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Department of Water Resources
Eastern Region

Scott L. Campbell, ISB No. 2251
Andrew J. Waldera, ISB No. 6608
MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Floor
Post Office Box 829
Boise, Idaho 83701
Telephone (208) 345-2000
Facsimile (208) 385-5384
slc@moffatt.com
ajw@moffatt.com
24810.0000

Attorneys for Protestant
Portneuf Watershed Users Association, Inc.

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR
TRANSFER NO. 76779 IN THE NAME OF
THE CITY OF POCA TELLO

**PROTESTANT PORTNEUF WATERSHED
USERS ASSOCIATION'S MOTION FOR
JOINDER OR, IN THE ALTERNATIVE,
MOTION TO DISMISS APPLICATION FOR
TRANSFER**

COMES NOW the Portneuf Watershed Users Association ("PWUA"), by and through undersigned counsel of record and pursuant to Rules of Procedure of the Idaho Department of Water Resources ("Procedure Rules") Nos. 260 (IDAPA 37.01.01.260), 565 (IDAPA 37.01.01.565), Idaho Rule of Civil Procedure ("IRCP") 19(a)(1), and the Notice of Hearing and Order Setting Pre-Hearing Deadlines dated April 21, 2011, and hereby submits this Motion for Joinder or, in the Alternative, Motion to Dismiss Application for Transfer for the reasons, and based upon, the authorities discussed herein.

I. INTRODUCTION

Applicant City of Pocatello's ("City") proposed transfer (Transfer No. 76779) involves, implicates, and relies upon water rights and water storage and delivery infrastructure owned, operated, and maintained by the Portneuf-Marsh Valley Canal Company ("PMVCC"). However, the PMVCC (an entity with a direct and substantial interest in this proceeding) is not a party to this proceeding. PWUA contends that this transfer proceeding cannot continue absent joinder of the PMVCC for the reasons and authorities discussed below.

II. LEGAL STANDARDS

Various Idaho rules and statutes require the joinder of parties whose rights or interests could be impacted by legal proceedings. *See, e.g.*, IRCP 12(b)(7); IRCP 19(a)(1); and IDAHO CODE § 10-1211. For example, under Idaho Rule of Civil Procedure 12(b)(7), a claim may be dismissed for "failure to join an indispensable party." *Id.* Similarly, Idaho Code Section 10-1211 provides, in relevant part: "[w]hen declaratory relief is sought, all persons shall be made parties who *have* or claim *any interest which would be affected by the declaration*, and no declaration shall prejudice the right of persons not parties to the proceeding." *Id.* (emphasis added).

Rule 19(a)(1) governing joinder provides further guidance regarding the indispensability of parties. The rule provides in pertinent part:

A person who is subject to service of process *shall* be joined as a party in the action if (1) in the person's absence *complete relief cannot be accorded* among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter *impair or impede the person's ability to protect that interest* or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Id. (emphasis added).

Concerning Idaho Rule of Civil Procedure 19(a)(1) in particular, Idaho courts note that the purpose of joinder is “to protect the absentee from prejudice resulting from the judgment, [and] to protect the parties from harassment by successive suits and to advance judicial economy by avoiding multiple litigation.” *See Deer Creek, Inc. v. Clarendon Hot Springs Ranch, Inc.*, 107 Idaho 286, 292 (Ct. App. 1984). Moreover, tribunals are to “liberally grant joinder [under Rule 19] because the absence of an indispensable party is considered a *significant defect*.” *Id.* at 293 (emphasis added).

Though the Idaho Department of Water Resources’ (“IDWR” or “Department”) Procedure Rules do not contain an express analog to Idaho Rule of Civil Procedure 19(a)(1), the Procedure Rules do recognize the importance of protecting those whose rights or interests are implicated by a Department proceeding. For example, Procedure Rule 353 (IDAPA 37.01.01.353) provides for intervention by those with a “direct and substantial interest in any part of the subject matter of a proceeding.” *Id.* Furthermore, the rule provides that presiding officers “will grant intervention,” with reasonable conditions where necessary, “unless the [intervenor’s] interest is adequately represented by existing parties.” *Id.*

III. ARGUMENT

City’s Application for Transfer and supporting materials implicate the legal rights and interests of the PMVCC in a variety of ways. Most directly, the transfer involves water right nos. 29-53 and 29-589 (currently owned by the PMVCC, with post-transfer split rights to be retained by the PMVCC); affects the operation and administration of Chesterfield Reservoir (owned by the PMVCC); and affects the operation and administration of the PMVCC Canal (also owned by PMVCC). City’s pending transfer additionally: (1) requires the interpretation,

application, and enforcement of the Storage Water Agreement (Transfer Application Attachment Nos. 2a and 3) by and between City and the PMVCC, dated March 3, 2010; and (2) proposes the imposition of Portneuf River channel operations conditions that will affect the delivery of PMVCC storage water. In short, the operations, property, and legal rights of the PMVCC are inextricably intertwined with this transfer proceeding, and the PMVCC must be joined in order to properly complete this contested case.

