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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.

SURFACE WATER COALITION, a coalition of water right holders,

Cross-Petitioner,

vs.

THE IDAHO DEPARTMENT OF WATER RESOURCES,

Respondent.

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

Case No. CV01-20-8069

SURFACE WATER COALITION'S OPPOSITION TO SNAKE RIVER STORAGE PETITION TO INTERVENE

COME NOW, A&B IRRIGATION DISTRICT, AMERICAN FALLS RESEVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, and TWIN FALLS CANAL COMPANY (hereinafter "Cross-Petitioners," "Surface Water Coalition," or "Coalition"), by and through their attorneys of record, BARKER ROSHOLT & SIMPSON LLP, and FLETCHER LAW OFFICE, and hereby submit this *Opposition to Snake River Storage's Petition to Intervene*. The Coalition respectfully requests the Court deny the petition for the reasons set forth below.

INTRODUCTION

This judicial review proceeding is limited to discrete procedural issues regarding the Director's designation of the Eastern Snake Plain Aquifer (ESPA) Groundwater Management Area (GWMA) (hereinafter "GWMA Order"). R. 1. The proceeding does not concern the Settlement Agreement, private recharge, or the provisions of a future groundwater management plan.

The entities that comprise the unincorporated association known as Snake River Storage ("SRS") consist of nine canal companies and four ground water districts. *See SRS Pet.* at 1, n. 1. Each of these entities received published notice of the Director's original GWMA designation, and some even participated in public hearings and submitted formal comments. Notably, the four ground water district members of SRS are already participating in this appeal through the Idaho Ground Water Appropriators, Inc. ("IGWA"). R. 2307; *see also IGWA's Notice of Appearance* (June 3, 2020).

While the Director provided several months for interested parties to intervene in the underlying administrative case, the canal company entities in SRS consciously chose not to

participate. Moreover, the legal issues before this Court were specifically addressed by the Director through a separate order. R. 2977. At no time did the entities that comprise SRS allege an interest in any of these procedural issues. Now, nearly four years after the Director's designation, they allege a "substantial interest" in this case, not as to the procedural issues, but only as it relates to a potential impact on future recharge activities. This request is essentially an untimely challenge to the original designation.

As set forth below, the Court should deny the SRS petition to intervene because it fails to establish sufficient grounds for intervention pursuant to the applicable procedural rules. Further, the Court should deny SRS's participation to appear as amicus curiae, as any additional argument on the procedural issues is unnecessary and would only be duplicative of the positions of existing parties.

ARGUMENT

On November 2, 2016, the Director of the Idaho Department of Water Resources ("IDWR") issued the GWMA Order. R. 1. Thereafter, the Director published notice of the designation in two consecutive weekly issues of various newspapers across the state in compliance with I.C. § 42-233b. R. 2326-2329, 2337, 2346-2351, 2356-2358, 2366-2367, 2384-2385. Pursuant to statute, aggrieved parties were provided the opportunity to request a hearing on the matter and initiate a contested case within fifteen (15) days of the order's issuance. R. 28. Only the Sun Valley Company ("SVC") filed a *Petition Requesting a Hearing*. R. 2302-2306. No other party, including SRS and its member entities, filed any such petition.[1]

[1] The failure to request a hearing within the statutory timeframe is an issue the SWC will raise through a separate motion to dismiss. Even though SVC withdrew its request for hearing (R. 2474), the Director allowed the intervenors to continue to a hearing. Even then, SRS did not seek to intervene or address the procedural issues it now wants to argue before this Court.

Following the initiation of the case, the Director set a deadline to file petitions to intervene by March 22, 2017, and then extended that deadline another month until April 20, 2017. R. 2439, 2489-2493. Numerous entities petitioned to intervene including the ground water districts represented by SRS through the Idaho Ground Water Appropriators, Inc. ("IGWA"). R. 2307-2310. However, once again, none of SRS's member canal companies chose to participate and file a petition to intervene.

