following requests apparently based on the language of the 1986 Resolution:

REQUEST FOR ADMISSION NO. 11: Admit that the waters of the Snake River basin upstream from Milner Dam always have been managed and administered separately from the waters of the Snake River downstream from Milner Dam.

REQUEST FOR ADMISSION NO. 18: Admit that Idaho Power Company agreed to the 1986 amendment of Idaho Code § 42-203B(2) to clarify that the Swan Falls Settlement was never intended to force waters arising above Milner Dam to be released to fill water rights downstream of Milner Dam.

REQUEST FOR ADMISSION NOS. 16/17: Admit that Idaho Power Company represented to [the Committee of Nine / Water District 01] prior to the enactment of the 1986 amendment of Idaho Code § 42-203B(2) that it was never the intent of the Parties that the Swan Falls Settlement would force waters arising above Milner Dam to be released to fill water rights downstream of Milner Dam.

C. The Motion to Participate Is Not Timely Given the Long Pendency of this Case and the Further Delay Occasioned by Inclusion of Movants' Claims and Interests If Allowed to Participate at this Late Stage

The issue of whether Idaho Power's water rights are subordinate to use of water for recharge has been in the case since the filing of Idaho Power's Complaint, which was served upon both counsel for the Movants along with all other parties on the SRBA Court's expedited service list. The Complaint did not raise the "two source" or "two rivers" concept, nor has the State or any other party ever filed a responsive pleading that would give rise to such an issue. *See* Motion to Strike or in Limine at 8-9. Now, over a year into this consolidated subcase, just as the parties are addressing the final substantive issue and proceeding toward trial, the Movants seek to inject themselves and their issues into the case. The Court should reject this belated attempt to change the course of these longstanding proceedings. *See Herzog v. City of Pocatello*, 82 Idaho 505, 356 P.2d 54, 57 (1960) (intervention as of right may be denied based on unnecessary and unreasonable delay in trial of issues between original parties).

Were the Movants allowed to participate in this case at this late stage, it would further delay the initiation of summary judgment briefing, already on hold because of the State's attempt to expand the scope of this case, and would require further modification of the case schedule. If the Movants enter the case now, Idaho Power would be entitled to undertake discovery related to their claims and contentions, including but not limited to issues such as: (1) the specifics of the Movants' water rights and their relative priority vis-à-vis Idaho Power's water rights; (2) what is encompassed by the Movants' claimed "rights of recharge in various manners" (Motion to Participate at 2); (3) the "historical practices of the river and previous agreements" cited by Movants (*id.* at 5); and (4) other issues concerning the history, operation and reach of "two rivers" administration of water rights.

The participation of Movants, whose "recharge" claims have been objected to by other SRBA parties, may prompt other parties to seek participation in this case, causing yet further delay. Indeed, the Movants' proposed participation based on inclusion in this case of "two source" or "two rivers" administration issues demonstrates concretely why the Court should grant Idaho Power's motion to strike or in limine seeking to limit the introduction of such new and complex issues in a case which concerns interpretation and application of the Swan Falls Agreement. Accordingly, the Court should also deny the Motion to Participate on the ground that it is untimely and would further delay these proceedings.

CONCLUSION

For all of the foregoing reasons, the Court should deny the Motion to Participate. The Movants do not allege a sufficient interest or issue in common with those properly included in this action, but rather seek to expand the scope of this litigation by injecting into it issues regarding "two source" or "two rivers" administration. Their interests are adequately represented by the State as trustee. Finally, their participation is untimely and would require further delaying summary judgment proceedings and the overall case schedule.

Respectfully submitted,

Dated this 22nd day of July, 2008

IDAHO POWER COMPANY

James C. Tucker, Esq.
Senior Attorney, Idaho Power Company
1221 West Idaho Street
Boise, ID 83702-5627

John K. Simpson, ISB No. 4242
Shelley M. Davis, ISB No. 6788
BARKER ROSHOLT & SIMPSON LLP
205 North Tenth St., Suite 520
P.O. Box 2139
Boise, ID 83701-2139

By: Michael Gheleta

James S. Lochhead, Esq.

Michael A. Gheleta, Esq.

Mark J. Mathews, Esq.

