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**IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO IN AND FOR THE COUNTY OF POWER**

ABERDEEN-SPRINGFIELD CANAL  
COMPANY, an Idaho Corporation, JEFFREY  
and CHANA DUFFIN, individually, as  
stockholders, and as husband and wife,

Plaintiffs,

vs.

IDAHO DEPARTMENT OF WATER  
RESOURCES, an executive department of the  
State of Idaho,

Defendant.

Case No. CV-2014-165

**MEMORANDUM IN SUPPORT OF  
SURFACE WATER COALITION'S  
MOTION TO INTERVENE**

COME NOW, A&B Irrigation District, American Falls Reservoir District #2, Burley  
Irrigation District, Minidoka Irrigation District, Milner Irrigation District, North Side Canal  
Company and Twin Falls Canal Company (hereafter collectively "Surface Water Coalition",  
"Coalition", or "SWC"), by and through their attorneys of record, and submit this *Memorandum in  
Support of Motion to Intervene*.

**I.**  
**INTRODUCTION AND PROCEDURAL HISTORY**

On or about June 6, 2014 Plaintiffs filed a *Complaint for Declaratory Relief*; a *Motion for Issuance of Temporary Restraining Order and Order to Show Cause Re: Preliminary Injunction*; a *Memorandum In Support* thereof; and the *Affidavits of Jeffrey Duffin and Steve Howser*. On June 9, 2014, the court issued the *Order Granting Plaintiff's Motion for Temporary Restraining Order and Order to Show Cause*, setting the preliminary injunction hearing for June 12, 2014.

On June 11, 2014, the Idaho Department of Water Resources and Plaintiffs entered into a stipulation whereby the June 12, 2014 hearing would be vacated, and the case would be transferred to the SRBA Court for further action. It is the Coalition's understanding that the parties further stipulated that Plaintiff Duffin would make an application to the state water supply bank, which would alleviate the need for the preliminary injunction hearing, and leave only the declaratory judgment action to be litigated.

The Department has not filed a response or answer in this action, and the parties have not set a briefing schedule. The Coalition is comprised of seven individual canal companies and irrigation districts located in the Magic Valley. The Coalition holds individual natural flow and storage water rights to the Snake River and relies upon these supplies to deliver water to their water users. Coalition member A&B Irrigation District also holds several groundwater rights. The Eastern Snake Plain Aquifer is hydraulically connected to the Snake River. *See Clear Springs Food, Inc. v. Spackman*, 150 Idaho 790, 794 (2011); *Rules for Conjunctive Management of Surface and Ground Water Resources*, 37.03.11.50 ("CM Rules").

Accordingly, the diversion and consumptive use of groundwater from the aquifer that supplies water to the Snake River reduces and impacts the Coalition's water supplies. Furthermore, for A&B, which relies upon the ESPA for its groundwater rights, diversion and

consumptive use of groundwater can reduce and impact A&B's groundwater supplies as well. As such, the Coalition has a substantial interest in this case. Second, both TFCC and NSCC protested the Duffins' original application for permit concerning the illegal groundwater well. The processing was placed on hold due to the moratorium and no action has been taken to date. As protestants, TFCC and NSCC have this additional specific interest in the well and the fact it does not have a valid water right authorizing any groundwater use. Furthermore, as this case may be a matter of first impression concerning recovery wells, this is a matter of substantial concern and interest for the Coalition as I.C. § 42-228 is applicable to canal companies and irrigation districts. The Coalition is aware of no court case addressing this statute.

Accordingly, the Coalition seeks to intervene and participate in this litigation for the purpose of protecting their water rights, protectable real property interests, from current and future injury caused by such wells that unlawfully take water from the Eastern Snake Plain Aquifer. The Coalition respectfully requests the Court to grant its motion accordingly.

## **II. STATEMENT OF RELEVANT FACTS**

Plaintiffs, Aberdeen-Springfield Canal Company (ASCC) and Jeffrey and Chana Duffin (husband and wife and stockholders of ASCC), filed a request for declaratory relief concerning the application of Idaho law, specifically I.C. § 42-228, to a well located on the Duffins' parcel of land—and application to recovery wells in Idaho generally. The *Complaint* states that ASCC delivers surface irrigation water to stockholders in Power and Bingham Counties, and that ASCC has natural flow water rights in the Snake River and also storage water rights in Palisades and Jackson reservoirs. Plaintiffs also allege that this case presents legal issues that appear to be of first impression for the Idaho courts. *See Memorandum in Support of Plaintiffs' Motion for*

*Issuance of Temporary Restraining Order and Order to Show Cause Re: Preliminary Injunction* at 4 (“*Plaintiffs Br.*”).