Through SVC's original petition, the Director established a briefing deadline to address whether the Director should hold a hearing on the GWMA Order. R. 2535. Neither IGWA, nor SRS's member canal companies participated. The Director issued an order to continue with the hearing, limited to the issues SVC raised, and yet again SRS and its members did not participate. R. 2620.

The Director then addressed each of the legal issues now raised in this appeal. R. 2977-2993. In his *Order on Legal Issues*, the Director found that the GWMA Order was not procedurally deficient, that he was not required to conduct rulemaking, that he did not have to designate the ESPA GWMA first through a contested case, and finally that the adjudication and formation of ground water districts did not foreclose the designation of a GWMA on the ESPA. *Id.* Presumably SRS and its members did not believe their participation was critical then, or that they held any interests that would be affected by the outcome of those proceedings. Now nearly 4 years after the Director's original designation of the ESPA GWMA, SRS seeks to participate on these limited procedural issues, which did not affect its interests then, and do not affect its interests now. Since SRS' participation as a party in this proceeding would only be repetitive and create additional burdens and expenses on the parties and the Court, the petition to intervene should be denied.

I. I.R.C.P. 84 DOES NOT PROVIDE FOR INTERVENTION UNDER I.R.C.P. 24 IN THIS JUDICIAL REVIEW PROCEEDING.

The Court's *Procedural Order Governing Judicial Review of Final Order of Director of Idaho Department of Water Resources* (May 27, 2020) ("Procedural Order"), states "[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." R. 3300 (emphasis added). The Court states the Procedural Order, "together with Rule 84...govern all proceedings before the Court." R. 3299.

Rule 84 does not explicitly allow for petitions for intervention. Instead, under Rule 84(r), "[a]ny procedure for judicial review not specified or covered by these rules must be in accordance with the appropriate rule of the Idaho Appellate Rules to the extent not contrary to this Rule 84." (emphasis added). It is only if review is de novo or the court orders an evidentiary hearing that the other "Idaho Rules of Civil Procedure apply." I.R.C.P. 84(r). Therefore, the Idaho Rules of Civil Procedure are limited in this proceeding and only apply if: (1) the court orders an evidentiary hearing; or (2) the court is exercising de novo review. Since neither criterion is met here, the civil rules do not apply.

First, this Court has not ordered an evidentiary hearing. In fact, such an order would be extraordinary considering the nature of this proceeding. As noted by the Court, pursuant to Rule 84(e)(1), when judicial review is authorized by statute, judicial review "shall be based upon the record created before the Department rather than as a trial de novo." R. 3300 (emphasis added). The Court has not ordered additional evidence either on its own motion or on the motion of any party. Therefore, Rule 24 is not applicable.

Furthermore, the parties are appealing agency action under I.C. § 67-5279. This statute does not provide that judicial review is de novo as required for Rule 24 to apply under Rule 84.

Under Idaho law, when courts are confronted with questions of similar agency action, they have consistently applied more deferential standards of review like an abuse of discretion and the substantial evidence rule. *See e.g., Haw v. Idaho State Bd. of Medicine*, 143 Idaho 51, 43, 137 P.3d 438, 441 (2006); *Holloway v. Palmer*, 105 Idaho 220, 225, 668 P.2d 96, 101 (1983) (stating the substantial evidence rule is a "middle position which precludes a de novo hearing"). Since Rule 24 does not apply to these proceedings, SRS must show that it meets the criteria in I.A.R. 7.1 in order to intervene. *See generally, In re Idaho Dept. of Water Resources Amended Final Order Creating Water Dist. No. 170*, 148 Idaho 200, 220 P.3d 318 (2009); *Loser v. Bradstreet*, 145 Idaho 670, 183 P.3d 758 (2008); *Local 1494 of Intern. Ass'n of Firefighters v. City of Coeur d'Alene*, 99 Idaho 630, 586 P.2d 1346 (1978).

