

John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
Abby R. Bitzenburg, ISB #12198
MARTEN LAW LLP
163 Second Ave. West
P.O. Box 63
Twin Falls, Idaho 83303-0063
Telephone: (208) 733-0700
Email: jsimpson@martenlaw.com
tthompson@martenlaw.com
abitzenburg@martenlaw.com

Attorneys for Burley Irrigation District

Jerry Rigby, ISB #2470
Hyrum Erickson, ISB #7688
RIGBY, ANDRUS & RIGBY LAW, PLLC
P.O. Box 250
Rexburg, Idaho 83440
Telephone: (208) 356-3633
Email: jrigby@rex-law.com
herickson@rex-law.com

*Attorneys for Fremont-Madison Irrigation
District and Idaho Irrigation District*

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

IN THE MATTER OF THE ALLOCATION
OF STORED WATER TO THE CITY OF
POCATELLO BY WATER DISTRICT 01

Docket No. _____

**SPACEHOLDERS' COMBINED
MOTION TO INTERVENE &
MEMORANDUM IN SUPPORT OF THE
MOTION TO INTERVENE**

COME NOW, Burley Irrigation District, Fremont-Madison Irrigation District, and Idaho Irrigation District (hereafter collectively referred to as "Spaceholders"), by and through their undersigned counsel of record, and hereby seek leave to intervene as Respondent-Intervenors in the above captioned action pursuant to Rules 350 through 354 of the Idaho Department of Water Resources and Idaho Water Resource Board ("IDWR" or "Department") found at IDAPA 37.01.01.01 et seq. Additionally, Spaceholders meet the requirements for intervention under I.R.C.P. 24(a) and (b) which further justifies granting this motion. This motion is supported by the *Memorandum in Support of Motion to Intervene*, filed herewith.

The Spaceholders move for the right to intervene as follows:

1. The Spaceholders have a direct, substantial, and protectable interest in the subject matter of this litigation because it involves a matter concerning the legitimacy of Water District 01 (“WD01”) Rental Pool Procedures and the allocation of storage water in 2023. The Spaceholders hold unique storage water rights administered by WD01 and the subject matter of this litigation has the potential for immediate and future impacts and injuries to their storage water rights and the implementation and use of the WD01 Rental Pool.
2. This motion is timely as the *City of Pocatello’s Petition Requesting a Hearing on WD01’s 2023 Storage Report* was filed on April 25, 2024. IDWR has not substantively nor substantially heard the issues, and the Spaceholders’ intervention and participation in this case will not cause undue delay. To the Spaceholders’ knowledge, no pre-hearing conference date has been set, therefore the timing requirement of IDAPA 37.01.01.352 is satisfied (at least 14 days before the date set for formal hearing, or by the date of the initial prehearing conference, whichever is earlier).
3. Spaceholders satisfy the requirements for intervention as of right under both IDAPA 37.01.01 and I.R.C.P. 24(a). The Spaceholders have a direct and substantial interest (IDAPA 37.01.01.351) and significant, protectable interest (I.R.C.P. 24(a)) in the subject matter of this litigation, because it involves a matter of first impression concerning implementation of the WD01 Rental Pool Procedures. The Spaceholders hold various natural flow and storage water rights to the Snake River, and the subject matter of this litigation could have both

immediate and future impacts upon administration of those rights that are relied on by Spaceholders to satisfy the delivery of water to their landowners.

4. The Spaceholders also satisfy the requirements for permissive intervention under I.R.C.P. 24(b). The Spaceholders' defense has a question of fact or law in common with the main action, and intervention will not unduly delay or prejudice adjudication of the rights of the original parties.
5. The Spaceholders' interests are not protected by any party in this proceeding.
6. Disposition of the action has potential to impede Spaceholders' ability to protect their water rights, which are real property right interests under Idaho law.

Spaceholders' provide the *Memorandum in Support of the Motion to Intervene* as follows:

I. INTRODUCTION

On or about March 16, 2023, Petitioner filed a *Complaint for Declaratory Relief to Find the WD01 Rental Pool Procedures Void, to Find Rule 7.3 Unconstitutional, and for Damages from the Unconstitutional Taking of Property* with the Sixth District Court. On or about March 22, 2023, the *Summons* and *Complaint* were served on Defendants. On or about April 12, 2023, Defendants filed an *Answer to Complaint*. On February 1, 2024, Judge Wildman released the final *Judgment* and dismissed the case with prejudice. One of the issues identified in the *Judgment* was that Petitioners failed to exhaust their administrative remedies.

Therefore, on or about April 25, 2024, Petitioner filed the *Petition Requesting a Hearing on WD01 2023 Storage Report* before the Department. In response, Spaceholders now provide a memorandum in support of their *Motion to Intervene*.