Though not exhaustive, the following list illustrates the indispensable nature, and the direct and substantial interests of, the PMVCC in the context of this transfer proceeding:

1. Enforcement Of Existing Water Right Conditions

Both water right nos. 29-53 and 29-589 require the installation of suitable measuring devices at various locations, including “on the Portneuf River above the flow line of [Chesterfield] Reservoir at which point the water comes into the reservoir.” City acknowledges this requirement and concedes that no such measuring device exists to measure reservoir inflows. *See Expert Report, Chesterfield Reservoir Transfer, City of Pocatello, Transfer Application No. 76779*, dated June 10, 2011 (“Sullivan Report”), pp. 4-5 (“a device to measure the Portneuf River inflow to the reservoir reportedly existed on Indian lands at or near the site specified in the partial decrees, but [] the device was removed by an unknown party and has not been replaced”).

Though City “supports the installation of a device to measure reservoir inflow,” City contends that it “has no legal right to access the [Fort Hall] Reservation lands to install, operate, or maintain such a device.” Sullivan Report, p. 5. Instead, City asserts that “the legal right and responsibility of access and the responsibility for operation and maintenance of [the inflow measuring device] lies with the PMVCC.” *Id.*

Should the pending transfer be approved absent installation of a suitable measuring device to properly account for Chesterfield Reservoir inflows, the transfer would perpetuate the illegal use of water rights 29-53 and 29-589 given the partial decrees' mandatory measurement requirement. Purchasing 3,100 acre-feet of PMVCC storage water effectively joins City and PMVCC in the continuing use and administration of the underlying water rights (29-53 and 29-589). City's contention that only PMVCC has the legal right and responsibility to comply with the restrictions and requirements of the transfer water right partial decrees serves as an express concession that PMVCC needs to be joined as a party in this proceeding. According to City, failure to join the PMVCC would preclude the ability to administer (*i.e.*, measure) the transfer water rights as required by the underlying decrees.¹

2. Application And Enforcement Of The Storage Water Agreement

In support of its transfer application, City attached the March 3, 2010 Storage Water Agreement ("SWA") between it and the PMVCC. *See* Attachment Nos. 2a and 3. The SWA is then cited a number of times within the Sullivan Report. *See, e.g.*, Sullivan Report, pp. 1, 5, 9, 10, 12, 26, and 34. In short, much of the operation and administration of the proposed transfer is dependent upon the interpretation, application, and enforcement of the SWA—activities that implicate the legal rights, and the direct and substantial interests of the PMVCC under the SWA.

Among other things, the SWA provides that the PMVCC "shall convey . . . a share of the outlet capacity and conveyance capacity of the Company's Water System from

¹ PWUA finds it duplicitous that City seeks, or is willing, to step into the shoes of the PMVCC to receive certain benefits (*i.e.*, City's attempt to avail itself of the shrink-free/without conveyance loss delivery of storage water to the PMVCC Canal headgate), but disclaims any participation in PMVCC obligations (such as the installation of a measuring device to measure reservoir inflows).

Chesterfield Reservoir to the point of delivery to the City on the Portneuf River sufficient to deliver up to a maximum flow rate of 50 cubic feet per second” and to “have the 3,100 acre-feet of water released . . . [and] delivered at a rate of up to 50 cubic feet per second . . . in the amounts and at the times requested by the City.” SWA, Section 1. Consequently, evaluation of this transfer, and subsequent administration of the transfer water rights should the transfer be approved, necessarily implicates the operation, maintenance and administration of “*the Company’s Water System*” (*i.e.*, Chesterfield Reservoir, the PMVCC Canal, and any and all corresponding diversion works and infrastructure associated with those facilities).

