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DEPARTMENT OF
WATER RESOURCES

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Twin Falls Canal Company*

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

In Re SRBA

Case No. 39576

)
) Subcase Nos.: SEE ATTACHMENT A
)
) **RESPONSE TO IGWA'S MOTION**
) **FOR RECONSIDERATION OF**
) **ORDER DENYING IGWA'S**
) **MOTION TO PARTICIPATE**
)
)
)
)

COMES NOW, American Falls Reservoir District #2, A&B Irrigation District, Burley
Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal

Company and Twin Falls Canal Company (collectively “Surface Water Coalition” or “Coalition”), by and through their undersigned attorneys of record, and submits this *Response to IGWA’s Motion for Reconsideration of Order Denying IGWA’s Motion to Participate* in the above-captioned subcases. For the reasons set forth below, this Court should deny IGWA’s motion.

INTRODUCTION

On August 28, 2007, the Special Master correctly issued an Order denying IGWA’s *Motion to Participate* in this matter consistent with prior decisions from the Presiding Judge on the question of standing and party status in the SRBA. In that August 28 *Order*, the Special Master unequivocally stated: “The clear language of the **Rules** limits participation in subcases to ‘parties to the adjudication’ and IGWA fails to meet that threshold requirement.” IGWA filed a *Motion for Reconsideration* of the August 28 *Order*, arguing that its uncontested participation in previous SRBA proceedings somehow constitutes a “global” joinder and allows IGWA to continue to participate as a party in essentially any subcase in the SRBA.¹ The law does not support this conclusion.

membersmembersmembersNo statutory authority has been provided to any “association”, such as IGWA, that is not a claimant in the SRBA. Since IGWA is not a claimant, it must be joined pursuant to Civil Rules 19 or 20. IGWA has not made such a showing and no order has been issued by the SRBA Court joining IGWA to any particular subcases. IGWA’s attempt to circumvent the express language of AOI and the SRBA’s specific statutes under the auspices of associational standing is without merit. Accordingly, the Special Master correctly decided the motion pursuant to the August 28 Order and IGWA’s motion should be denied.

¹ Since IGWA has not challenged the Special Master’s August 28 *Order*, finding that IGWA is not a claimant in the SRBA, this matter will not be discussed in this briefing.

ARGUMENT

I. IGWA's Prior Participation in Certain Subcases Before the SRBA Court does not Constitute Joinder for the Entire SRBA.

IGWA's primary argument before the Special Master is that the rules dealing with participation are bifurcated such that they provide IGWA with at least two different ways to demonstrate that they are a "party" to the SRBA. *IGWA Br.* at 2-3 (*citing* Rule 10(k) and I.C. § 42-1701A). However, the law and facts defeat any such claim. Idaho Code section 42-1401A(6) defines a "party" to an adjudication to mean "any person who is a claimant or *any person who is served or joined.*" It is this second, italicized, phrase that IGWA contends supports its motion to participate in these proceedings.

Whenever a party attempts to participate in an SRBA proceeding, that party must file a motion pursuant to Rule 10(k), of AO1. That rule provides:

Any **party to the adjudication** who is not a party to a subcase may seek leave to participate in a subcase by filing a timely *Motion to Participate*. A *Motion to Participate* shall be treated like a motion to intervene under **I.R.C.P. 24** and shall be decided by the Presiding Judge or the assigned Special Master. A **party to the adjudication** who does not file an objection, a response or a timely *Motion to Participate* waives the right to be a party to the subcase and to receive notice of further proceedings before the Special Master, except for *Motions to Alter or Amend*.

(Bold and underlined emphasis added); *see* I.C. § 42-1401A(6), *supra*.

As Rule 10(k) makes clear, any time a party seeks to participate in a particular subcase before the SRBA court that party must file a motion to participate and make a showing similar to that required under Civil Rule 24 (dealing with intervention). What is also clear from the rule is that a party seeking to participate in an SRBA subcase is **not** obligated to meet the requirements under Civil Rules 19 or 20 (dealing with joinder). In other words, the rules and statutes recognize a distinction between parties participating in a matter (i.e. intervention) and parties

being allowed joinder in a matter. IGWA does not assert that it has attempted to meet the requirements necessary to obtain joinder under these Civil Rules. This alone defeats any claim by IGWA.

