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DEPARTMENT OF  
WATER RESOURCES

Attorneys for City of Pocatello

**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. 29-271 et al. (see Attachment A) |
|                | ) |                                               |
| Case No. 39576 | ) | <b>CITY OF POCATELLO'S AO1 RESPONSE</b>       |
|                | ) | <b>TO UNITED WATER IDAHO, THE CITY</b>        |
|                | ) | <b>OF NAMPA, AND THE CITY OF</b>              |
|                | ) | <b>BLACKFOOT'S MOTION FOR LEAVE TO</b>        |
|                | ) | <b>PARTICIPATE OR TO PARTICIPATE AS</b>       |
|                | ) | <b>AMICI CURIAE</b>                           |

The City of Pocatello (Pocatello or the City), by and through its counsel of record, Beeman & Associates, P.C., hereby responds to the April 10, 2009 Motion for Leave to Participate or To Participate as Amici Curiae filed by United Water Idaho, the City of Nampa, and the City of Blackfoot (collectively, the Providers).

**INTRODUCTION**

In response to several decisions issued by the Special Master in the above captioned matter, Pocatello issued a Notice of Challenge on June 11, 2008.<sup>1</sup> Providers did not file or participate in a Motion to Alter or Amend filed in the above captioned matter, nor did they participate or seek leave to participate in any of the proceedings leading up to the Notice of

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<sup>1</sup> See City of Pocatello's Notice of Challenge at 3, *In re SRBA Case No. 39576*, Subcase Nos. 29-271 et al. (June 11, 2008)(challenging the Special Master's Order Denying Motion to Alter or Amend dated May 28, 2008, the Master's Report and Recommendation and Order on Motion to Reconsider, dated Oct. 2, 2007, and the Amended Master's Report and Recommendation and Order on Motion to Reconsider dated Oct. 30, 2007, among others); Notice of Errata for City of Pocatello's Notice of Challenge, *In re SRBA Case No. 39576*, Subcase Nos. 29-271 et al. (June 25, 2008).

Challenge.<sup>2</sup> Providers now seek leave to participate pursuant to Administrative Order No. 1 (AO1) § 10(k) and Idaho Rule of Civil Procedure 24 (I.R.C.P. 24).

AO1 § 10(k) provides that “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,” however, “[a] party to the adjudication who does not file an objection, a response or a timely Motion to Participate waives the right to be a party to the subcase.” Generally, a Motion to Participate shall be treated like a motion to intervene under I.R.C.P. 24.<sup>3</sup> However, section 13(c) of AO1 provides that only parties who first filed or participated in a Motion to Alter or Amend may file a Notice of Challenge to the decision on a Motion to Alter or Amend.<sup>4</sup> Furthermore, section 13(a) of AO1 states that, “[f]ailure of any party in the adjudication to pursue or participate in a Motion to Alter or Amend the Special Master’s Recommendation shall constitute a waiver of the right to challenge it before the Presiding Judge.”<sup>5</sup>

Because Providers did not file or participate in a Motion to Alter or Amend in the above captioned matter, Providers’ Motion is untimely under the standard set by AO1. Providers should not be allowed to participate in the proceedings now that a Notice of Challenge has been filed.

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<sup>2</sup> United Water Idaho, City of Nampa, and City of Blackfoot’s Motion for Leave to Participate or To Participate as Amici Curiae; Statement in Support of Motion for Leave; Request for Hearing; and Motion for Shortening of Time at 3, *In re SRBA Case No. 39576*, Subcase Nos. 29-271 et al. (Apr. 10, 2009)[hereinafter Providers’ Motion].

<sup>3</sup> AO1 § 10(k).

<sup>4</sup> AO1 § 13(c).

<sup>5</sup> AO1 § 13(a)(Providing also that “a party not already a party to the subcase may respond to a Motion to Alter or Amend by filing a Notice of Participation which shall set forth the party’s name, the water right number, ... and a short statement of the party’s position on the issues presented in the Motion to Alter or Amend.”). Had the Providers followed this procedure, they would have had to provide water right numbers and responses to the issues raised by Pocatello – neither of which was done in Providers’ motion or brief.

