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DEPARTMENT OF
WATER RESOURCES

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**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

BASIN 33 WATER USERS, a coalition of
water right holders, and the UPPER VALLEY
WATER USERS, a coalition of water right
holders,

Petitioners,

vs.

THE IDAHO DEPARTMENT OF WATER
RESOURCES,

Respondent.

Case No. CV01-20-8069

**SNAKE RIVER STORAGE'S VERIFIED
PETITION TO INTERVENE OR, IN THE
ALTERNATIVE, APPEAR AS AMICUS
CURIAE**

**IN THE MATTER OF DESIGNATING THE
EASTERN SNAKE PLAIN AQUIFER
GROUND WATER MANAGEMENT AREA**

COMES NOW Snake River Storage (“SRS”),¹ by and through its undersigned counsel, Parsons Behle & Latimer, and hereby respectfully petitions the Court to intervene in the above-entitled matter pursuant to paragraph 3 of the Court’s *Procedural Order Governing Judicial Review of Final Order of Director of Idaho Department of Water Resources* (May 27, 2020) (“Procedural Order”), Idaho Appellate Rule 7.1 and Idaho Rules of Civil Procedure 24(a) and 24(b), to represent and protect its interests, or in the alternative, to appear as amicus curiae pursuant to Idaho Rule of Civil Procedure 84(r) and Idaho Appellate Rule 8, for the limited purpose of briefing the issues in this matter and participating in oral argument.

I. INTRODUCTION

A. Procedural Background

This matter involves an appeal of the Director’s decision to designate the Eastern Snake Plain Aquifer (“ESPA”) as a Ground Water Management Area (“GWMA”). *Joint Notice of Appeal and Petition for Judicial Review of Final Agency Action* (May 19, 2020) (“Petition”).

The issues raised by the Basin 33 Water Users and the Upper Valley Water Users include:

¹ SRS is an Idaho unincorporated nonprofit association formed and operating pursuant to Chapter 27, Title 30, Idaho Code. Its members include nine canal, irrigation and ditch companies (Aberdeen-Springfield Canal Company (“ASCC”), Peoples Canal & Irrigation Company (“Peoples Canal”), Corbett Slough Ditch Company, Blackfoot Irrigation Company, Parsons Ditch Company, Riverside Canal Company, Wearyrick Ditch Company, Watson Canal Company and United Canal Company) and four ground water districts (American Falls-Aberdeen Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District and Jefferson-Clark Ground Water District). SRS engages in cooperative efforts between surface and ground water entities, including ground water recharge, to improve available water supplies from the Eastern Snake Plain Aquifer and the Snake River. *Declaration of Norman M. Semanko in Support of Petition*.

1. Whether the Order Designating the ESPA GWMA was procedurally deficient;
2. Whether the Director should have conducted rulemaking;
3. Whether the Director should have designated the ESPA GWMA in a contested case; and
4. Whether adjudication and the formation of ground water districts in the ESPA forecloses the designation of a GWMA.

Petition at 5.

In addition, a cross-appeal has been filed in this matter, raising questions as to whether the Director erred in ruling that intervenors in the contested case before the agency remained parties, after the original petition filed by Sun Valley Company was withdrawn, and despite not requesting a hearing in the pending action. *Surface Water Coalition's Cross-Petition for Judicial Review* at 3-4 (June 2, 2020).

The Court issued its Procedural Order on May 27, 2020, providing that the parties to the underlying administrative proceeding may file a Notice of Appearance in this matter within fourteen (14) days from the issuance of the Procedural Order, which will be treated as a Motion to Intervene and automatically granted by the Court unless it is opposed. The Order further provides that a person or entity not a party to the underlying administrative proceeding who desires to participate in this action, and is not otherwise a Petitioner, must proceed in accordance with Idaho Appellate Rule 7.1 (Intervention). Procedural Order at 2.