The Court has already confirmed that the rules of civil procedure do not apply by limiting a "person or entity not a party to the underlying administrative proceeding" to only proceed in accordance with Idaho Appellate Rule 7.1. Contrary to SRS' position, petitions for intervention must be submitted in strict compliance with the Idaho Appellate Rules which foreclose its ability to obtain party status at this stage under Rule 24(a) or (b).

Further, Idaho Appellate Rule 7.1 by its plain language cannot apply at a district court level. Under Rule 7.1, "[a]ny person or entity who is a real party in interest to an appeal or proceeding governed by these rules or whose interest would be affected by the outcome of an appeal or proceeding under these rules may file a verified petition with the Supreme Court asking for leave to intervene as a party." I.A.R. 7.1 (emphasis added). It is only the Supreme Court that may allow a petitioning person or entity status as an intervenor in an appellate proceeding. There is no mechanism in either the Idaho Rules of Civil Procedure, or the Idaho

Appellate Rules, that allow for intervention in a judicial review proceeding before the district court.

This is also consistent with Idaho's appellate policy which states the rule "must be construed to provide a just, speedy and inexpensive determination of all petitions for review." I.R.C.P. 84(r). Allowing persons or entities, who failed to participate or petition to intervene in the administrative proceeding to become a party to judicial review at the district court level would prolong petitions for review, forcing existing parties to the appeal to expend unnecessary time and resources to address new interests and perspectives absent from the administrative proceedings.

From the plain language of I.R.C.P. 84 and I.A.R. 7.1, the type of intervention SRS seeks is only allowed at the Supreme Court level. The Court should deny SRS' petition to intervene accordingly.

II. THE PETITION TO INTERVENE DOES NOT MEET I.A.R. 7.1.

Should the Court find the petition is allowed for consideration under I.A.R. 7.1, then the Court should still deny the petition to intervene as of right for SRS has failed to meet the required criteria.

Under Idaho Appellate Rule 7.1, SRS must demonstrate that it is either: (1) a real party in interest to the appeal or proceeding; or (2) an entity whose interest would be affected by the outcome of an appeal or proceeding. *See* I.A.R. 7.1.[2] A real party in interest is "one who has a real, actual, material, or substantial interest in the subject matter of the action, the primary object being to save a defendant from further suits covering the same demand or subject matter, i.e., the real party in interest is the person who can discharge the claim upon which the suit is brought

[2] Rule 24(a) or 24(b) requirements are not implicated in I.A.R. 7.1. SRS erroneously attempts to satisfy the criteria in I.R.C.P. 24(a) and 24(b) to justify intervention under I.A.R. 7.1.

and control the action brought to enforce it, and who is entitled to the benefits of the action, if successful, and can fully protect the one paying the claim or judgment against subsequent suits covering the same subject matter, by other persons." *Caughey v. George Jensen & Sons*, 74 Idaho 132, 134–35, 258 P.2d 357, 359 (1953); *Citibank (South Dakota), N.A. v. Carrol*, 148 Idaho 254, 220 P.3d 1073 (2009). SRS neither satisfies, nor claims to satisfy, the standard to intervene as "a real party in interest." Therefore, in order to satisfy I.A.R. 7.1, SRS would need to show that it has actual interests affected by the outcome of this appeal for the Court to allow intervention. SRS falls far short of this standard.

In order to satisfy I.A.R. 7.1, SRS must show its "interest would be affected by the outcome" of this appeal. First, SRS, an unincorporated non-profit association, does not hold any water rights. While SRS states it "engages in cooperative efforts between surface and ground water entities, including ground water recharge," it admits that its members hold the actual water rights related to this effort. *See Semanko Dec.* at 2-3.