In its brief, IGWA attempts to blur the lines between intervention/participation and joinder. Indeed, IGWA asserts “That IGWA has been joined in the SRBA is likewise beyond dispute.” *IGWA Br.* at 3. Yet, IGWA fails to provide any order that formally “joined” IGWA in any subcases in the SRBA, let alone the subcases specifically before the Special Master. To the knowledge of the Coalition, no such order exists, otherwise IGWA would have provided it. Furthermore, IGWA’s attempt to prove “joinder” by providing copies of SRBA summary reports, court minutes and the first page of an SRBA Court order are misleading. While IGWA provides these documents to show “joinder,” IGWA conveniently fails to recognize that it filed a “*Notice of Intent to Participate*” in the Basin 37 Interim Administration proceedings. *See IGWA Br.* at Exs. C, D & E, *See Attachment B* at 2. Apparently, after making a showing under Rule 10(k) and Civil Rule 24 and which was not contested, IGWA was allowed to participate in those subcases.² This is not the situation here, where IGWA’s participation has been challenged and denied consistent with the SRBA statutes and prior precedent in the SRBA. IGWA cannot now retroactively convert its participation/intervention motion into a motion for joinder under Rule 19 or 20.

Since IGWA has failed to make any showing that it has ever been joined in the SRBA, as opposed to merely participating in various distinct subcases in the SRBA without contest from the parties in those subcases, the Special Master should deny IGWA’s *Motion for Reconsideration*.

² In fact, none of the proceedings provided by IGWA to “prove” that it has been “joined” in the SRBA show that IGWA ever did anything other than file a notice of intent to participate under Rule 10(k).

II. Association Standing, under *Glengary-Gamlin*, is not applicable in the SRBA.

IGWA's attempt to have the Special Master adopt the association standing rule, set forth in *Glengary-Gamlin Prot. Assoc., Inc. v. Bonner County Bd. Of Comm.*, 106 Idaho 84 (Ct. App. 1983), is nothing more than an attempt to circumvent the specific SRBA requirements set forth in AO1 and Idaho Code section 42-1401A. While *Glengary-Gamlin* may have "firmly settled the question of whether an organization has standing to represent its members in Idaho courts," see *IGWA Br.* at 4, that decision does not support IGWA's motion for participation in this matter. Indeed, the particular rules governing water right adjudications make clear that IGWA is not authorized to participate in these proceedings because it is not a claimant and it has not been allowed joinder.³

The *Glengary-Gamlin* court set forth three requirements that must be met in order to have associational standing: (1) the members of the association must have the right to sue on their own behalf; (2) the interests sought must be germane to the organization's purpose; and (3) neither the claim nor the relief requires participation of individual members. 106 Idaho 87-88.

First, some of IGWA's members apparently have water right claims and have been granted statutory authority to participate in water rights adjudications, such as the SRBA. On the other hand, there is no such statute, rule or other provision of law which authorizes IGWA to participate in any water rights adjudication on their behalf. Rule 10(k) and Idaho Code section

³ IGWA attempts to argue around this fact by citing to decisions from the SRBA Court and Supreme Court which, it argues, demonstrates why IGWA should be allowed to participate. See *IGWA Br.* at nn.3 & 4 (citing *Memorandum Decision & Order on Challenge, Subcase Nos. 34-12, 34-13, 34-2507 & 34-10873* (April 29, 1999) & *Fort Hall Water Users Assoc. v. U.S.*, 129 Idaho 39 (1996)). In the *Memorandum Decision & Order* at page 10, the SRBA Court allowed a water users association to participate in a decision that was "narrowly limited to the facts and circumstances of these subcases **and because the actions of the [irrigation district] Board in relation to the district's water are claimed to be ultra vires.**" (Emphasis added). No *ultra vires* actions have been alleged by IGWA in this matter. Furthermore, the SRBA Court made clear that its decision in that case would be "narrowly limited to" that case and, therefore, would not govern the proceedings in this case. That notwithstanding, nothing in that decision supports IGWA's attempt to circumvent the procedural requirements governing participation in these subcases. Likewise, nothing in the *Fort Hall* decision would support an action by IGWA to participate in a subcase proceeding without first complying with the requirements of the governing statutes and rules.

42-1401A further support this conclusion by limiting participation in water right proceedings to those who are claimants or those who have been joined. Since IGWA is not a claimant and cannot show that it has ever been joined in the SRBA, it fails the first requirements.

As to the second requirement, the SRBA rules of procedure make no provision for consideration of the intent of an entity seeking to participate. Rather, the SRBA Court is limited to a consideration of two factors: (1) is the moving party a claimant; or (2) has the moving party been joined.

Finally, all claims asserted and relief requested by IGWA require the participation of a claimant or of a party who has been joined in the SRBA.. Since IGWA cannot meet this test, it is not “required” to participate in these subcases. *See IGWA Br.* at 7. The fact that the claims at issue in these proceedings may impact certain ground water claimants is of no relevance in light of the plain language of Rule 10(k) and Idaho Code 42-1401A. These provisions plainly state that only claimants and parties who have been joined may participate in the SRBA.

