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OCT 20 2008
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

Case No. 39576

**Subcase Numbers: See Attachment
A**

**CITY OF POCATELLO'S
MEMORANDUM REGARDING
POCATELLO'S PARTICIPATION
IN ISSUES RAISED AFTER
MARCH 26, 2008**

The City of Pocatello ("Pocatello") hereby submits this Memorandum Regarding Pocatello's Participation in Issues Raised after March 26, 2008, as permitted by the Special Master's Order of October 8, 2008.

Pocatello respectfully requests that the Special Master enter an order confirming that Pocatello's participation in the referenced subcases is limited only by the issues in the case, regardless of whether those issues were raised in the original pleadings or in amended pleadings.

BACKGROUND

On May 15, 2006, the Director filed his recommendations for the above-listed water rights with this Court in the SRBA Basin 01, Part I Irrigation and Others Director's Report. The Director recommended these water rights be decreed with the claimed priority dates.

On October 4, 2006, the Groundwater Users¹ and the United States, among other objectors, filed objections to these water rights alleging, *inter alia*, that these rights had not been delivered and thus should be disallowed. See Objections on file in the subject sub-cases. Pocatello filed a Motion to Participate on November 14, 2007 and therein agreed to "be limited to the issues raised by other parties to this matter." Memorandum in Support of City of Pocatello's Motion to Participate at 5. Following briefing and argument, Pocatello was allowed to participate as an objector in these subcases under the Special Master's Order of April 1, 2008. The Order reflects that no party opposed Pocatello's Motion to Participate and does not limit the scope of Pocatello's participation in the referenced sub-cases beyond whatever limitations exist under Idaho law and SRBA law of the case.

On August 22, 2008, Pocatello and the Groundwater Users filed a Joint Motion for Summary Judgment on Priority Dates (hereinafter "Joint Motion"). In the Joint Motion Pocatello and the Groundwater Users requested a clarifying remark to establish the proper priority date for purposes of administration of the water rights in the referenced sub-cases, because the claimed priority dates are based on a stipulation

¹ On May 29, 2008, the Court issued its order *Granting IGWA's Motion for Substitution of Parties* which substituted the Ground Water Districts for IGWA.

between parties to a prior decree, and because the decree term itself establishes that the actual date of first diversion for beneficial use is uncertain.

The claimants filed a Joint Motion to Strike on September 18, 2008 (hereinafter “Motion to Strike”), seeking an order striking pending motions by Pocatello and the Groundwater Users, including the Joint Motion. A hearing on the Motion to Strike was held by telephone on October 2, 2008. Although the Movants did not provide written argument in support of their Motion to Strike, at the hearing it became clear that the grounds for the Motion to Strike were that neither Motion for Summary Judgment addressed issues raised by “checking the box” in objectors’ form objections.

In his Order of October 18, 2008, (“October Order”) the Special Master denied the Motion to Strike and determined that

to ensure an orderly development of the subcases with their potential wide range of issues, the only viable remedy at this point is to deny the [Motion to Strike].... In addition, the Ground Water Districts should be provided a fair opportunity to move to amend their Objections and the claimants should have an equal opportunity to respond.

October Order at 3-4. The Special Master also vacated the 2nd Amended Trial Schedule and the September 2, 2008 Amended Trial Scheduling Order, which contained a briefing schedule for the three (3) pending motions for summary judgment, and went on to state that “[i]f any of the parties so choose they may submit arguments on the matter of the City of Pocatello’s participation in issues raised after March 26, 2008, when it was allowed to participate.” *Id.* at 4. This memorandum addresses the October Order’s allowance for briefing on the scope of Pocatello’s participation. Pocatello notes that, because no deadline was set for this memorandum, and because neither AFRD#2 nor its co-claimants have filed written briefs on this matter, it is essentially “guessing” at what

arguments might actually be raised regarding limitations on Pocatello's participation. To the extent that subsequent briefing by claimants reveals a need for additional argument to establish Pocatello's ability to participate fully in these sub-cases, Pocatello reserves the right to file a reply brief.

ARGUMENT

A. Under Idaho law, intervenors have "full party status" for purposes of participation in the litigation.

SRBA Court Administrative Order 1 ("AO1") §10(k) provides that "[a]ny party to the adjudication... may seek leave to participate in a subcase by filing a timely Motion to Participate." Because Pocatello owns the right to use water within the state of Idaho, it is a claimant under the statute and was granted the right to intervene in this matter by the Special Master. Pocatello's Motion to Participate was timely as no decrees had been issued, no motions had yet been heard, there was no schedule, and no trial date had been set.