Further, by SRS' own argument, it is only the ground water management plan that has the potential to impact SRS's interests. *SRS Pet.* at 8. SRS claims a plan could directly or indirectly impact its interests, and whether the plan is developed is "directly dependent upon whether the...GWMA is affirmed." *Id.* If the GWMA is affirmed, then the specifics of the management plan, which are currently purely hypothetical at this point, might "directly or indirectly impact" SRS's interests. Such a tangential interest is too far removed from the currently proceedings to satisfy I.A.R. 7.1. While SRS's true concern is not with the designation, but with the details of a groundwater management plan, they have not asserted they will be prohibited from participating in that proceeding.

Moreover, SRS makes no claim that it will be impacted by this proceeding alone, which only addresses legal procedural issues associated with the Director's original designation. SRS does not provide any legal basis for its conclusory claim that it "will be compelled to participate in the ground water management plan development process to protect its interests." *SRS Pet.* at 8. SRS was not compelled to participate in the underlying contested case, and it chose not to. More importantly, through this statement, SRS implicitly admits that its participation in the plan development process would protect its interests. This aligns with the Director's November 2, 2016 *Order Designating the ESPA GWMA* where he stated 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 [GWMA]." R. 25 (emphasis added). There is no evidence to support SRS' claims that the simple designation of the ESPA GWMA will "directly or indirectly increase or add to the private recharge obligations of [SRS's] members," or "further regulate or otherwise impact the ground water recharge that SRS coordinates with its members," or "have direct or indirect impacts on the surface and ground water rights held by SRS members." *SRS Pet.* at 8. Only the separate order for the actual development of the ground water management plan has that potential. Whether the ESPA is designated a GWMA or not, in and of itself, has no impact on SRS or any of its members.

Lastly, the Director's separate order that will govern the procedure for developing the ground water management plan, and the plan itself, will be final agency actions that will allow SRS to challenge should their interests be impacted at that stage. Intervention in this proceeding should only be allowed if being denied "might impair their ability to protect their interests." *State v. United States*, 134 Idaho 106, 110, 996 P.2d 806, 810 (2000). SRS will be afforded multiple future opportunities to protect its interests when the Department issues the separate order

regarding the procedure for developing the ground water management plan. Since SRS will not be impacted by the procedural issue concerning the original designation of the ESPA as a GWMA, but only might have its interests effected by the plan, the current petition to intervene is premature. The Court should deny SRS's petition to intervene for failing to comply with the requirements of I.A.R. 7.1.

III. THE COURT SHOULD DENY INTERVENTION UNDER I.R.C.P. 24.

While SRS fails to satisfy the criteria under I.A.R. 7.1, which is the only criteria relevant to whether this Court will grant their petition to intervene, SRS also fails to satisfy the criteria under I.R.C.P. 24. First, SRS cites no authority to justify its use of criteria under I.R.C.P. 24. The Court clearly stated that "[a] person or entity not a party to the underlying administrative proceeding who desired to participate in this action...must proceed in accordance with Idaho Appellate Rule 7.1." R. 3300 (emphasis added). There is no language in I.A.R. 7.1 that implicates I.R.C.P. 24. However, should the Court decide to evaluate SRS's petition to intervene under Rule 24, the Court should also deny the petition since SRS also fails to meet this standard.

Under I.R.C.P. 24(a), a person or entity may intervene in an action as a matter of right if they meet the following criteria:

> (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 interests, unless the applicant's interest is adequately represented by existing parties.

First, to support intervention as of right, the moving party must demonstrate a significantly protectable interest that is protectable under some law, and that there is a relationship between the legally protected interest and the claims at issue. *City of Boise v. Ada Cty.*, 147 Idaho 794, 803, 215 P.3d 514, 523 (2009). A "generalized interests [is] insufficient to