## ARGUMENT

Under I.R.C.P. 24(a), a party may seek to intervene when, upon timely application, “the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant’s interest is adequately represented by existing parties.”<sup>6</sup> Because Providers’ interest is generalized, adequately represented, and the Motion is untimely, Providers do not meet the requirements set out in I.R.C.P. 24(a) for intervention of right, and therefore, Providers’ Motion should be denied.<sup>7</sup>

Providers’ Motion is untimely because Providers did not participate in any of the proceedings below and because Providers are seeking to enter the proceedings at a very late stage, after the issues have already been significantly developed and decided.<sup>8</sup> Section 13(c) of AO1 limits the persons who may participate in or file a Notice of Challenge to those parties who first filed or participated in a Motion to Alter or Amend.<sup>9</sup> The Order also states that, once raised and detailed, the issues on challenge may not be amended to include additional issues not identified in the Notice of Challenge.<sup>10</sup> These limitations are intended to prevent parties from entering the litigation at a late stage and confusing or adding additional issues to the litigation, as is Pocatello’s concern with respect to the Providers.

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<sup>6</sup> I.R.C.P. 24(a)(2).

<sup>7</sup> See *State v. United States*, 134 Idaho 106, 110 (2000) (wherein the Supreme Court upheld the SRBA Court’s decision to deny intervention of right because the applicant’s “generalized interest... was insufficient to support intervention of right”).

<sup>8</sup> The issues have been developed substantially through a trial and several motions for summary judgment. If United Water Idaho (UWI), City of Nampa, and City of Blackfoot were concerned with the possible outcome of the current litigation, they had ample opportunity and notice to intervene at an earlier time when they could have helped establish the record.

<sup>9</sup> AO1 § 13(c).

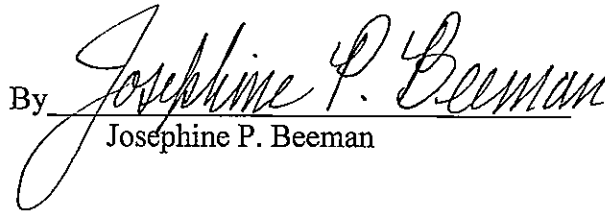
<sup>10</sup> *Id.*

WHEREFORE, the City of Pocatello respectfully requests this Court to:

1) Enter an Order denying the Providers' Motion for Leave to Participate or To Participate as Amici Curiae.

Dated this 23<sup>rd</sup> day of April 2009.

BEEMAN & ASSOCIATES, P.C.  
Attorneys for the City of Pocatello

By   
Josephine P. Beeman

Attachment A (30 subcases)

29-00271  
29-00272  
29-00273  
29-02274  
29-02338  
29-02401  
29-02499  
29-04221  
29-04222  
29-04223  
29-04224  
29-04225  
29-04226  
29-07106  
29-07118  
29-07119  
29-07322  
29-07375  
29-07450  
29-07770  
29-11339  
29-11348  
29-13558  
29-13559  
29-13560  
29-13561  
29-13562  
29-13637  
29-13638  
29-13639

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23<sup>rd</sup> day of April 2009, I caused a true and correct copy of the foregoing document to be served on the following by the method indicated:

AMERICAN FALLS RESERVOIR DIST #2

Represented by:  
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Via email

STATE OF IDAHO

Represented by:  
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STATE OF IDAHO  
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PO BOX 44449  
BOISE, ID 83711-4449

Via U.S. mail

A & B IRRIGATION DISTRICT  
BURLEY IRRIGATION DISTRICT

Represented by:  
ROGER D LING  
PO BOX 396  
RUPERT, ID 83350-0396  
Phone: 208-436-4717

Via email

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PO BOX 83720  
BOISE, ID 83720-0098

Via U.S. mail

UNITED STATES OF AMERICA

Represented by:  
US DEPARTMENT OF JUSTICE  
ENVIRONMENT & NAT'L RESOURCES  
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BOISE, ID 83724

Via U.S. mail

MINIDOKA IRRIGATION DISTRICT

Represented by:  
W KENT FLETCHER  
1200 OVERLAND AVE  
PO BOX 248  
BURLEY, ID 83318  
Phone: 208-678-3250

Via email

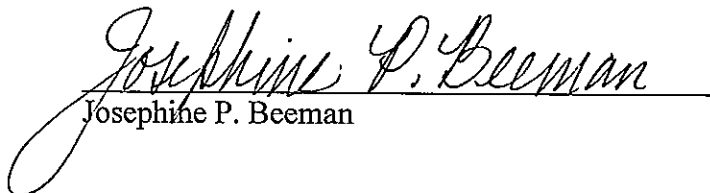
MILNER IRRIGATION DISTRICT  
NORTH SIDE CANAL COMPANY  
TWIN FALLS CANAL COMPANY

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