The Coalition holds various natural flow and storage water rights to the Snake River, including to Lake Walcott, American Falls, Palisades, and Jackson Lake Reservoirs. *See* Ex. A to *Affidavit of Travis L. Thompson*. In addition, A&B holds several groundwater rights to the ESPA as well. *See id.* Ex. B. The Coalition relies upon these water supplies to deliver irrigation water to their respective landowners and shareholders. The outcome of the declaratory relief action will potentially have current and future impacts upon the aquifer and the Coalition’s water rights, as well as the meaning of I.C. § 42-228 and how it applies to canal companies and irrigation districts across the state.

One of Plaintiff Duffin’s predecessors-in-interest, Vern Duffin, filed an application for water right permit (#35-8980) to use 2.20 cfs of groundwater from the ESPA in or about 1992. Coalition members TFCC and NSCC filed a protest to the proposed appropriation. It is uncertain when exactly the well was drilled, but since its filing the application has not been processed due to a Moratorium Hold by IDWR. Vern Duffin completed a *Moratorium Exemption Questionnaire* in or about 1992 that stated the land had been irrigated with ASCC surface water for the previous ten years. Vern Duffin then sold the property and assigned the application to Richard Schelske in 2002, who subsequently sold the property and assigned the application to Plaintiff Jeffrey Duffin in 2011.

Plaintiff Duffin claims that in 2013 he made an application to ASCC to move the point of diversion from the canal lateral to the well, and that ASCC accepted, and has authority to operate it as a recovery well pursuant to I.C. § 42-228 to fully irrigate the 175 acres of Duffins’ real property. *See Affidavit of Jeffrey Duffin*.

IDWR is charged with the responsibility of distributing water according to priority and in conformance with its duty under state law. IDWR issued two separate Notices of Violation to the Duffins indicating they were in violation and that IDWR was going to assess civil fees/penalties and curtail the use of the recovery well. *Id.* at ¶ 9; *Complaint for Declaratory Relief, Exhibits A, C*. The Duffins and IDWR were unable to reach an amicable resolution, and therefore Plaintiffs filed this current action in district court.

### **III. ARGUMENT**

#### **1. THE COALITION IS ENTITLED TO INTERVENE AS A MATTER OF RIGHT PURSUANT TO I.R.C.P. § 24(a)(1) & (2).**

Idaho's civil rules provide for intervention of right in a civil proceeding, as follows:

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 he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

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

Considering the procedural history of when this case was initiated, and its current status, the interveners meet the requirement for a timely application for intervention.

Further, certain statutes in the state's water code grant water users within a water district the "right" to have the Idaho Department of Water Resources ("IDWR") administer water rights appropriately in conformance with Idaho law. For example, I.C. § 42-602 states that the "director . . . shall distribute water in water districts in accordance with the prior appropriation doctrine." I.C. § 42-602. Additionally, I.C. § 42-607 requires watermasters to:

***[D]istribute the waters of the public stream, streams of water supply, comprising a water district, among the several ditches taking water therefrom according to***

***the prior rights*** of each respectively, in whole or in part, ***and to shut and fasten, or cause to be shut or fastened***, under the direction of the department of water resources, the headgates of the ditches or other ***facilities for diversion of water from such stream, streams or water supply, when in times of scarcity of water it is necessary so to do in order to supply the prior rights of others in such stream or water supply***; . . .

I.C. § 42-607 (emphasis added). Accordingly, IDWR has a specific “duty” to ensure that water is distributed according to the prior appropriation doctrine, and watermasters must “physically” curtail junior appropriators when necessary. Moreover, the Coalition has requested conjunctive administration of groundwater rights in the ESPA and has had a pending delivery call on junior groundwater rights since 2005. Further, the Coalition has a right to participate in any proceedings that could affect the definition or administration of natural flow or storage rights and recovery wells. Idaho Code § 42-228 is applicable to canal companies and irrigation districts and therefore the Coalition has a substantial interest in protecting their interests in this regard, particularly where this case is a matter of first impression for Idaho courts.

The Coalition also meets the requirements to intervene as matter of right pursuant to I.R.C.P. 24(a)(2). To meet the requirements of I.R.C.P. 24(a)(2), an applicant must do the following: 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 in not adequately protected by existing parties.

The motion to intervene is timely based upon the procedural history of this case and current 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 complaint in the instant case was filed on June 6, 2014, less than two weeks ago. IDWR has not filed or served

an answer yet, and the parties have already stipulated to change the venue and apparently resolved the issue concerning the preliminary injunction. Furthermore, it is the Coalition's understanding that the parties anticipate setting forth a briefing schedule, however have yet to discuss the same. Given that the litigation is in the very earliest stages and no contested proceedings have taken place, the court should find that the motion to intervene is timely.

