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BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATIONS
FOR PERMIT NOS. 63-34079 AND 63-
34080 IN THE NAME OF CHRIS EMMERT

MUNICIPAL PROVIDERS'
RESPONSE TO THREE SUBMISSIONS BY
BOISE PROJECT

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INTRODUCTION

COMES NOW the City of Meridian and the City of Caldwell, by and through their attorney Honsinger Law, PLLC, the City of Nampa and Suez Water Idaho Inc., by and through their attorneys Givens Pursley LLP, the City of Eagle, by and through its attorneys MSBT Law, Chtd., the City of Boise, by and through its attorney Abigail R. Germaine, and the City of Kuna, by and through its attorney Richard T. Roats (collectively “Municipal Providers”) and hereby submit *Municipal Providers’ Response to Three Submissions by Boise Project* in the above captioned matter currently on review before the Director of the Idaho Department of Water Resources (“IDWR”) or (“Department”). This responds to (1) *Motion to Strike and Memorandum in Support* (“*Motion to Strike*”), (2), *Memorandum in Opposition to Second Petition to Intervene* (“*Second Intervention Opposition*”), and (3) *Boise Project Board of Control’s Response to Applicant’s Exceptions to Amended Preliminary Order* (“*Response to Exceptions*”) filed by Protestant Boise Project Board of Control (“Boise Project”) on August 11, 2017.

ARGUMENT

I. RESPONSE TO *MOTION TO STRIKE*

Municipal Providers filed *Municipal Providers’ Brief on Exceptions to the Director* (“*Municipal Provider’s Brief*”) contemporaneously with *Municipal Providers’ Second Petition to Intervene* (“*Second Petition to Intervene*”) on August 4, 2017. This eliminated any speculation about what issues the Municipal Providers seek to put before the Director. It also served to allow the Director to move forward with addressing the Applicant’s Exceptions to the *Amended Preliminary Order* as he sees fit without any further delay if he grants the *Second Petition to Intervene*. If anything, Boise Project would have been in a position to complain if the

Municipal Providers had failed to simultaneously provide the brief with the *Second Petition to Intervene*.

In any event, it goes without saying that, if the Director were to deny the *Second Petition to Intervene*, he should disregard *Municipal Provider's Brief*. Even if he were to deny the *Second Petition to Intervene*, however, *Municipal Provider's Brief* should remain in the record for purposes of exceptions or appeal.

II. RESPONSE TO *SECOND INTERVENTION OPPOSITION*

The *Second Intervention Opposition* is a repeat of arguments Boise Project made to the Hearing Officer in opposition to *Municipal Providers' Petition to Intervene* ("*First Petition to Intervene*"). It fails to address the key points made in the *Second Petition to Intervene*.

Boise Project makes three arguments. Each misses the point.

A. Mere precedent

Boise Project says intervention should be denied because Municipal Providers are solely interested in avoiding the establishment of bad precedent. Of course Municipal Providers seek to avoid the establishment of bad precedent. That does not mean they have no direct interest in this matter.

If Municipal Providers' interest in the bad precedent was academic, that would be different and that would be a good reason to deny intervention. For example, if a person sought intervention who did not own a water right nor intend to own one that might be affected by the bad precedent, that intervention should be denied. Boise Project fails to grasp that when persons who do own water rights and are actively in the process of obtaining additional water rights that would be directly affected by a bad precedent, they have a direct and substantial interest being heard before that precedent is adopted.

A worthy example is *State v. Hagerman Water Right Owners, Inc.* (“*Hagerman I*”), 130 Idaho 736, 947 P.2d 409 (1997) (Schroeder, J.). In that case 22 non-parties, many represented by the same counsel as in this litigation, were allowed to intervene in the companion case to the more famous partial forfeiture case.¹ The Court noted without comment that permissive intervention had been granted. *Hagerman II*, 130 Idaho at 740, 947 P.2d at 413. Apparently the fact that all these parties were interested in the “mere precedent” that would be set by that decision did not raise an eyebrow.

Of course, intervention in that litigation was governed by I.R.C.P. 24(b), not by the Department’s Rules. If anything, one would think that the Department’s rules (which broadly allow intervention to anyone with a “direct and substantial interest in the proceedings”) are even more flexible.

But even if not controlling, I.R.C.P. 24(b)(1) may serve as a useful model. It provides that a party may seek permissive intervention if it can point to “a common question of law or fact.” We obviously have that here. Municipal Providers’ water rights are geographically located to be similarly affected by allegations of induced seepage from Lake Lowell and/or Boise Project’s canals and delivery system. And, of course, there are common issues of law—fundamental ones going to the core of the Prior Appropriation Doctrine (not unlike those in *Hagerman II*).

¹ In *State v. Hagerman Water Right Owners, Inc.* (“*Hagerman I*”) (“*Basin-Wide Issue 10*”), 130 Idaho 727, 947 P.2d 400 (1997) (Schroeder, J.), the Idaho Supreme Court overturned the SRBA Court’s rejection of the partial forfeiture principle. In a companion case, *Hagerman II*, the Court said that the Department could not report a water right for less than its prior decreed quantity simply because it was not being beneficially used to the same extent today. The only reason this “beneficial use” issue was raised is that the SRBA judge (Judge Hurlbutt) recently had rejected partial forfeiture (and abandonment is difficult to prove). Consequently, the Department was trying at the time (prior to *Hagerman I*) to find another legal theory on which to justify reporting and recommending water rights at their current level of use.

There was a time, prior to the rule change in 1966, when courts hesitated to recognize mere precedent as a basis for permissive intervention. That is no longer the case.

