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**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

CITY OF POCATELLO,

Plaintiff,

vs.

IDAHO WATER RESOURCES BOARD,
IDAHO DEPARTMENT OF WATER
RESOURCES, GARY SPACKMAN, in his
capacity as Director of the Idaho Department
of Water Resources, and TONY
OLENICHAK, in his capacity as Water
District 01 Watermaster,

Defendants.

Case No. CV42-23-1668

**MEMORANDUM IN SUPPORT OF
SPACEHOLDERS' MOTION TO
INTERVENE**

COMES NOW, Burley Irrigation District, Fremont-Madison Irrigation District and Idaho Irrigation District (hereafter collectively the "Spaceholders"), by and through their attorneys of record, and submit this *Memorandum in Support of Spacholders' Motion to Intervene*.

I. INTRODUCTION AND PROCEDURAL HISTORY

On or about March 16, 2023 Plaintiff 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 or about April 24, 2023 Plaintiff and Defendants filed a *Joint Motion for Change of Venue I.R.C.P 40.1(a)(1)(B)*, which was subsequently granted by the Sixth District Court on May 1, 2023. On May 2, 2023, the Plaintiff filed an *Amended Complaint*. Also on May 2, 2023, the Plaintiff and Defendants filed a *Joint Motion to Set Deadline for State of Idaho's Amended Answer*, requesting an order setting that deadline for May 16, 2023. On May 4, 2023 this Court granted that motion and also ordered that future filings in this case be filed with the Fifth Judicial District under case number CV42-23-1668. Defendants filed their *Amended Answer* yesterday, May 16, 2023.

II. STATEMENT OF RELEVANT FACTS

Plaintiff is seeking numerous declarations, an injunction and monetary damages based on its assertions that Defendants, the Idaho Department of Water Resources (“IDWR”), the Idaho Water Resources Board (“IWRB”), IDWR Director Gary Spackman and Water District 01 (“WD 01”) watermaster Tony Olenichak have acted illegally, unconstitutionally and without authority in the “delegation” of the WD 01 Rental Pool Procedures to the Committee of Nine, the Advisory Committee to WD 01.

Plaintiff rented water in 2022 under the Rental Pool Procedures. Under those procedures Plaintiff’s storage space in the Upper Snake River Basin reservoir system is subject to a “last to fill” priority so as not to adversely impact other spaceholders who did not rent their water in

2022. Any change to that procedure or avoidance of that procedure, therefore, necessarily has the potential to reduce or otherwise impact the Spaceholders' allocations in 2023 and in the future thereby potentially causing direct injury to their water rights in 2023 and in future irrigation seasons.

The Spaceholders are all located in WD 01. The Spaceholders are active participants in the WD 01 Rental Pool. The Spaceholders also 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 A list of the Spaceholders' water rights is provided in Exhibit A to the *Declaration of Travis L. Thompson* filed concurrently herewith. Distribution of these water rights is administered by the WD 01 watermaster, Tony Olenichak. The Spaceholders rely upon these water supplies to deliver irrigation water to their respective landowners. The outcome of the actions sought by Plaintiff will therefore potentially have current and future impacts upon the Spaceholders' water rights and the distribution of those water rights, including potentially during the 2023 irrigation season and in future irrigation seasons.

III. ARGUMENT

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

Idaho Rules of Civil Procedure ("I.R.C.P.") provide for intervention of right in a civil proceeding, where "On timely motion, the court must permit anyone to intervene who:

(1) is given an unconditional right to intervene by an Idaho statute; or

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.

(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, and its current status, the Spaceholders meet the requirement for a timely application for intervention.

The Spaceholders also meet the requirements to intervene as a matter of right pursuant to I.R.C.P. 24(a)(1) because certain 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. Further, the Spaceholders have a right to participate in any proceedings that could affect the definition or administration of their natural flow or storage rights.

The Spaceholders also meet the requirements to intervene as a 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 is not adequately protected by existing parties.

First, this Motion to Intervene is timely based upon the procedural history of this case and its 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 *Amended Complaint* in this case was filed on May 2, 2023 and the *Amended Answer* was filed by the

Defendants on May 16, 2023. Given that the litigation is in the very earliest stages and no substantive determinations have taken place, the Court should find that this Motion to Intervene is timely.

Second, the Spaceholders have an interest that is subject to this action. Courts have defined an “interest” for purposes of 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 determine the distribution of water in the Upper Snake River Reservoir System. Plaintiff has invoked its right as a “spaceholder” in Palisades Reservoir. *Amended Complaint*, at ¶16. Likewise, the Spaceholders all hold storage water rights in the Upper Snake reservoir system and have significant interests in the distribution of that system targeted by the Plaintiff in this matter.

Further, the Spaceholders hold various natural flow and storage water rights to the Snake River and decisions regarding the distribution of water in this system have the potential to injure those water rights and their administration. For example, changing the administration of storage water at this time has the potential to impact their 2023 allocation and supply. Additionally, the procedure at the center of Plaintiff’s complaint, Procedure 7.3 of the Rental Pool Procedures, is an essential component the Nez Perce Agreement and the Snake River flow augmentation program implemented by the United States Bureau of Reclamation. As such, any decision regarding the validity of Procedure 7.3 will have far-reaching consequences for the Spaceholders. Moreover, 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 will potentially have current and future impacts upon the Water District 01 Rental Pool Procedures and consequently, the Spaceholders’ water rights. As

such, the Spaceholders have a “legal,” and therefore, a “significant and protectable” interest in this action.

Third, the Spaceholders’ ability to protect and use their water rights 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).

Because the Spaceholders are located within WD 01 and actively participate in the WD 01 Rental Pool, there is no question they will be affected by the outcome of this decision. If finally and fully resolved, this case will establish precedent regarding WD 01 Rental Pool Procedures, and the Spaceholders may be bound by a judgment in this action.

Fourth, none of the other parties to this action adequately represent the Spaceholders’ interests. Similar to the “may be bound” standard noted previously, the *Duff* Court noted that an applicant need only “show that the representation ‘may’ be inadequate.” *Duff v. Draper*, 96 Idaho at 302. Here, Plaintiff seeks a declaratory order voiding the WD 01 Rental Supply Procedures which would directly impact the Spaceholders’ water rights and water distribution. On the other hand, Defendants also do not represent the Spaceholders’ interests in their individual water rights.

As set forth above, the Spaceholders meet all the requirements under I.R.C.P. 24(a) to intervene in this proceeding as a matter of right. The Idaho Supreme Court has directed 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, 215 P.3d 514, 523 (2009) (providing, “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, 356 P.2d 54, 55 (1960) (“statutes providing for intervention should be given a liberal construction”).

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

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

1. 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 explained above, 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 Spaceholders... 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 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)(1)(B). Even if the Court should find that 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 constitutionality of the WD 01 Rental Pool Procedures it further warrants permissive intervention. The Spaceholders rent and lease water through the WD 01 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 in order 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.

VI. CONCLUSION

Based upon the aforementioned, the Spaceholders respectfully request that they be granted intervention pursuant to I.R.C.P. 24(a) or 24(b).

DATED this 17th day of May, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of May, 2023, the foregoing was filed electronically using the Court's e-file system, and upon such filing the following parties were served electronically.

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