In the context of SRBA Rule 10(k), Motions to Participate are routinely granted if the adjudication of the water right claim at issue may impair the ability of the intervening SRBA claimant to protect its interests. *Compare State v. Hagerman Water Rights Owners*, 130 Idaho 736, 739, 947 P.2d 409, 412 (1997) (State's motion to participate granted in part "[b]ecause the legal issues raised by HWRO motions will have a significant impact [on] the State's interests"), and *Fort Hall Water Users Assoc. v. United States*, 129 Idaho 39, 40, 921 P.2d 739, 740 (1996), with *State v. United States*, 134 Idaho 106, 109-11, 996 P.2d 806, 809-11 (2000) (motion to participate properly denied in part, as motions for summary judgment were filed and the intervenor's general (not particular) interest was insufficient to intervene in a subcase as a matter of right so late in the

proceedings.)

Under Idaho law, intervening parties generally have “full party status” and are permitted to fully participate once admitted to a case. *Hayden Lake Fire Protection Dist. v. Alcorn*, 141 Idaho 388, 397, 111 P.3d 73, 82 (2005), *quoting United States v. Cal. Mobile Home Park Mgmt. Co.*, 107 F.3d 1374, 1378 (9th Cir. 1997). An intervenor must take the case as he finds it; while he may litigate fully on the merits, he must not attempt to litigate issues already decided or raise new claims outside the scope of the issues in the adjudication. *Wing v. Amalgamated Sugar Co.*, 106 Idaho 905, 908, 684 P.2d 307, 310 (Idaho App. 1984), *overruled on other grounds, NBC Leasing Co. v. R & T Farms, Inc.*, 112 Idaho 500, 733 P.2d 721 (1987).

In light of Idaho law on the scope of intervenor participation, the central question raised by the October Order is whether Pocatello’s participation in these sub-cases should be limited by the date of the Court’s order granting its Motion to Participate. In other words, should Pocatello, as an intervenor, be limited to those issues that were originally raised by the pleadings, or should it be allowed to litigate all issues in the case, regardless of whether the issues were raised in the original pleadings or amended pleadings.

B. Pocatello’s participation should include the full scope of the issues, whether raised in the original or amended pleadings.

The Special Master has ordered that the Groundwater Users file a Motion to Amend its objections and established a time frame for claimants to respond. The purpose of these procedural efforts is to clarify the scope of the issues that are properly before the Special Master before proceeding with further briefing on Motions for Summary Judgment or developing a new trial schedule. Once the Special Master has determined whether to accept any amended objections by the Groundwater Users regarding priority

date, it will be clear to parties whether the issues raised by the Motions for Summary Judgment are properly before the Court. At that point, the issues raised by the objections, as well as any amended objections, will control Pocatello's participation in these subcases.

At the hearing on SWC's Motion to Strike, AFRD#2 suggested that Pocatello should be limited to the issues that were raised as of April, 2008, when it was allowed to intervene. As a practical matter, as the substance of the Motions for Summary Judgment demonstrate, there was substantial confusion among all the parties to this case about what issues were properly raised as of April 2008. To avoid prejudice to AFRD#2 and others, the Special Master vacated the trial date and asked for amended objections from the Ground Water Districts.

In the absence of a showing of prejudice, there does not seem to be any colorable basis under Idaho law for limiting intervenor participation to only those issues that were live at the time the intervention was granted. Allowing Pocatello to continue to participate on all issues raised by other parties, including the Groundwater Users' amended objections (if approved by the Special Master), will not cause prejudice to the claimants or delay the proceedings. The Motions for Summary Judgment are either solely made by the Ground Water Districts or jointly made by the Ground Water Districts and Pocatello. If the objections are amended, the issues raised by those Motions will be litigated, and Pocatello's participation in briefing and argument of the Motions for Summary Judgment will not alter the logistics of these sub-cases, either by altering the schedule or by raising new issues.

The Special Master made clear in his October Order that the wide range of

potential issues in these sub-cases needs to be clarified and that the vacating the scheduled in order to ensure the orderly development of the subcases. Under these circumstances, and because no prejudice has been alleged or shown, Pocatello should be allowed to continue to participate on issues raised by either the original objections or issues raised by any amended objections allowed the Groundwater Users.

CONCLUSION

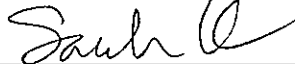
Pocatello respectfully moves for a ruling clarifying that it may participate in the referenced subcases on all issues raised by other parties to this matter, including those raised in any amended objections approved by the Special Master.

Respectfully submitted, this 16th day of October, 2008.

CITY OF POCATELLO ATTORNEY'S
OFFICE

By 
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By 
Sarah A. Klahn

ATTORNEYS FOR POCATELLO

ATTACHMENT 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/SERVICE

I hereby certify that on this 16th day of October, 2008, a true and correct copy of **City of Pocatello's Memorandum regarding Pocatello's Participation in Issues Raised after March 26, 2008 for SRBA Surface Water Coalition Water Rights Cases [High Water aka Source Objection Subcases]** was served by email to those with email addresses and U.S. Mail, postage pre-paid and addressed to the following:



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