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FEB 06 2012

DEPARTMENT OF
WATER RESOURCES

A. Dean Tranmer I.B. #2793
City of Pocatello
P. O. Box 4169
Pocatello, ID 83201
(208) 234-6149
(208) 234-6297 (Fax)
dtranmer@pocatello.us

Sarah A. Klahn I.B. #7928
Mitra M. Pemberton
White & Jankowski, LLP
511 16th St., Suite 500
Denver, CO 80202
303-595-9441
303-825-5632 (Facsimile)
sarahk@white-jankowski.com

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	)	Subcases Nos.01-17 and 01-2050
	)	
	)	CITY OF POCATELLO'S MEMORANDUM IN
Case No. 39576	)	SUPPORT OF MOTION TO PARTICIPATE
_____	)	

COMES NOW, the City of Pocatello ("City" or "Pocatello"), by and through their counsel of record, and submits this *Memorandum in Support of Motion to Participate* in the above-captioned subcase pursuant to this Court's Administrative Order No. 1 ("AO1"), section 10(k) and Idaho Rule of Civil Procedure ("I.R.C.P.") 24(c). Pocatello's Responses in subcase nos. 01-17 and 01-2050 are also filed with this Motion, as well as a proposed order.

PROCEDURAL HISTORY

On February 3, 2011 Pocatello filed a Motion to Withdraw Objections in Certain Subcases in numerous sub-cases, including subcase nos. 1-17 and 1-2050. The Court granted

this motion on February 17, 2011 in an Order Granting City of Pocatello's Motion to Withdraw Objections in Certain Subcases and Pocatello's objections were dismissed, with prejudice.

On November 16, 2011 Milner Irrigation District ("Milner") filed a Motion to File Late Objection/Supporting Points and Authorities ("Motion"), stating that Milner "mistakenly did not file an objection to the final recommendation for water right 1-17." Motion at 3. Pocatello and the Ground Water Districts filed a Response to Motion to File Late Objection on December 5, 2011, stating that they did not object to the Motion, but reserved the right to respond to the late objection and to participate in subcase no. 1-17. On November 30, 2011, the Idaho Department of Water Resources ("IDWR") issued an Amended Director's Report in subcase no. 1-2050. The Amended Director's Report includes the recommendation "Right nos. 1-17 and 1-2050 are limited to the irrigation of a combined total of 9033 acres in a single irrigation season." Milner filed an Objection to Amended Director's Report on December 9, 2011 to this place of use condition. Pocatello was not served with the Amended Director's Report, or Milner's objection thereto.

On December 9, 2011 the Court issued an Order Granting Motion to File Late Objection and Setting Response Deadline and Status/Scheduling Conference, granting Milner's Motion and setting a deadline of January 20, 2012 for responses to Milner's late objection in subcase 1-17 and responses to objections to the Amended Director's Report in subcase no. 1-2050. The City was not served with this Order, and was unaware of this deadline until January 26, 2012. attached to this motion.

STANDARD OF REVIEW

SRBA Administrative Order 1, section 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.

Id. (emphasis added). AO1 section 2(q) defines “[p]arty to the [a]djudication” as “[a]ny claimant as defined in I.C. §§ 42-1401A(1) and (6).” I.C. § 42-1401A(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.”

In order to intervene as a matter of right, 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. I.R.C.P. 24(a). 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*.

I.R.C.P. 24(b) also provides for permissive intervention, and states that:

[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. 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.

ARGUMENT

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

A. Pocatello’s Motion to Participate is Timely.

Although Pocatello filed a response to Milner’s Motion to File Late Objection, it was unaccountably not served with either the Court’s Order of December 9, 2011 or objections filed

by Milner in subcase Nos. 1-17 and 1-2050. As such, the City was unaware of the deadline of January 20, 2012 to file responses in subcase nos. 1-17 and 1-2050 until after it had passed. Pocatello learned of the missed deadline on January 26, and filed this motion only 4 business days later. Affidavit of Sarah Klahn, January 31, 2012. Accordingly, this *Motion to Participate* is timely.

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

Pocatello is a claimant in the SRBA. 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. 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. As a junior ground water user, Pocatello is subject to delivery calls from the claimants in the captioned matters. 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. As such, it has an important interest in litigating the nature and extent of the water rights claims made in these cases.