II. STATEMENT OF RELEVANT FACTS

On April 10, 2024, the City of Pocatello (“Petitioner”) received notice of WD01’s publication of the final version of the *2023 Storage Report*. WD01’s publication of the *2023 Storage Report* and the allocation of stored water to Spaceholders contained therein, “constitutes an action of the Director.” *City of Pocatello v. Idaho Water Resources Control Board*, Case No. 42CV-23-1668.

Petitioner’s grounds alleged for requesting a hearing and contesting the *2023 Storage Report* include:

1. The application of WD01 Rental Pool Procedure 7.3 (the “Last to Fill Rule”) against Pocatello in 2023 was unlawful;
2. The allocation of stored water in 2023 was contrary to the Watermaster’s duties as provided by the decree for Water Right No. 01-02068 and Idaho law; and
3. The allocation of stored water to Pocatello in 2023 in the amount of 46,590 acre-feet deprived Pocatello of stored water to which it was entitled under its contract with the Bureau of Reclamation, Contract No. 14-06-100-1825.

The Spaceholders are all located within WD01. Spaceholders are active participants in WD01’s Rental Pool. The Spaceholders hold various natural flow water rights to the Snake River and storage water rights in the Upper Snake River Basin including Jackson Lake Reservoir, Palisades Reservoir, Island Park Reservoir, American Falls Reservoir, and Lake Walcott Reservoir.¹ Distribution of these water rights is administered by the WD01 watermaster, Craig Chandler. Spaceholders rely on these water supplies to deliver irrigation water to their respective landowners. Thus, the outcome of the actions sought by Petitioner has the potential for current

¹ The associated storage water rights are Lake Walcott (1-219), American Falls (1-2064, 1-10042, 1-10053), Palisades (1-2068, 1-10043) & Jackson Lake (1-4055, 1-10044, 1-10045). Burley Irrigation District has 155,395 acre-feet stored in American Falls Reservoir, 39,200 acre-feet in Palisades and 33.5% of 95,200 acre-feet in Lake Walcott. Idaho Irrigation District has 22,541 acre-feet in American Falls and 40,900 acre-feet in Palisades Reservoir. Fremont-Madison has 127,200 acre-feet in Island Park and 15,200 in Grassy Lake.

and future impacts to the Spaceholders' water rights and distribution of those rights, including during the 2024 irrigation season and future irrigation seasons. Relatedly, whether Petitioner's storage allocation in 2023 was properly distributed by the Watermaster hinges upon the Petitioner's contract with the Bureau of Reclamation and whether storage water should have been delivered to other impacted water rights resulting from Petitioner's groundwater pumping and implementation of the contract.

III. ARGUMENT

1. Spaceholders Should be Allowed to Intervene under IDAPA 37.01.01 (Rules 350 through 354).

IDAPA 37.01.01.353 establishes that motions to intervene should be granted if the motion is (1) timely filed, (2) shows a direct and substantial interest in any part of the subject matter of a contested case, and (3) does not unduly broaden the issues.

IDAPA states that timely motions to intervene must be filed at least fourteen (14) days before the date set for formal hearing, or the date of the initial prehearing conference, whichever is earlier, unless a different time is provided by order or notice. IDAPA 37.01.01.352. To the Spaceholders' knowledge, no date has been set for a formal hearing or prehearing conference. Since no hearings have yet been scheduled, Spaceholders satisfy the timing requirement.

Spaceholders should be granted the motion to intervene under IDAPA 37.01.01. The provision states that "A person who is not already a party to a contested case and who has a direct and substantial interest in the proceeding may petition for an order granting intervention as party to the contested case." IDAPA 37.01.01.350. As spaceholders whose interests will be directly affected and possibly harmed by the results of this case, due to their water rights being directly impacted, the Spaceholders are substantially interested in this proceeding and should be

granted the right to intervene for that reason and the other reasons described above related to the Spaceholders' water rights.

Finally, the Spaceholders interests do not broaden the issues in this matter. The focus of this proceeding is on the rental pool procedures that control distribution of water in WD01 and how water is properly allocated to the City of Pocatello's storage account. Those procedures directly overlap with the Spaceholders' interests in the proper distribution of their water rights in WD01. No additional issues arise due to the Spaceholders' intervention.

2. The Spaceholders are Entitled to Intervene as a Matter of Right Pursuant to I.R.C.P. § 24(a)(1) & (2).

The Spaceholders meet the requirements for intervention under civil law as well. Idaho Rules of Civil Procedure ("I.R.C.P.") provide for intervention of right in civil proceedings wherein, on timely motion, the court must permit anyone to intervene who:

- (1) Is given an unconditional right to intervene by an Idaho statute; or
- (2) Claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

I.R.C.P. 24(a).

