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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

**PLAINTIFFS' MEMORANDUM IN
OPPOSITION TO SURFACE WATER
COALITION'S MOTION TO
INTERVENE**

COME NOW, the Plaintiffs, by and through counsel of record, and submit their
Memorandum in Opposition to Surface Water Coalition's Motion to Intervene as follows:

ARGUMENT

**A. The Surface Water Coalition Should Be Denied Intervention Under Idaho Rule of
Civil Procedure 24(a).**

The Surface Water Coalition (hereafter "SWC") has failed to show that it is entitled to
intervention as a matter of right under I.R.C.P. 24(a). Rule 24(a) states 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 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.

First, SWC fails to meet the requirement to intervene under Rule 24(a)(1). No statute in Idaho specifically grants SWC a right to intervene in this case. Although SWC contends the statutes relating to the distribution of water, I.C. §§ 42-602 and 607, grant it the right to intervene, this argument is invalid.

Idaho Code § 42-602 grants no right to intervene to any party, and instead focuses on the duty of the Director to distribute water. I.C. § 42-602 provides as follows:

The director of the department of water resources 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 created pursuant to section 42-604, Idaho Code, shall be accomplished by watermasters as provided in this chapter and supervised by the director. The director of the department of water resources shall distribute water in water districts in accordance with the prior appropriation doctrine. The provisions of chapter 6, title 42, Idaho Code, shall apply only to distribution of water within a water district.

Similarly, Idaho Code § 42-607 also grants no right of intervention, but instead, focuses on the duties of watermasters. I.C. § 42-607 provides as follows:

It shall be the duty of said watermaster to distribute the waters of the public stream, streams or 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; provided, that any person or corporation claiming the right to the use of the waters of the stream or water supply comprising a water district, but not owning or having the use of an adjudicated or decreed right therein, or right therein evidenced by permit or

license issued by the department of water resources, shall, for the purposes of distribution during the scarcity of water, be held to have a right subsequent to any adjudicated, decreed, permit, or licensed right in such stream or water supply, and the watermaster shall close all headgates of ditches or other diversions having no adjudicated, decreed, permit or licensed right if necessary to supply adjudicated, decreed, permit or licensed right in such stream or water supply. So long as a duly elected watermaster is charged with the administration of the waters within a water district, no water user within such district can adversely possess the right of any other water user.

As neither of the statutes relied upon by SWC grant a right of intervention in this declaratory judgment action, SWC must be denied intervention under Rule 24(a)(1).

Just as SWC is unable to demonstrate that it is entitled to intervention under Rule 24(a)(1), SWC is unable to show that it is entitled to intervene based upon Rule 24(a)(2). This is because, Rule 24(a)(2) requires the intervenor to have an interest in the “property or transaction which is the subject of the action.”¹

SWC has no arguable interest in the “property or transaction” upon which this case is based. While SWC is arguing that it has an interest in ensuring that the Director and watermasters distribute water to its members based upon priority dates, that interest is not at issue or undermined by this case. The lawful use of recovery wells under Idaho Code §42-228 is the issue here. As the Affidavit of Steve Howser filed herewith confirms, the recovery wells operated by ASCC **are used to recover Company surface water lost through seepage** from ASCC’s delivery system to supplement flow and supply irrigation water directly to certain shareholders with ASCC shares appurtenant to their land within the service area. The wells are not used to undermine water distribution based upon priority dates, but rather, to recover Company water which would otherwise be lost due to seepage.

¹ I.R.C.P. 24(a)(2)

Even if SWC could show that their ability to protect their interest in their water rights could somehow be impaired by Plaintiffs' request for the Court to deem its use of recovery wells lawful under I.C. §42-228, which it may not, SWC still is unable to establish the right to intervene under the exception to Rule 24(a)(2).

Specifically, this exception to Rule 24(a)(2) states that, even if a party has an interest in the disposition of this case, they will not be allowed to intervene if "the applicant's interest is adequately represented by existing parties." There is no legitimate controversy as to whether the Idaho Department of Water Resources (hereafter "IDWR") can adequately represent SWC's interests in this case. The IDWR is arguing that the Plaintiffs' use of recovery wells is unlawful based upon its strained interpretation of I.C. §42-228. As the IDWR is charged by statute with protecting SWC's interests by ensuring that water is distributed according to priority date and to curtail junior users if the need arises, and the IDWR is defending this case on the basis that the Plaintiffs' use of recovery wells is unlawful, SWC's interests are clearly well-represented by IDWR. As such, intervention should also be denied under Rule 24(a)(2).

B. The Court Should Also Deny Permissive Intervention to SWC Under Idaho Rule of Civil Procedure 24(b).

SWC has not shown that it is entitled to permissive intervention under I.R.C.P. 24(b). Rule 24(b) states as follows:

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 the applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. 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.