City also contends that the SWA requires the PMVCC to bear all conveyance losses through the PMVCC Canal from the canal headgate to the Sorenson hydropower plant, and to make those losses up to City through the provision of additional water to cover those losses. Sullivan Report, pp. 9-10. Because the PMVCC is not a party to this proceeding, it is impossible to know what the company does or does not agree with. Whether City’s interpretation and application of the SWA is correct is beside the point. At its core, City’s proposed transfer relies upon the SWA, which in turn relies upon the use and administration of PMVCC water rights, PMVCC water storage and delivery infrastructure, and requires water delivery coordination between City and PMVCC. The PMVCC has a direct and substantial interest in its property, and in interpreting, applying, and enforcing the SWA in a manner with which it agrees. Any conditioning of the proposed transfer predicated upon application or enforcement of the SWA requires the participation (joinder) of the PMVCC.

3. Proposed Conditions Concerning Storage Water Release Rates

Perhaps the most glaring example of why joinder of the PMVCC to this proceeding is necessary is City’s proposed transfer condition number 7 (whereby the amount of

storage water released from Chesterfield Reservoir for the benefit of both City *and* PMVCC shall not exceed 140 cfs during the months of July and August). Sullivan Report, pp. 11 and 35. Stated differently, City proposes a combined storage water release limitation purportedly binding upon it and the PMVCC despite the fact that the PMVCC is not a party to this proceeding.

This City-proposed combined storage water release limitation condition is based upon Greg Sullivan's opinion that 140 cfs represents the "maximum daily release by PMVCC during the months of July and August for the period 2002-2009." Sullivan Report, p. 11. Assuming *arguendo* this to be the case, City's proposed transfer condition would require the PMVCC to subordinate approximately 36% of its storage water delivery (50 cfs divided by 140 cfs) to make room for the simultaneous delivery of 50 cfs to City under the SWA. While the above-referenced subordination percentage will fluctuate based upon City delivery demands of quantities of water less than 50 cfs, and/or with different PMVCC release rate demands, the proposed condition will require some level of water delivery subordination on the part of PMVCC. This proceeding cannot impose such a condition upon, and bind, the PMVCC without the PMVCC being a party to this proceeding.

B. City Has Requested PMVCC Participation In The Past

City, itself, has recognized the indispensable nature of the PMVCC during the course of this transfer proceeding. For example, in correspondence dated August 30, 2010 (enclosing City's transfer application), counsel for City offered to make City officials and consultants available to discuss the parameters of the proposed transfer with the Department during the pre-publication stage.² However, counsel for City requested that should the Department have questions or raise issues implicating the PMVCC that PMVCC officials be

² A courtesy copy of the August 30, 2010 letter is attached hereto for reference.

present to address those questions/issues. Similarly, City communicated to the Department (via correspondence dated September 27, 2010) that it was gathering information and “discussing with the Portneuf-Marsh Valley Canal Company certain issues related to the purposes of use requested in the [transfer] application.”³

As the above-referenced pieces of correspondence illustrate, PMVCC is an indispensable party to this transfer proceeding. From the beginning, City was not willing (or not authorized) to speak on behalf of PMVCC during pre-publication transfer discussions with the Department. Likewise, the transfer has required City coordination and discussion with the PMVCC. This proceeding cannot continue without the participation of the PMVCC. The company, its property, and its legal rights and interests are inextricably intertwined with this transfer proceeding. In the parlance of Idaho Rule of Civil Procedure 19(a)(1), “complete relief cannot be accorded,” and the continuation of this proceeding without the PMVCC “impairs and impedes” the company’s ability to protect its interests.

IV. CONCLUSION

City cannot prosecute this pending transfer application on its own. By City’s own admissions, this transfer relies upon the administration and use of PMVCC property; the joint-coordination of water delivery; the interpretation, application, and enforcement of the SWA; and the imposition of transfer conditions that implicate the separate rights and interests of the PMVCC. Consequently, the PWUA requests that the PMVCC be joined in this proceeding, and that the hearing of this matter be postponed so that discovery can be propounded upon the PMVCC. Absent on-the-record participation of the PMVCC, there is no way of ascertaining the intentions or purported cooperation of the PMVCC to manage and operate its facilities in a

³ A courtesy copy of the September 27, 2010 letter is attached hereto for reference.

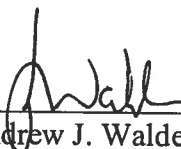
manner that both satisfies conditions imposed on the transfer water right decrees, and that satisfies the water delivery and administration framework proposed by City. PMVCC's absence prejudices the hearing preparation of all of the protestants, not just the PWUA. The protestants have no assurances as to how the PMVCC will proceed with its future operations should the transfer be approved.