Considering the procedural history of when this case was initiated, the recent petition, and its current status, the Spaceholders meet the requirement for a timely motion for intervention.

The Spaceholders may also intervene as a matter of right pursuant to I.R.C.P. 24(a)(1) because Idaho statutes grant water users within a water district the "right" to have IDWR administer water rights appropriately in conformance with Idaho law. For example, I.C. § 42-602 states that the "director... shall have direction and control of the distribution of water from all

natural water sources within a water district to the canals, ditches, pumps, and other facilities diverting therefrom. Distribution of water within water districts... shall be accomplished by watermasters as provided in this chapter and supervised by the director.” I.C. § 42-602. The Spaceholders are entitled to participate in any proceedings that have the potential to affect the status, definition, or administration of their natural flow or storage water rights.

The Spaceholders also meet the requirements to intervene as a matter of right pursuant to I.R.C.P. 24(a)(2). To satisfy I.R.C.P. 24(a)(2), an applicant must: 1) file a timely motion; 2) claim an interest in the property subject to the action; 3) demonstrate that it is so situated that the outcome will impair or impede its ability to protect that interest; and 4) that interest is not adequately protected by existing parties.

First, this motion to intervene is timely filed in light of the procedural history of this case and current administrative status. The Idaho Supreme Court has noted that “timeliness” for purposes of a motion to intervene is “determined from all the circumstances: the point to which the suit has progressed is not solely dispositive.” *State v. United States*, 134 Idaho 106, 109 (2000). The City of Pocatello’s *Petition Requesting a Hearing* in this case was filed on April 25, 2024. Since the administrative process is in the very earliest stages and no substantive determinations have been made, the Department should find this motion to intervene timely.

Second, the Spaceholders have an interest that is subject to this action. Courts have defined an “interest” pursuant to Rule 24(a) as a “significant protectable interest.” *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998). This action is about the validity and constitutionality of procedures that dictate distribution of water in the Upper Snake River Reservoir System. The Petitioner has invoked its right as a “spaceholder” in Palisades Reservoir. *Petition*, at 2. The Spaceholders all hold storage water rights in the Upper Snake reservoir system

and have significant interests in the distribution of that system that is being targeted by the Petitioner.

Further, the Spaceholders hold many natural flow and storage water rights to the Snake River and any decision regarding the distribution of water within the system has potential to injure those water rights and their effective administration. Changing the administration of storage water at this time has the potential to impact their 2024 allocation and supply (which a final allocation may not be known until early next year). Additionally, the procedure at the crux of Plaintiff's complaint, Procedure 7.3 of the Rental Pool Procedures, is an essential component of the Nez Perce Agreement and Snake River flow augmentation program implemented by the Bureau of Reclamation. Therefore, any decision regarding the validity of Procedure 7.3 will have extensive consequences for Spaceholders. Furthermore, the Spaceholders' water rights represent real property interests in Idaho. *See* I.C. § 55-101; *Olsen v. Idaho Dept. of Water Resources*, 105 Idaho 98, 101 (1983). The outcome of the declaratory relief action may have current and future impacts upon WD01 Rental Pool Procedures and consequently, the Spaceholders' water rights. As such, the Spaceholders have a "legal," and "significant and protectable" interest in this action.

Third, Spaceholders' ability to protect and use their water rights will, or may be, "impaired or impeded" by the results of this action. The Idaho Supreme Court has said that:

The language of Rule 24(a)(2) indicates that the drafters did not contemplate that the petitioner in intervention be required to show... that the petitioner in the intervention "is" bound by the judgment... It was sufficient that ... the applicant "may" be bound by a judgment in the action.

Duff v. Draper, 96 Idaho 299, 302 (1974).

Because the Spaceholders are located within WD01 and actively participate in the WD01 Rental Pool, there is no question they will be affected by the outcome of this decision. If fully

resolved, this case will establish precedent regarding WD01 Rental Pool Procedures, and Spaceholders may be bound by any judgment in this action.

Fourth, no party to this action represents the Spaceholders' interests. Like the "may be bound" standard noted above, the *Duff* court noted that an applicant need only "show the representation 'may' be inadequate." *Duff v. Draper*, 96 Idaho at 302. Here, Petitioner seeks a hearing addressing allocation of WD01 stored water; claims that the WD01 Rental Pool Procedure "Last to Fill Rule" was unlawful as applied to Pocatello; claims that the allocation of stored water was contrary to the Watermaster's duties; and claims that allocation of stored water in 2023 deprived Pocatello of water to which they were entitled. All those claims relate to allocation of storage water in WD01, which directly impacts Spaceholders' water rights and water distribution. No party is representing the Spaceholders' interests before the Department or any interest relatively close to that of the Spaceholders—currently only the Petitioner is active in this issue. Therefore, the Spaceholders are left with a substantial interest in this action but are currently completely unrepresented.