Milner's late objection in subcase no. 1-17 and objection to the Amended Director's Report raise new issues in these cases that were not present when Pocatello filed its Motion to Withdraw Objections in Certain Subcases for subcases 1-17 and 1-2050 in February 2011. Pocatello withdrew its objections on the basis of the contentions made by the claimant Milner and IDWR in their pleadings filed as of February 2011. At that time, Milner was not alleging that its claims in subcase nos. 1-17 and 1-2050 should be decreed to permit irrigation of 9,468 acres, over three hundred acres more than the place of use element originally recommended by IDWR. As a junior water user in the SRBA, Pocatello has an interest in defending its water rights against any illegal expansion of use by a senior claimant such as Milner. Pocatello should

be allowed to participate in the above-captioned proceedings to address Milner's new contentions regarding its place of use. Accordingly, Pocatello's late objections are with merit and should be accepted by this Court. 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.

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*, 96 Idaho 299, 302, 527 P.2d 1257, 1260 (1974) (emphasis added). Further, because Pocatello's ground water is subject to administrative delivery calls made, *inter alia*, by claimants to these subcases, the disposition of this matter 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.” *Id.*; see also *Idaho v. United States*, 134 Idaho 106, 110, 996 P.2d 806, 810.

As described above, 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. For the following reasons, allowing Pocatello to file a late response will not prejudice any party:

- This motion comes 7 business days after the deadline for responses to Milner’s late objection in subcase 1-17 and the deadline for responses to objections to the Amended Director’s Report in subcase no. 1-2050.
- Pocatello has been informed of the schedule set by the Court at the January 26, 2012 status conference, and Pocatello agrees to abide by the schedule as established.
- Further, claimant Milner stated in its Motion that “[i]f Milner’s late objection is allowed, any party would then be allowed to file a response pursuant to the SRBA Court’s procedures. If any of those parties that had previously withdrawn their objections would seek to respond to Milner’s late objection, they would have that opportunity.” Motion at 8.

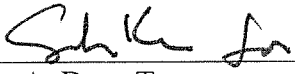
Given the timing of Pocatello's *Motion to Participate* and the relatively early stage of this litigation, Pocatello's late responses causes no prejudice to any party. Therefore, Pocatello respectfully requests that, in the alternative to granting its *Motion to Participate* as of right, this Court grant such participation pursuant to I.R.C.P. 24(b).

CONCLUSION

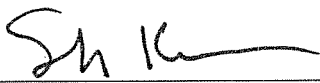
Pocatello respectfully requests this Court grant its *Motion to Participate* as a matter of right pursuant I.R.C.P. 24(a). Alternatively, Pocatello request permission to intervene pursuant to I.R.C.P. 24(b).

Dated this 31st day of January, 2012.

CITY OF POCATELLO ATTORNEY'S OFFICE
Attorneys for the City of Pocatello

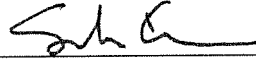
By _____
A. Dean Tranmer

WHITE & JANKOWSKI, LLP
Attorneys for the City of Pocatello

By _____
Sarah A. Klahn

CERTIFICATE OF MAILING / SERVICE

I hereby certify that on this 31st day of January, 2012, a true and correct copy of **City of Pocatello's Memorandum in Support of Motion to Participate** for **SRBA Case No. 39576 subcases 01-17, 01-2050 [Milner Irrigation District]** was served by email to those with email addresses and U.S. Mail, postage pre-paid and addressed to the following:



Sarah A. Klahn

Clerk of SRBA Court 253 3 rd Ave North Twin Falls ID 83303-2707 Phone 208-736-3011 [original & 2 copies]	IDWR Repository PO Box 83720 Boise ID 83720-0098
Travis L. Thompson Barker Rosholt & Simpson LLP PO Box 485 Twin Falls ID 83303-0485 [Milner Irr Dist] tlr@idahowaters.com	Randall C. Budge Candice McHugh Racine Olson Nye Budge & Bailey 101 S Capitol Blvd Ste 300 Boise ID 83702 [IGWA., "Ground Water Districts"] rcb@racinelaw.net cmm@racinelaw.net
Jerry R. Rigby 25 N 2 nd E PO Box 250 Rexburg ID 83440-0250 [Blackfoot Irr Co, Fremont Madison Irr, Untied Canal Co] jrigby@rex-law.com	A. Dean Tranmer City of Pocatello PO Box 4169 Pocatello ID 83201 [City of Pocatello] dtranmer@pocatello.us
	Director of IDWR PO Box 83720 Boise ID 83720-0098 [IDWR]
US Department of Justice Environment & Natural Resources 550 W Fort St MSC 033 Boise ID 83724 [US, USDI Bureau of Reclamation]	State of Idaho – Natural Resources Div Chief PO Box 44449 Boise ID 83711-4449 [State of Idaho]