The decision whether to grant a motion to intervene is discretionary with the trial court. *See State v. United States (In re SRBA Case No. 39576)*, 134 Idaho 106, 996 P.2d 806 (2000) (wherein irrigators were given only the limited right to intervene to participate as amicus curiae in order to minimize delay).

Again, there is no statute which confers a conditional right to SWC to intervene in this case. Further, SWC does not have a claim which shares a common question of law or fact with the claim made by the Plaintiff in this case. The Plaintiffs' claim is for the Court to find, as a matter of law, that their use of recovery wells is lawful under I.C. §42-228 whereas the SWC has only an interest, not a claim, in making sure that it receives water based upon priority date. SWC's interest is already protected by the statutes discussed above and the Director and watermasters entrusted with complying with Idaho's statutes. That is precisely what has occurred in this case because the IDWR has defended Plaintiffs' claim for the protection of other Idaho water users, including SWC.

Not only should permissive intervention be denied for the foregoing reasons, but it should also be denied for lack of standing and undue delay. (*See Spangler v. Pasadena City Bd. Of Education*, 552 F.2d 1326, 1329 (9th Cir. 1977) (emphasizing that courts may deny permissive intervention based on an array of factors including the intervenors' lack of standing and "whether intervention will prolong or unduly delay the litigation").

First, "standing is the requirement that each party to the suit has such a personal stake in the outcome as to assure the court that a justiciable controversy exists."² This personal stake requirement has come to be known as the standing doctrine's requirement of a "case or

² *Bowles v. Pro Indiviso Inc.*, 132 Idaho 371, 375, 973 P.2d 142, 146 (1999).

controversy.”³ “[T]o satisfy the case or controversy requirement of standing, litigants generally must allege or demonstrate an injury in fact and a substantial likelihood that the judicial relief requires will prevent or redress the claimed injury.”⁴ The SWC has failed to show any injury for which its participation in the case will prevent or redress. Again, SWC’s interest is in receiving their water in order of priority, and the outcome of this statutory interpretation case will not impact SWC’s receipt of water in order of priority. Consequently, SWC lacks standing to participate in this case.

Second, if SWC is permitted to participate in this case it will undoubtedly cause undue delay. Plaintiffs are planning to move for summary judgment on the application of I.C. §42-228 to the use of recovery wells. As this case involves the sole issue of whether recovery wells are lawful under I.C. §42-228, allowing SWC to intervene and represent their interest in getting all of their water in order of priority will only detract from the real issue, cause additional and unnecessary briefing, and potentially unnecessary discovery.

CONCLUSION

Based upon the foregoing, Plaintiffs respectfully request that the Court deny SWC’s request to intervene in this action as: (1) SWC has not shown that it is entitled to intervene under I.R.C.P. 24(a) or (b); (2) SWC lacks standing; and, (3) intervention would only serve to cause undue delay. If the Court is inclined to allow intervention, then it should follow the reasoning of *State v. United States (In re SRBA Case No. 39576)*, supra, and allow SWC to participate only as *amicus curiae*.

³ *Miles v. Idaho Power Co.*, 116 Idaho 635, 641, 778 P.2d 757, 763 (1989).

⁴ *Id.*; see also *Friends of Minidoka v. Jerome County (In re Jerome County Bd. of Comm’rs)*, 153 Idaho 298, 281 P.3d 1076 (2012).

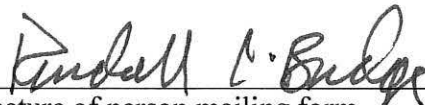
DATED this 26th day of June, 2014.

RACINE, OLSON, NYE, BUDGE &
BAILEY, CHARTERED

By: Randall C. Budge
RANDALL C. BUDGE

CERTIFICATE OF SERVICE

I certify that on this the 25th day of June, 2014, the foregoing document was served on the following persons in the manner indicated.


Signature of person mailing form

Clerk of the District Court Snake River Basin Adjudication P.O. Box 2707 253 Third Avenue North Twin Falls, Idaho 83303-2707	<input checked="" type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> E-mail
John K. Simpson/Travis L. Thompson Barker Rosholt & Simpson LLP P.O. Box 485 Twin Falls, Idaho 83303-0485 tlr@idahowaters.com	<input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-mail
W. Kent Fletcher Attorney at Law P.O. Box 248 Burley, Idaho 83318 wkf@pmt.org	<input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-mail
John Homan Deputy Attorney General P.O. Box 83720 Boise, Idaho 83720-0098 john.homan@idwr.idaho.gov	<input type="checkbox"/> U.S. Mail/Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-mail
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