support intervention of right." *State v. United States*, 134 Idaho 106, 110, 996 P.2d 806, 810 (2000). "It is enough under Rule 24(a)(2) that an adverse judgment would seriously prejudice those who seek to intervene, at least where allowance of intervention will not introduce extraneous issues into the suit, threaten to disrupt the action, or run counter to the policy of the statute under which the action is brought." *Duff v. Draper*, 96 Idaho 299, 303, 527 P.2d 1257, 1261 (1974) (internal citation omitted) (emphasis added). Here, SRS only claims a generalized interest in the designation of the ESPA as a GWMA because of its potential future implications related to a groundwater management plan. As discussed above, SRS states that "[w]hether a ground water management plan is developed for the ESPA is directly dependent upon whether the...GWMA is affirmed." R. 3363. It is only the plan that "could directly or indirectly increase or add to [SRS's] private recharge obligations." *Id.* It is only the plan that "could further regulate or otherwise impact the ground water recharge that SRS coordinates." *Id.* It is only the plan that "could have direct or indirect impacts on the surface and ground water rights held by SRS members." *Id.* These are all hypothetical implications of the management plan, and SRS provides no evidence that its interests will be impacted by the designation itself. Therefore, SRS's interests are merely tangentially related to the claims at issue as SRS will have numerous future opportunities to protect their interests during the plan development phase. The Director "will issue a separate order addressing the procedure for developing...a management plan." R. 25. SRS's claims to be impacted by the designation are hypothetical and premature. SRS fails the first requirements under Rule 24.

Second, the disposition of this petition for judicial review will not and cannot impair or impede the ability of SRS to protect its interests. Whether the Director complied with proper procedure is really the only issue to be addressed in this appeal. SRS will be afforded future

opportunities both upon the Director's issuance of the separate order regarding the procedure for establishing the ground water management plan, and upon the Director's issuance of the plan itself. SRS's petition is premature and fails the second requirements under Rule 24 for intervention as of right.

Third, the position taken by SRS is already adequately represented by the existing parties, including several ground water districts already participating through IGWA. SRS is an association of nine canal companies and four ground water districts. None of these entities will be impacted in any distinguishable manner from the current parties to this appeal. SRS makes no claim to advance any legal position not already advanced by the Petitioners, and if even granted amicus status, SRS stated they would "appear...in support of the Petitioners." *SRS Pet.* at 10.

The Idaho Supreme Court has found it is proper to deny intervention where other water users are already participating and can adequately represent their interests. *See Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 154 P.3d 433 (2007). The existing petitioners cover both surface and ground water interests. Not only do existing parties adequately represent SRS's interests, some literally represent the same interests. Notably, SRS's member ground water districts are already represented in this case by IGWA. R. 3318-3322. Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, and Jefferson-Clark Ground Water District are all members of IGWA. R. 2307. This double representation through SRS should not be allowed and creates the untenable situation of having parties advance multiple positions through different entities in a proceeding.

Moreover, the Basin 33 Water Users and the Upper Valley Water Users already adequately represent the surface water interests of SRS members (entities that divert above

American Falls Reservoir), and SRS did not address why its interests were not adequately represented by the existing parties.

SRS and its members had a full and fair opportunity to request a hearing and participate below. In fact, a representative[3] of Aberdeen-Springfield Canal Company (now a member of SRS) attended the ESPA GWMA public meeting in Blackfoot, Idaho (R. 2247-2256), and both Bingham GWD and American Falls-Aberdeen GWD submitted formal comment letters to the Director regarding the GWMA designation. *See Reagan Dec.* Ex. A, B. After the Director issued the GWMA Order, any of these entities could have requested a hearing. R. 28. They did not. After SVC requested a hearing, any of these entities could have petitioned for intervention, first by March 22, 2017, and then extended that deadline until April 20, 2017. R. 2439, 2489-2493. Again, they did not. SRS and its members could have also appealed the Director's *Order on Fact Issue*, or previous orders, within twenty-eight days after its issuance. R. 3281. They did not. Four years later is simply too late to claim procedural issues with the original designation create a sufficient interest to participate in this appeal. These parties had months to decide to participate below. If the members of SRS had a "real interest" they had every opportunity to participate in the proceedings on multiple occasions and for unstated reasons, elected not to be involved.