Second, the Coalition has an interest that is subject to this action. Courts have further defined an "interest" for purposes of Rule 24(a) as a "significant protectable interest", *Donnelly v. Glickman*, 159 F.3d 409 (9<sup>th</sup> Cir. 1998). This action is about the designation of an illegally drilled groundwater well in the ESPA, not associated with a valid water right, and the attempt to arbitrarily designate this as ASCC's "recovery well" for purposes of irrigating 175 acres previously irrigated with ASCC surface water. The Coalition holds various natural flow and storage water rights to the Snake River and the decision and continued operation of the well could reduce groundwater levels and reach gains to the detriment of the Coalition's water rights. *See* Exs. A, B; *Thompson Aff.* These water rights represent real property interests in Idaho. *See* I.C. § 55-101; *Olson v. Idaho Dept. of Water Resources*, 105 Idaho 98, 101 (1983). Moreover, the outcome of the declaratory relief action will potentially have current and future impacts upon the aquifer and the Coalition's water rights. As such, the Coalition has a "legal", and therefore a "significant" and "protectable" interest in this action.

The Coalition's ability to protect and use its water right will or may be "impaired or impeded" by the outcome of this action. The Idaho Supreme Court has noted 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). Plaintiffs have indicated their belief that this is a matter of first impression concerning I.C. § 42-228 and recovery wells, and therefore considering the statute applies to canal companies and irrigation districts—it is applicable to the Coalition members. There is no question the Coalition will be affected by the outcome of this decision.

Finally, none of the other parties to this action adequately represent the Coalition’s interests. Similar to the above “may be bound” standard, the *Duff* Court noted that an applicant need only “show that the representation ‘may’ be inadequate.” 96 Idaho at 302. Here, Plaintiffs seek to enjoin IDWR from restricting its use of a recovery well, which has the direct and indirect impact on the Coalition’s water supplies. While IDWR may have an interest that Plaintiffs follow the law and ensure that it follows the law when administering water rights, it does not “represent” the interests of the Coalition and its individual private property right interests. Furthermore, IDWR may not represent the Coalition’s position concerning the meaning and application of I.C. § 42-228 in all matters.

As set forth above, the Coalition meets all of the requirements under I.R.C.P. 24(a) to intervene in this proceeding as a matter of right. It is generally recognized that courts should be liberal in permitting parties to intervene and look with favor on intervention in proper cases—and that if there is any doubt, intervention should usually be permitted. *See City of Boise v. Ada County (In re Facilities & Equip. Provided by the City of Boise)*, 147 Idaho 794, 803, 215 P.3d 514, 523, (2009).

**2. ALTERNATIVELY, THE COALITION SHOULD BE ALLOWED TO PERMISSIVELY INTERVENE UNDER I.R.C.P. 24(b).**

In the event the Court denies intervention by right, the Coalition alternatively requests permissive intervention under I.R.C.P. 24(b). Rule 24(b) provides the following:



Upon 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. . . . 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.

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

The Idaho Court of Appeals, in *In re Doe*, 134 Idaho 760 (Ct. App. 2000), 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.

134 Idaho at 763.

As explained above, I.C. § 42-607 confers a "right" upon the Coalition to have IDWR distribute water in accordance with the prior appropriation doctrine, hence, it meets the first standard for permissive intervention. That IDWR must follow the law and ensure water is not illegally diverted to the detriment of other water right holders, like the Coalition, further meets this standard.

The Coalition may also intervene pursuant to I.R.C.P. 24(b)(2). 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 505, 509 (1960), only that its 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)(2). Even if the Court should find that Coalition does not have a "direct or personal pecuniary interest," the Court should grant permissive intervention. Since the Coalition's water rights, and the procedures governing how those water rights are administered will be directly (or indirectly) affected by this action, there is no question that the Coalition has a common question of law and fact in this action.

Further, Coalition members TFCC and NSCC protested the original groundwater application for permit requested for this well. IDWR has yet to process that application due to a moratorium hold and these Coalition members have this additional interest in this matter due to that outstanding administrative proceeding.

Finally, since this case is a matter of first impression concerning the interpretation and application of I.C. § 42-228, that further warrants permissive intervention. The Coalition members are all irrigation districts and canal companies subject to the statute and would be impacted by any ruling in this case. Accordingly, they have an interest and should be able to present their position on this matter.

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

#### **IV. CONCLUSION**

Based upon the aforementioned, the Coalition respectfully requests that it be granted intervention pursuant to I.R.C.P Rule 24(a) or 24(b).

**DATED** this 19<sup>th</sup> day of June, 2014.

**BARKER ROSHOLT & SIMPSON LLP**



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*Attorneys for A&B, BID, Milner, NSCC, TFCC*

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19<sup>th</sup> day of June, 2014, I served true and correct copies of the foregoing upon the following by the method indicated:

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John Homan  
Meghan Carter  
Deputys Attorney General  
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