B. Interests of Snake River Storage

SRS coordinates the use of available natural flow, ground water recharge rights held by its members (Permit Nos. 1-10625 (Peoples Canal) and 1-10629 (ASCC)) to benefit SRS members and help them meet the terms of the Surface Water Coalition-Idaho Ground Water Appropriators Settlement Agreement (June 30, 2015) (“Settlement Agreement”) (available at www.idwr.idaho.gov). *Declaration of Norman M. Semanko in Support of Petition (“Semanko Declaration”)*. Specifically, SRS provides “private recharge,” which is recognized under the Settlement Agreement as a mechanism for satisfying the required consumptive use reductions by ground water users for the ESPA. *See* Settlement Agreement, Sec. 3.a (Consumptive Use Volume Reduction) (long-term practices commenced in 2016 include annual ground water reductions, which may be accomplished by “conducting an equivalent private recharge activity”). To implement the Settlement Agreement, the ground water districts — including those who are SRS members — are required to submit their ESPA recharge data to the Steering Committee prior to April 1 annually. Second Addendum to Settlement Agreement, Paragraph 2.a (December 14, 2016) (available at www.idwr.idaho.gov).

Each of the nine canal, irrigation and ditch companies who are SRS members have consented to the use of their respective irrigation points of diversion, conveyance systems, and places of use for these ESPA ground water recharge activities, pursuant to amendments filed to Permit Nos. 1-10625 and 1-10629. *Semanko Declaration*. These delivery organization members of SRS also hold numerous natural flow, storage and ground water rights diverted from the Snake River, Palisades, Jackson Lake and American Falls Reservoirs, and the ESPA. *Id.*

The private recharge coordinated by SRS allows the SRS member ground water districts and others to meet their legal obligations, including those provided for in the Settlement Agreement.

SRS is concerned that the outcome of this appeal would affect its interests in operating as it currently is, including the coordination of ESPA private recharge activities among, and for the benefit of, its members, result in an additional, increased need for recharge, pursuant to the ESPA GWMA designation and any resulting ground water management plan, or otherwise impact their members' water rights.

II. LEGAL STANDARDS

A. Petition to Intervene

Under Idaho Appellate Rule 7.1, any person or entity whose interest would be affected by the outcome of an appeal may file a verified petition asking for leave to intervene as a party to the appeal. If the Court finds that such petitioning person would be affected by the outcome of the appeal, the Court may, in its discretion, grant leave to the petitioning party to intervene.

1. Intervention as a Matter of Right.

This Court has previously observed that under Idaho Rule of Civil Procedure 24(a), a party may intervene in an action as a matter of right if they meet the following criteria:

Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the state of Idaho confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Order Granting Motion to Intervene, Case No. CV-2014-165 at 2 (July 18, 2014) (quoting I.R.C.P. 24(a)). The Idaho Supreme Court has directed that rules providing for intervention should be given liberal construction. *Id.* at 2–3 (citing, *City of Boise v. Ada County*, 147 Idaho 794, 803, 215 P.3d 514, 523 (2009) as providing, “if there is any doubt as to whether intervention is appropriate, a motion to intervene should usually be granted”; also citing, *Herzog v. Pocatello*, 82 Idaho 505, 509, 523, 356 P.2d 54, 55 (1960) as providing, “statutes providing for intervention should be given a liberal construction”).

2. Permissive Intervention.

This Court has previously found that permissive intervention may be permitted upon timely application if the following conditions are met: “when an applicant’s claim or defense and the main action have a question of law or fact in common.” *Id.* at 4 (quoting I.R.C.P. 24(b)(2)). The Court further observed that the decision to grant or deny a request for permissive intervention is left to the discretion of the court. *Id.* at 4-5 (citing, *American Falls Reservoir Dist. #2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 882, 154 P.3d 433, 453 (2007)). The Court will also consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. *Id.* at 5; I.R.C.P. 24(b)(2).