Michelle C. Kales, Esq.

Brownstein Hyatt Farber Schreck, P.C.

410 17th Street, Twenty-Second Floor

Denver, CO 80202

Attorneys for Idaho Power Company

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of July 2008, I caused to be served a true and correct copy of the foregoing document entitled **IDAHO POWER COMPANY'S RESPONSE TO JOINT MOTION TO PARTICIPATE & MEMORANDUM IN SUPPORT** via the method indicated below, and addressed to each of the following:

Lawrence Wasden	☒	U.S. Mail, Postage Prepaid
Steven Olsen	☐	Hand Delivered
Karl T. Klein	☐	Overnight Mail
Michael C. Orr	☐	Facsimile
Shasta Kilminster-Hadley	☒	Electronic Mail: michael.orr@ag.idaho.gov
700 W. Jefferson, Room 210	☒	Electronic Mail: steven.olsen@ag.idaho.gov
Boise, ID 83711-4449	☒	Electronic Mail: shasta.k-hadley@ag.idaho.gov
IDWR Document Depository	☒	U.S. Mail, Postage Prepaid
PO Box 83720	☐	Hand Delivered
Boise, ID 83720-0098	☐	Facsimile
United States Department of Justice	☒	U.S. Mail, Postage Prepaid
Environment & Nat'l Resources Div.	☐	Hand Delivered
550 W Fort Street, MSC 033	☐	Overnight Mail
Boise, ID 83724	☐	Facsimile
Chief, Natural Resources Division	☒	U.S. Mail, Postage Prepaid
Office of Attorney General	☐	Hand Delivered
PO Box 44449	☐	Overnight Mail
Boise, ID 83711-4449	☐	Facsimile
Josephine Beeman	☒	U.S. Mail
Beeman & Associates, P.C.	☐	Hand Delivered
409 W. Jefferson Street	☐	Overnight Mail
Boise, ID 83702	☐	Facsimile
	☒	Electronic Mail: jo.beeman@beemanlaw.com
Jerry R. Rigby	☒	U.S. Mail
Rigby Andrus & Moeller Chtd.	☐	Hand Delivered
P.O. Box 250	☐	Overnight Mail
Rexburg, ID 83440	☒	Facsimile: (208) 356-0768
Randall C. Budge	☒	U.S. Mail
Candice M. McHugh	☐	Hand Delivered
Thomas J. Budge	☐	Overnight Mail
Racine Olson Nye Budge & Bailey, Chtd.	☐	Facsimile
P.O. Box 1391	☒	Electronic Mail: cmm@racinelaw.net
Pocatello, ID 83204-1391		



Alison Cameron

Brownstein Hyatt
Farber Schreck

RECEIVED

JUL 25 2008

DEPARTMENT OF
WATER RESOURCES

July 22, 2008

Alison Cameron
Paralegal
T 303.223.1331
F 303.223.0331
acameron@bhfs.com

Lawrence Wasden
Steven Olsen
Karl T. Klein
Michael C. Orr
700 W. Jefferson, Room 210
Boise, ID 83711-4449

United States Department of Justice
Environment & Nat'l Resources Div.
550 W Fort Street, MSC 033
Boise, ID 83724

Clive Strong
Chief, Natural Resources Division
Office of Attorney General
PO Box 44449
Boise, ID 83711-4449

Randall C. Budge
Candice M. McHugh
Racine Olson Nye Budge & Bailey, Chtd.
P.O. Box 1391
Pocatello, ID 83204-1391

Josephine Beeman
Beeman & Associates, P.C.
409 W. Jefferson Street
Boise, ID 83702

IDWR Document Depository
P.O. 83720
Boise, ID 83720-0098

Jerry R. Rigby
Rigby Andrus & Moeller Chtd.
P.O. Box 250
Rexburg, ID 83440

RE: *In Re SRBA*, Case No. 39576 - Consolidated Subcase No. 92-23

Dear Counsel:

Enclosed please find Idaho Power Company's Response to Joint Motion to Participate & Memorandum in Support that was fax filed today with the SRBA Court. Please contact me if you have any questions. Thank you.

Sincerely,



Alison Cameron

Enclosures

8607\5\1177978.1