In the alternative, the PWUA respectfully requests that City's pending Application for Transfer No. 76779 be dismissed for failure to join an indispensable party. The PWUA fails to see how this proceeding can impose conditions that bind the PMVCC to act in a certain manner absent PMVCC participation as a party.

DATED this 1st day of July, 2011.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By


Andrew J. Waldera – Of the Firm
Attorneys for Portneuf Watershed Users
Association, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of July, 2011, I caused a true and correct copy of the foregoing **PROTESTANT PORTNEUF WATERSHED USERS ASSOCIATION'S MOTION FOR JOINDER OR, IN THE ALTERNATIVE, MOTION TO DISMISS APPLICATION FOR TRANSFER** to be served by the method indicated below, and addressed to the following:

James Cefalo, Hearing Officer
IDAHO DEPARTMENT OF WATER RESOURCES
900 N. Skyline Drive, Suite A
Idaho Falls, ID 83402
Fax: (208) 525-7177

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Michael C. Creamer
Jeffrey C. Fereday
GIVENS PURSLEY, LLP
601 W. Bannock Street
P.O. Box 2720
Boise, ID 83701-2720
Fax: (208) 388-1300

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Lynden and Candice Symons
SYMONS FARM AND RANCH LLC
P.O. Box 604
Lava Hot Springs, ID 83246

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

John Schwarz
Box 240
McCammon, ID 83250

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

James A. Spinner
ATTORNEY AT LAW
P.O. Box 6009
Pocatello, ID 83205-6009
Fax: (208) 232-1808

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Travis L. Thompson
BARKER RSHOLT & SIMPSON, LLP
113 Main Avenue West
Suite 303
Twin Falls, ID 83301
Fax: (208) 735-2444

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Randall C. Budge
RACINE OLSON NYE BUDGE & BAILEY, CHTD.
201 E. Center
P.O. Box 1391
Pocatello, ID 83204-1391

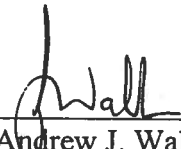
☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Tom Barnes, President
PORTNEUF-MARSH VALLEY CANAL COMPANY
22465 S. Cambridge Road
Downey, ID 83234

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Mark Bennett, Secretary
PORTNEUF-MARSH VALLEY CANAL COMPANY
3670 E. Richards Road
Downey, ID 83234

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile



Andrew J. Waldera

GIVENS PURSLEY LLP

LAW OFFICES
601 W. Bannock Street
PO Box 2720, Boise, Idaho 83701
TELEPHONE: 208 388-1200
FACSIMILE: 208 388-1300
WEBSITE: www.givenspursley.com

Michael C. Creamer
mcc@givenspursley.com
(208) 388-1247

Gary G. Allen
Peter G. Barton
Christopher J. Beeson
Clint R. Bolinder
Erik J. Bolinder
Jeremy C. Chou
William C. Cole
Michael C. Creamer
Amber N. Dina
Elizabeth M. Donick
Kristin Bjorkman Dunn
Thomas E. Dvork
Jeffrey C. Fereday
Justin M. Fredin
Martin C. Hendrickson

Steven J. Hippler
Donald E. Knickrehm
Debora K. Kristensen
Anne C. Kunkel
Michael P. Lawrence
Franklin G. Lee
David R. Lombardi
Emily L. McClure
Kenneth R. McClure
Kelly Greene McConnell
Cynthia A. Medillo
Christopher H. Meyer
L. Edward Miller
Patrick J. Miller
Judson B. Montgomery

Deborah E. Nelson
Kelsey J. Nunez
W. Hugh O'Riordan, LL.M.
Angela M. Reed
Justin A. Steiner
Robert B. White

Of Counsel
Conley E. Ward

Retired
Kenneth L. Pursley
James A. McClure
Raymond D. Givens (1917-2008)

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AUG 30 2010

DEPARTMENT OF
WATER RESOURCES

August 30, 2010

VIA HAND DELIVERY

Jeff Peppersack, Manager
Idaho Department of Water Resources
322 East Front Street
P.O. Box 83720
Boise, ID 83720-0098

Re: City of Pocatello Transfer Application
GP File No. 5902-6

Dear Jeff:

Enclosed are two copies of an Application for Transfer of Water Right being submitted by the City of Pocatello for review and processing. One is for the Department and the second is to be file stamped and returned to this office. Also enclosed is a check in the amount of \$1230.00 to cover the filing fee. Per our discussion, a copy of this Application also is being forwarded to the Department's Eastern Regional Office.