Furthermore, IGWA’s claim that “the protection of common interests among the association’s members practically require collective effort and judicial economy will be served by allowing the organization to represent the collective interest of its members,” is somewhat disingenuous when certain of its claimant members are already being represented or are already participating in similar subcases in Basins 21, 22, and 27..

Finally, the SRBA Court has already decided that an association does not have standing to participate in a subcase, merely because it represents claimants. *Order on Motion to Participate/Intervene, AOI 10k, I.R.C.P. 24(a) & (b); Order on Motion to Dismiss Objections to Amended Claims, I.R.C.P. 12(b)(6)* in Consolidated Subcase No 75-13316 (“*Wild & Scenic Order*”). In that case, an association representing claimants attempted to participate in an SRBA

Proceeding. Just like IGWA in this matter, the members of the association were claimants and had a right to object on their own, presumably, the interests of the association were being promoted in the attempted participation and, finally, its claims were not particular to any one member. *See IGWA Br.* at 4-8 (making identical arguments to supports its “associational standing” argument). However, in the *Wild & Scenic Order*, the SRBA Court recognized that the statutes and rules governing water rights adjudications do not allow for participation by associations. Since IGWA has not met the requirements of Idaho Code section 42-1401A and Rule 10(k), it’s motion for reconsideration should be denied.

CONCLUSION

IGWA cannot demonstrate that it has been joined in the SRBA Court under Idaho’s civil rules of procedure. Rather, IGWA attempts to confuse the Special Master by providing examples of subcases where it participated, without objection. The fact IGWA may have participated in some subcases because no party objected at the time does not justify granting its participation contrary to AOI, the SRBA statutes, and prior SRBA Court precedent in this case. IGWA has never made a showing that it is a “party” or that it has been joined under Civil Rules 19 or 20. Furthermore, the associational standing rules do not override the statutes and rules applicable to the SRBA. That law clearly requires that any who participate in the SRBA must be either claimants or joined. IGWA cannot make either showing. Accordingly, the Special Master should deny IGWA’s motion for reconsideration.

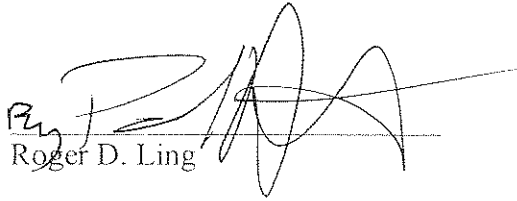
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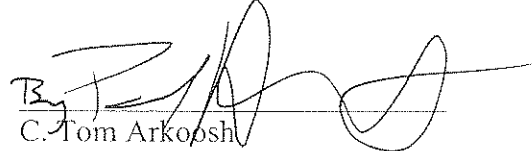
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Dated this 1st day of November, 2007.


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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of November, 2007, I served a true and correct copy of the foregoing **RESPONSE TO IGWA's MOTION FOR RECONSIDERATION OF ORDER DENYING IGWA'S MOTION TO PARTICIPATE** on the person(s) listed below, in the manner indicated:

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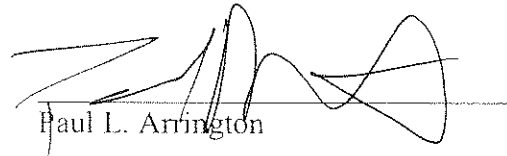
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ATTACHMENT A

1-1J	1-10474
1-2A	1-10475
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Attachment B

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

In Re SRBA	)	Subcase No.: 92-00021-37 SW (Surface
	)	Water)
Case No. 39576	)	
	)	ORDER GRANTING MOTION FOR
	)	INTERIM ADMINISTRATION FOR
	)	BASIN 37 PART 1 SURFACE WATER
	)	
	)	ORDER DENYING REQUEST FOR
	)	CLARIFICATION

**I.
APPEARANCES**

Clive Strong, Office of the Idaho State Attorney General, appearing on behalf of the State of Idaho

Jeffrey C. Fereday, Givens Pursley LLP, on behalf of the Idaho Ground Water Appropriators, Inc.

Daniel V. Steenson, Charles L. Honsinger, Ringert Clark Chartered, appearing on behalf of John W. Jones, Jr. and Deloris D. Jones, Billingsley Creek Ranch, Blue Lakes Trout Farm, Inc. and Western Legends, LLC ("Spring Users")

John K. Simpson, Travis L. Thompson, Barker Rosholt & Simpson, LLP, appearing on behalf of the Twin Falls Canal Company and Clear Springs Foods, Inc.