Although the Rule 24(b) requirements have never been altered, Rule 24(a)(2) was significantly changed in 1966 and those changes have an impact on Rule 24(b). Some of the cases in which the court, prior to 1966, exercised its discretion and granted or denied intervention under subdivision (b) now meet the requirements for intervention of right under Rule 24(a)(2) and the court would not have the discretion it once had. Nor are cases interpreting amended Rule 24(a)(2) wholly irrelevant in passing on applications for permissive intervention. Thus cases under the 1966 rule have held that, in proper circumstances, the effect of a decision as stare decisis would put the absentee at a practical disadvantage if not allowed to intervene, and, on the basis of this, have allowed intervention of right. Even when this situation exists, intervention of right must be denied if the party is adequately represented. But the stare-decisis effect on the absentee may tip the scales in favor of allowing permissive intervention even by one who is adequately represented. Early cases had thought intervention not appropriate when the applicant merely wished to avoid the creation of a precedent that might someday come back to haunt him, and had suggested that the applicant could be protected sufficiently by appearing as amicus curiae. The post-1966 decisions taking stare decisis into account for intervention of right under Rule 24(a)(2) add weight to the argument that this is a relevant consideration when permissive intervention is sought under Rule 24(b).

7C Fed. Prac. & Proc. Civ. (3d ed.) § 1911 (2017) (footnote citations omitted).²

If precedent is a valid consideration in permissive intervention in court, surely it is a legitimate consideration for the Director under the discretion granted under the Department's Rules.

This does not mean any person is entitled to intervene any time they can point to any precedent that might conceivably someday be helpful or unhelpful to them. But if where, as

² The federal rule is identical to Idaho's rule on permissive intervention. Both are entitled to "the same rule of liberal construction." *Herzog v. City of Pocatello*, 82 Idaho 505, 509, 356 P.2d 54, 55 (1960) (Knudson, J.).

here, the precedent is aimed like a gun to their heads—where some even have pending applications that will have to overcome this precedent (if not reversed)—that “mere precedent” is a legitimate basis for intervention. Indeed, it would seem that the Department has long recognized this. Municipal Providers are stunned by the Hearing Officer’s conclusion to the contrary.

Finally, failing to grasp the difference between intervention as of right and permissive intervention, Boise Project cites two ancient cases based on long repealed intervention statutes in support of its opposition. *People v. Green*, 1 Idaho 235 (1869) (Miller, J.) and *Pittock v. Buck*, 15 Idaho 47 (1908). They are irrelevant.

B. Bait and switch

Boise Project complains that Municipal Providers had no good reason for their delay in intervention. Boise Project fails to respond to Municipal Provider’s prior observations as to the “bait and switch” tactic it previously employed. *Municipal Providers’ Response to Boise Project’s Motion to Strike and Memorandum in Opposition* at 5 (July 20, 2017). Instead, Boise Project continues to insist unreasonably that water right holders are not entitled to rely on the issues identified in a protest and must, instead, monitor each administrative proceeding on an ongoing basis in order to seek intervention at once if anyone expands the scope of the proceedings.

C. Broadening of issues

Ironically, Boise Project, which broadened the issues beyond the scope of its own protest, now complains that Municipal Providers are broadening the scope of the issues. Municipal Providers are doing no such thing.

Municipal Providers have not sought to introduce any evidence or otherwise even address the technical issues in this case. Instead, they have focused solely on critical issues of law (notably, where injury is evaluated and the maximum use of water). These are not new issues. These are issues that are always before the Director. Whether any party raises them or not, the Director always has a duty to evaluate injury in the context of the prior appropriation doctrine.

In any event, as explained in prior briefing, the issues have been in the case prior to Municipal Providers' attempt to intervene. The problem is that they have not been at the center of the case. The reason for that is simple. The Applicant has different interests than do Municipal Providers.

III. RESPONSE TO *RESPONSE TO EXCEPTIONS*

That is a good segue to the center of the case. Boise Project loves the fact that the Hearing Officer jumped right over the threshold issues of where injury is measured and how use of the public's water resource is maximized. The Hearing Officer leapt straight to a technical engineering analysis of mitigation without even addressing these basic legal issues. That is a home run for irrigators who seek to shift the responsibility for their leaky delivery systems to those who would put the Treasure Valley's ground to maximum use.

The Director needs to consider whether it is in the best interest of the state to impose on every ground water user, large and small, the burden of quantifying the impacts of every ground water diversion on every leaky delivery or storage system—and then finding wet water to make the owner whole—and to impose this burden without any consideration as to whether the owner of the leaky system actually has experienced any loss of beneficial use.

Henry Schodde's widow also contended that she was entitled to be made whole for her husband's inefficient means of diversion. This is too important an issue to fly past.

CONCLUSION

Accordingly, the Director should grant the *Second Petition to Intervene* and consider the *Municipal Providers' Brief on Exceptions to the Director*.

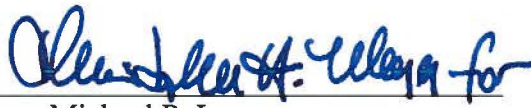
Respectfully submitted this 18th day of August, 2017.

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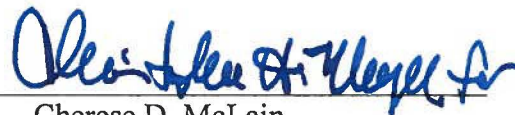
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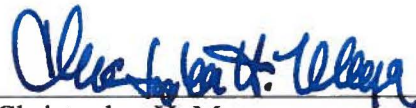
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