B. Appearance as Amicus Curiae

Idaho Appellate Rule 8 allows a person or entity to make application and appear as amicus curiae, by stating its interest in the appeal, in whose support the amicus curiae would appear, and stating whether leave is sought to brief the issues or participate in oral argument, or

both. The decision on amicus curiae participation is discretionary with the Court. *State v. United States*, 134 Idaho 106, 111, 996 P.2d 806, 811 (2000); *see, e.g., Order on Petitions to Appear as Amicus Curiae* (April 27, 2015) and *Order on Petition to Appear as Amicus Curiae* (May 18, 2015), Case No. CV-2015-172 (granting petitions to appear in briefing and oral argument as amicus curiae in judicial review action).

III. ARGUMENT

A. SRS's Petition to Intervene Should Be Granted

SRS has satisfied the provisions of I.A.R. 7.1 and I.R.C.P. 24(a) and 24(b) and should therefore be granted intervention by the Court as a matter of right, or permissively.

First, the petition is timely. It has been filed early in the appeal, before any briefing has occurred or any substantive determinations have been made by the Court. In fact, the petition was filed within the 14-day deadline that the Court set for parties to the underlying administrative proceeding to file their notices of appearance, which will also be treated as petitions to intervene under the Procedural Order. As a result, SRS's petition is timely.

Next, SRS has a direct and substantial interest in the subject matter of the appeal. This action involves the designation of the ESPA as a GWMA. Upon such designation — if it is upheld as lawful by the Court — the Director may approve a ground water management plan for the area, which shall provide for managing the effects of ground water withdrawals on the aquifer from which withdrawals are made and on any other hydraulically connected sources of water. I.C. § 42-233b. The Director, upon determination that the ground water supply is insufficient to meet the demands of water rights within the area, shall order those water right

holders on a time priority basis, within the area determined by the Director, to cease or reduce withdrawal until the Director determines that there is sufficient ground water. Water right holders participating in an approved ground water management plan shall not be subject to administration on a time priority basis so long as they are in compliance with the ground water management plan. *Id.*

The interests of SRS and its members stand to be directly impacted by the outcome of this matter. A ground water management plan could directly or indirectly increase or add to the private recharge obligations of its ground water district members. In addition, the plan could further regulate or otherwise impact the ground water recharge that SRS coordinates with its members under Permit Nos. 1-10625 and 1-10629. Finally, the plan could have direct or indirect impacts on the surface and ground water rights held by SRS members.

Whether a ground water management plan is developed for the ESPA is directly dependent upon whether the Director's designation of the ESPA as a GWMA is affirmed on appeal. If it is upheld, SRS will be compelled to participate in the ground water management plan development process to protect its interests. *See, Order Designating the Eastern Snake Plain Aquifer Ground Water Management Area* at 25 (November 2, 2016) ("The Director will issue a separate order addressing the procedure for developing pursuant to Idaho Code Sec. 42-233b a ground water management plan for the ESPA Ground Water Management Area.") (available at www.idwr.idaho.gov). This interest relates directly to the property or transaction that is the subject of this matter.

Also, SRS is so situated that the disposition of this action may as a practical matter impair or impede its ability to protect its interests. The case will determine whether the designation of the ESPA as a GWMA was lawful and, therefore, whether the Director may proceed with the development of a ground water management plan pursuant to Idaho Code Section 42-233b. As a result, SRS may be bound by a judgment in this action. *See, e.g., Duff v. Draper*, 96 Idaho 299, 302, 527 P.2d 1257, 1260 (1974) (it is sufficient for intervention “that the applicant ‘may’ be bound by a judgment in the action”).

Finally, the interests of SRS may not be adequately represented by the existing parties. *Id.* (“[i]t was sufficient that the petitioner show that the representation ‘may’ be inadequate”). The Department does not represent the interests of SRS. It regulates the ground water recharge rights that SRS coordinates with its members. And it develops the ground water management plan for the ESPA GWMA that will directly or indirectly impact the rights and obligations of SRS and its members. The Basin 33 Water Users and Upper Valley Water Users are not SRS members and do not have the same interests to protect, particularly with regard to the SRS members’ individual water rights, including its ground water permits. The same is certainly true of the Surface Water Coalition and the other parties to the underlying administrative action, whose interests are not sufficiently aligned with SRS in this matter.