Furthermore, based upon the petition it is clear that SRS seeks to introduce extraneous issues into this proceeding, specifically concerns of recharge, which have no bearing on the procedural issues related to the designation of the GWMA. Lastly, it is the policy of the Idaho Administrative Procedures Act to afford those adversely impacted by an agency decision to

[3] The public meeting roster on July 26, 2016 in Blackfoot, Idaho lists Steve Howser (manager of ASCC) as attending. R. 2247.

request an agency hearing on any final action.[4] The hearing has already been held. To now allow intervention of an entity, whose members could have intervened in the underlying administrative action, disrupts the action, is unjust and inequitable to those who have expended time and resources litigating the matter for the past four years, and will undermine the efforts of all the entities that adhered to the Director's orders and have participated in the entire process.

Alternatively, SRS also requests permissive intervention under I.R.C.P. 24(b). SRS fails to provide any precedent that satisfying criteria under Rule 24(b) would somehow lead to becoming a party under I.A.R. 7.1. As such, this request should fail on its face. Further, for the reasons set forth above related to Rule 24(a), the Court should deny permissive intervention under Rule 24(b).

In sum, SRS does not have any sufficient interests to intervene in this limited procedural appeal. Any interests in the legal procedure are adequately represented by the existing parties. The Court should deny intervention accordingly.

IV. THE COURT SHOULD DENY SRS'S APPEARANCE AS AMICUS CURIAE UNDER I.A.R. 8.

The role of amicus curiae is to make up for the shortcomings in the representation of the parties or where an amicus has an interest in a pending case with similar questions. *Northern Securities Co. v. U.S.*, 191 U.S. 555, 555-56, 24 S.Ct. 119 (1903). Judge Richard Posner has found that the "vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigant's

[4] Furthermore, as referenced above, it is questionable whether this judicial review proceeding should even continue in light of the Director's decision to proceed with a hearing on a petition that was withdrawn by SVC. If the Director wrongfully continued with the administrative proceeding then any appeal of his decisions would be meaningless. The Surface Water Coalition reserves the right and intends to file a motion to dismiss in accordance with the applicable rules.

brief. Such amicus briefs should not be allowed." *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997).

While I.A.R. 8 does not set forth specific criteria to be met in order to appear as amicus curiae, SRS fails to allege any shortcomings in the current representation of the parties, and does not have an interest in a pending case with a similar question. Therefore, and by its own admission, SRS's inclusion will merely duplicate the arguments of Petitioners, which is unnecessary. R. 3365. Stated another way, there is no reason for SRS to participate in this appeal regarding limited procedural issues.

SRS has also failed to advance any unique interest or perspective concerning the issues before the Court that would be beneficial to a discussion on whether the Director of IDWR had to satisfy specific procedural requirements before designating the ESPA as a GWMA. SRS's participation is therefore redundant and unnecessary. SRS does not possess any information that will otherwise not be presented by the current parties. SRS makes no claim to advance any legal position not already advanced by the Petitioners, and if even granted amicus status, SRS warns they would "appear...in support of the Petitioners." R. 3365. SRS's member ground water districts are already represented by IGWA, and this proceeding has numerous water users, including surface water users, already participating, including both as petitioners, and cross-petitioners.

The specific questions of law concerning whether the Director designated the ESPA GWMA through proper procedure can be fully addressed through existing parties, like the Basin 33 Water Users, Upper Valley Water Users, cities, SWC, and IDWR. SRS's participation will only cost existing parties additional time and resources in addressing redundant procedural arguments. The Court should deny SRS's request to appear as amicus curiae.

CONCLUSION

For the foregoing reasons, SWC respectfully requests that the Court deny SRS's Motion to Intervene, and deny its request to appear as amicus curiae.

DATED this 23rd day of June, 2020.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23rd day of June, 2020, I served true and correct copies of the foregoing upon the following by the method indicated:

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