The Application proposes to transfer to the City's use 3,100 acre-feet of storage in the Chesterfield Reservoir, which is owned and operated by the Portneuf-Marsh Valley Canal Company ("PMVCC"). The Application and Transfer are being sought pursuant to an agreement between the City and PMVCC. A copy of that agreement is included with the Application materials. Approval of the Transfer will permit the City to proceed with the storage water purchase from PMVCC. PMVCC will in turn use the purchase funds as a match for federal funds that will finance significant improvements to PMVCC's and the Portneuf Irrigating Company's irrigation water distribution systems.

Because of the relative complexity of the proposed transfer, I believe that before the Application is processed, it would be very helpful if Department staff could meet with City representatives to discuss the Application and identify any issues or concerns that may need to be addressed in the pre-publication stage. I and the City's engineering consultant, Greg Sullivan of Spronk Water Engineers, can make ourselves available for such a meeting at the Department's

Jeff Peppersack, Manager

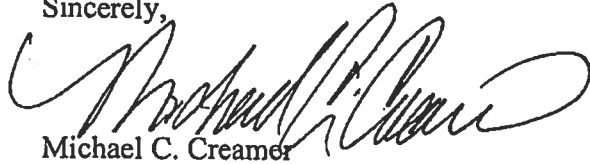
August 30, 2010

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convenience. If issues are identified that implicate PMVCC, the City will want PMVCC representatives to be able to participate in those discussions as well.

I will look forward to working with the Department on this Application.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael C. Creamer", written over a horizontal line.

Michael C. Creamer

MCC/kml

Enclosures

952372_1

cc: IDWR, Eastern Regional Office
Randy Budge (w/enclosures)
Dean Tranmer (w/enclosures)
Greg Sullivan (w/enclosures)



LAW OFFICES
601 W. Bannock Street
PO Box 2720, Boise, Idaho 83701
TELEPHONE: 208 388-1200
FACSIMILE: 208 388-1300
WEBSITE: www.givenspursley.com

Michael C. Creamer
mcc@givenspursley.com
(208) 388-1247

Transfer 76779
RECEIVED 29-53 RECEIVED
SEP 28 2010 OCT 18 2010
DEPARTMENT OF WATER RESOURCES
Department of Water Resources
Eastern Region

Gary G. Allen	Steven J. Hippler	Deborah E. Nelson
Peter G. Barton	Donald E. Krickrehm	Kelsey J. Nunez
Christopher J. Beeson	Debora K. Kristensen	W. Hugh O'Riordan, LL.M.
Clint R. Bolinder	Anne C. Kunkel	Angela M. Reed
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Jeremy C. Chou	Franklin G. Lee	Robert B. White
William C. Cole	David R. Lombardi	
Michael C. Creamer	Emily L. McClure	
Amber N. Dina	Kenneth R. McClure	Of Counsel
Elizabeth M. Donick	Kelly Greene McConnell	Conley E. Ward
Kristin Bjorkman Dunn	Cynthia A. Meillo	
Thomas E. Dvorak	Christopher H. Meyer	Retired
Jeffrey C. Fereday	L. Edward Miller	Kenneth L. Pursley
Justin M. Fredin	Patrick J. Miller	James A. McClure
Martin C. Hendrickson	Judson B. Montgomery	Raymond D. Givens (1917-2008)

September 27, 2010

Jeff Peppersack, Manager
Idaho Department of Water Resources
322 East Front Street
P.O. Box 83720
Boise, ID 83720-0098

Re: City of Pocatello Transfer Application
GP File No. 5902-6

Dear Jeff:

As we discussed on September 22nd, the City of Pocatello is gathering additional information to identify locations of anticipated points of diversion and places of use of the storage water, and will be discussing with the Portneuf-Marsh Valley Canal Company certain issues related to the purposes of use requested in the application. In the meantime, the City requests that the Department hold its processing of the application and not advertise it until these issues are addressed, which the City believes can be accomplished by October 22nd.

Sincerely,

Michael C. Creamer

MCC/kml
974523_1

cc: Shelley Keane, IDWR State Office
James Cefalo, IDWR Eastern Region
Dean Tranmer, City of Pocatello
Greg Sullivan, Spronk Water Engineers