SRS has met all of the criteria set forth in I.A.R. 7.1 and I.R.C.P. 24(a) and is therefore entitled to intervene in this appeal as a matter of right.

Even if SRS is not entitled to intervene as a matter of right, the Court should grant permissive intervention. Again, the Petition to Intervene is timely for the reasons set forth

above. Furthermore, SRS's claims and defenses share a common question of law or fact with this action. As explained above, the activities, operations, rights and obligations of SRS and its members may be subject to a ground water management plan if the Court upholds the ESPA GWMA designation by the Director. SRS and its members may be bound by the decision of this Court. Finally, permissive intervention by SRS will not result in undue delay or prejudice to the original parties. There was no delay in filing the petition to intervene; it was done during the early stages of the appeal and within the 14-day deadline set for notices of appearance to be filed by the parties to the underlying administrative proceeding. As a result, the Court should exercise its discretion to grant leave to SRS to permissively intervene in this matter.

B. In the Alternative, SRS Should Be Allowed to Appear as Amicus Curiae

If SRS is not granted intervention, it should be allowed to appear as amicus curiae to brief the issues in this matter and participate in oral argument.

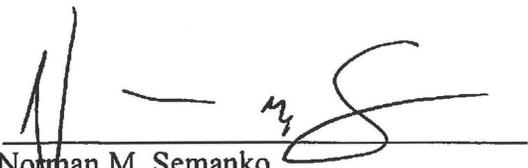
As discussed above, SRS has an interest in the outcome of this matter as it pertains to the Director's designation of the ESPA GWMA and the subsequent development of a ground water management plan resulting from such designation. Whether the designation was lawfully made stands to impact the private recharge activities that SRS coordinates with, and for, its members, as well as the water rights of various SRS members. As a result, SRS would most appropriately appear as amicus curiae in support of the Petitioners in the appeal. Accordingly, the Court should exercise its discretion to authorize SRS to appear as amicus curiae for the limited purpose of briefing the issues raised in this appeal and participating in oral argument.

IV. CONCLUSION

For the foregoing reasons, SRS has satisfied the applicable requirements regarding intervention, and its petition should be granted to allow it to intervene in this proceeding and fully participate in all matters that may arise. Alternatively, SRS should be allowed to appear as amicus curiae to provide briefing on judicial review and participate in oral argument.

DATED this 9th day of June, 2020.

PARSONS BEHLE & LATIMER

By: 

Norman M. Semanko

Attorneys for Snake River Storage

VERIFICATION

STATE OF IDAHO)
) ss.
COUNTY OF BINGHAM)

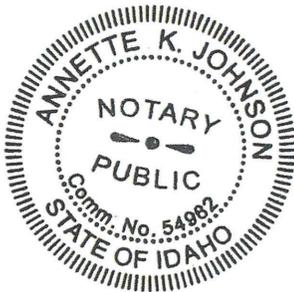
STEVE HOWSER, being first duly sworn upon oath, deposes and states:

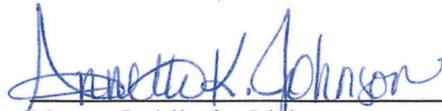
I am the Executive Director for Snake River Storage, Petitioner in the within action and have read foregoing and know the contents thereof, and the facts therein stated are true and correct to the best of my knowledge and belief.



Steve Howser

SUBSCRIBED AND SWORN to this 8th day of June, 2020.





Notary Public for Idaho
Residing at: Aberdeen, Idaho
My Commission Expires: August 31, 2021
Commission No. 54982

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of June, 2020, I served a true and correct copy of the foregoing document on the parties listed below by their designated method of service as indicated.

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 Norman M. Semanko