J. Dee May, May Sudweeks & Browning LLP, appearing on behalf of Rangen, Inc.

**ORDER GRANTING MOTION FOR INTERIM ADMINISTRATION FOR BASIN 37 PART 1
SURFACE WATER**

Page 1 of 1

II. PROCEDURE

A. On November 4, 2005, the Director of the Idaho Department of Water Resources (IDWR) filed the *Director's Report for Irrigation and Other Uses Surface Water, Reporting Area 16, IDWR Basin 37, Part 1 (Director's Report)*.

B. On that same date, in accordance with I.C. § 42-1417, the State of Idaho filed a *Motion for Order of Interim Administration* of water right claims reported in the *Director's Report*, together with an affidavit and brief in support. The State also moved to have its *Motion* heard on an expedited basis. The State's *Motion* complied with service and notice requirements set forth in I.C. § 42-1417.

C. On November 16, 2005, the Idaho Ground Water Appropriators filed a *Notice of Intent to Participate*. On November 23, 2005, the Spring Users filed a *Notice of Intent to Participate and Request for Clarification*. On November 28, 2005, the Twin Falls Canal Company and Clear Springs Foods, Inc. filed a *Notice of Intent to Participate and Notice of Joinder in the Request for Clarification*.

D. The objection period for the claims reported in the *Director's Report* expires March 10, 2006. The response period expires May 12, 2006.

E. A hearing was held on both *Motions* (Interim Administration and Expedited Hearing) November 29, 2005.

III. LEGAL STANDARD FOR INTERIM ADMINISTRATION

Idaho Code § 42-1417 authorizes the Court to enter an order of interim administration of water rights during the pendency of an adjudication. The party moving for interim administration must meet specified notice and service requirements and show that such an order "is reasonably necessary to protect senior water rights." I.C. § 42-1417(1)(c). Upon such a showing, the Court may order interim administration in accordance with the recommendations in the director's report or as modified by the

ORDER GRANTING MOTION FOR INTERIM ADMINISTRATION FOR BASIN 37 PART 1 SURFACE WATER

Court, or pursuant to superceding partial decrees. *Id.* The decision of whether to grant interim administration is discretionary with the Court.

IV. DISCUSSION

The State seeks interim administration so that surface water rights in Basin 37 can be included in a water district and IDWR can commence active administration of those rights in accordance with the provisions of Chapter 6, Title 42, Idaho Code.¹ The State asserts that interim administration is necessary to protect senior water rights.

At the hearing, this Court expressed the concern that the State's *Motion* represents the first time an order of interim administration was sought solely based on the director's recommendations and prior to the expiration of the objection period. As such, parties may have not had adequate opportunity to review either their recommendation or the recommendations of others for purposes of determining whether to contest interim administration. Presumably, if a party objects to the director's recommendation, they would also object to the water right being administered according to the recommendation during the pendency of their objection being heard. Based on the number of claims reported in the *Director's Report*, Idaho Code provides for a 120-day objection period. Because of the expedited nature of the State's *Motion*, parties only had 25 days, including the service period, within which to review recommendations and determine whether or not to contest the States' *Motion*. This Court acknowledges that in most basins where orders of interim administration have previously been entered objections were also pending. However, in those situations, the objection period had expired, a case management report had typically been prepared, and the Court had the benefit of knowing the number of outstanding objections and the type and scope of issues raised by those objections.

Despite these concerns, the Court is not necessarily predisposed to deny a motion for interim administration prior to the expiration of the objection period in every case. In the forthcoming year, the objection periods for remaining director's reports will be

¹ Interim administration for groundwater rights was granted November 19, 2002.

“staggered” such that the objection periods in most cases will exceed statutory minimums. It may therefore be unreasonable in some cases to delay granting a motion for interim administration beyond an objection period. The Court also notes that in such proceedings, as in this case, there is typically legal representation by multiple groups ultimately comprising a wide spectrum of interests within a particular basin. If these groups fail to oppose interim administration, then this Court’s concerns over a yet-to-be identified issue implicating a large number of claims are somewhat mitigated. Finally, all parties reasonably affected by a motion for interim administration are provided actual notice in accordance with I.C. § 42-1417. Parties whose rights may be affected by interim administration therefore have the onus of appearing in the proceedings and opposing the motion. Therefore, despite the Court’s concerns, to the extent there are no objections to a motion for order of interim administration, the Court does not find that issuing such an order prior to the expiration of an objection period to be problematic *per se*.