As described above, Spaceholders meet all the requirements necessary under I.R.C.P. 24(a) to intervene in this proceeding as a matter of right. The Idaho Supreme Court has determined that rules providing for intervention should be given liberal construction. *See e.g., City of Boise v. Ada County (In re Facilities & Equip. Provided by the City of Boise)*, 147 Idaho 794, 803 (2009) ("if there is any doubt as to whether intervention is appropriate, a motion to intervene should usually be granted."); *Herzog v. City of Pocatello*, 82 Idaho 505, 509 (1960) ("statutes providing for intervention should be given a liberal construction").

3. Alternatively, Spaceholders Should be Allowed to Permissively Intervene under I.R.C.P. 24(b)(1).

In the event the Court denies intervention under IDAPA rules and by right, the Spaceholders alternatively request permissive intervention under I.R.C.P. 24(b)(1). Rule 24(b)(1) provides the following:

In general, on timely motion, the court may permit anyone to intervene who:

- A. Is given a conditional right to intervene by an Idaho statute;
or
- B. Has a claim or defense that shares with the main action a common question of law or fact.

I.R.C.P. 24(b)(1).

The Idaho Supreme Court has interpreted I.R.C.P. 24(b) to establish the following test for an applicant seeking permissive intervention:

A party may intervene: 1) where a statute confers a conditional right to intervene, or 2) where an applicant's claim or defense has a question of law or fact in common with the matter in which the applicant seeks intervention.

In re Doe, 134 Idaho 760, 763 (2000).

As previously explained, I.C. § 42-602 states that the "director... shall have direction and control of the distribution of water from all natural water sources within a water district to the canals, ditches, pumps, and other facilities diverting therefrom. Distribution of water within water districts... shall be accomplished by watermasters as provided in this chapter and supervised by the director." I.C. § 42-602.

Under I.R.C.P. 24(b) "there is no requirement that the intervenor shall have a direct or personal pecuniary interest in the subject of the litigation," *see Herzog v. City of Pocatello*, 82 Idaho at 509 (1960) (citing *Securities & Exchange Commission v. United States Realty & Imp. Co.*, 310 U.S. 434, 60 S.Ct.1044), only that their claim or defense has a question of law or fact in

common with the matter in which the applicant seeks intervention. *See* I.R.C.P. 24(b)(1)(B). Even if the Court finds the Spaceholders do not have a “direct or personal pecuniary interest,” the Court should grant permissive intervention because the Spaceholders’ water rights, and the procedures governing how those water rights are administered, will be directly affected by this action. Therefore, there is no question that the Spaceholders have a common question of law and fact in this action.

Finally, because this case is a matter of first impression concerning the validity and implementation of the WD01 Rental Pool Procedures, it further warrants permissive intervention. The Spaceholders rent and lease water through the WD01 Rental Pool and will be impacted by any ruling in this case. Accordingly, they have an interest and should be able to present their position on this matter to protect that interest.

For these reasons, the interest of the Spaceholders in this proceeding is sufficient to meet the standards for permissive intervention. Since this motion is timely, and intervention will not unduly delay this proceeding or unfairly prejudice the rights of the other parties, the Court should permit the Spaceholders to intervene.

V. CONCLUSION

Based upon the above reasoning, the Spaceholders respectfully request that they be granted intervention pursuant to IDAPA 37.01.01 or I.R.C.P. 24(a) or 24(b). The Spaceholders fulfill all of the requisite requirements to intervene under both IDAPA and the civil rules.

DATED this 7th day of August, 2024.

MARTEN LAW LLP



Abby R. Bitzenburg

Attorneys for Burley Irrigation District

RIGBY, ANDRUS & RIGBY LAW, PLLC

/s/ Jerry Rigby

Jerry Rigby

*Attorneys for Fremont-Madison Irrigation
District and Idaho Irrigation District*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of August, 2024, I caused to be filed and served a true and correct copy of the foregoing document via electronic mail to the following:

Idaho Dept. of Water Resources Director Mathew Weaver *** service by electronic mail mathew.weaver@idwr.idaho.gov garrick.baxter@idwr.idaho.gov file@idwr.idaho.gov sarah.tschohl@idwr.idaho.gov	Craig Chandler IDWR – Eastern Region WD01 Water Master Craig Chandler *** service by electronic mail only craig.chandler@idwr.idaho.gov
Sarah A. Klahn Max C. Bricker Veva Francisco Somach Simmons & Dunn *** service by electronic mail only sklahn@somachlaw.com mbricker@somachlaw.com vfrancisco@somachlaw.com	