In this particular case, notice of the State’s *Motion* was served on all parties reasonably determined to have affected water right claims in accordance with I.C. § 42-1417(2)(b). No objections were filed to the State’s *Motion*. Interests of various spring and groundwater users within the basin were represented by counsel. No party appearing at the hearing opposed the State’s *Motion*. No potential major issues were identified resulting from the preliminary director’s reports. The available water supply in all or portions of Basin 37, Surface Water, is currently not adequate to satisfy some senior surface water rights and is projected in the future to be insufficient at times to satisfy these water rights. The Court finds that interim administration is necessary for the protection of senior priority rights. Interim administration of the surface water rights in Basin 37, Part 1 in accordance with the director’s reports or superceding partial decrees is reasonably necessary to protect senior rights in accordance with the prior appropriation doctrine as provided for by Idaho law.

For these reasons, the State’s *Motion for Order of Interim Administration* is **Granted.**

**ORDER GRANTING MOTION FOR INTERIM ADMINISTRATION FOR BASIN 37 PART 1
SURFACE WATER**

V.

ORDER DENYING CLARIFICATION OF ORDER

The Spring Users filed a *Request for Clarification* of any order granting interim administration in Basin 37, Part I Surface Water, making clear that affected water rights are to be administered according to the director's reports or partial decrees as provided by I.C. § 42-1417. The *Request for Clarification* comes about as a result of issues previously raised in a *Motion to Enforce Order Granting State of Idaho's Motion for Interim Administration* filed by Rangen Inc. Rangen alleged in the *Motion to Enforce* that in response to a delivery call, IDWR was not administering Rangen's water right in basin 36 according to the partial decree. Rangen was joined in its *Motion* by several other parties.

In that case, the Director of IDWR made findings and conclusions that the partial decree for Rangen's water right was issued in error. Rangen alleged that the Director used those findings and conclusions as the basis for failing to deliver its water right. Following a hearing on Rangen's *Motion*, this Court issued an *Order on Motion to Enforce Order Granting State of Idaho's Motion for Interim Administration (Subcase 92-00021 Interim Administration) (Nov. 17,2005)*. In that *Order*, this Court concluded that IDWR cannot collaterally attack elements of water rights through administrative proceedings based on conditions existing prior to the issuance of the partial decree. The Spring Users now seek to have some of the language from that *Order* incorporated into any order issued granting interim administration.

This Court finds a clarifying remark to be unnecessary and potentially misleading. In the *Order on Motion to Enforce* this Court also determined it was not clear from the face of Director's *Order* to what extent, if any, the Director relied on the finding and conclusion that the partial decree had been issued in error as the basis for his decision. The Director's *Order* also found that Rangen's call was futile as applied to two of its water rights. This Court ultimately determined that the Director's *Order* was ambiguous as to that issue and that the Director should have the opportunity to clarify the basis for the decision through the administrative process prior to this Court taking steps to address

**ORDER GRANTING MOTION FOR INTERIM ADMINISTRATION FOR BASIN 37 PART 1
SURFACE WATER**

its order granting interim administration. To the extent the Director arrives at the determination that Rangen's call is futile, irrespective of the finding and conclusion that the partial decree was issued in error, then IDWR was not acting contrary to the *Order Granting Interim Administration* and clarification is unnecessary.

Second, the Director's decision was limited to one particular instance wherein it was alleged the license and partial decree were issued in error and the underlying basis for the decision was not entirely clear. This was not the situation where IDWR was as a matter of course showing a complete lack of regard for the partial decrees in the administrative process. Grievances with how IDWR is carrying out its administrative function can be handled on a case-by-case basis.

Finally, Idaho Code § 42-1417, the statute authorizing interim administration, is clear that water rights are to administered according to the director's reports or superceding partial decrees. However, water rights are also administered according to the prior appropriation doctrine as opposed to strict priority. The prior appropriation doctrine consists of a number of legal principles such as futile call, which affect the administration of water rights. These legal principles become more complex when applied to the conjunctive administration of ground and surface sources. Additionally, after a partial decree has been issued a water right is not insulated from changes resulting from circumstances or conduct such as forfeiture occurring after the issuance of the partial decree. Any order by this Court attempting to clarify how IDWR is to administer water rights could be construed as an order modifying existing law. From this Court's perspective, it is better to handle grievances over administration on a case-by-case basis rather than confusing the process by attempting to define the prior appropriation doctrine in the face of an order. For these reasons, the Spring Users *Request for Clarification* is **Denied**.

Dated December 13, 2005.

/s/ John M. Melanson

JOHN M. MELANSON
Presiding Judge
Snake River Basin Adjudication

**ORDER GRANTING MOTION FOR INTERIM ADMINISTRATION FOR BASIN 37 PART 1
SURFACE WATER**