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a
RECEIVED
JAN 08 2008
DEPARTMENT OF
WATER RESOURCES

**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**
) **SUPPLEMENTAL BRIEFING IN**
) **SUPPORT OF 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 submit this *Response to IGWA’s Supplemental Briefing in Support of Motion to Participate* in the above-captioned subcases. For the reasons set forth below, this Court should deny IGWA’s motion, in part.

INTRODUCTION

On August 29, 2007, during a hearing on IGWA’s *Motion to Participate*, counsel for IGWA orally amended the motion to expressly include its member groundwater districts as movants. Importantly, however, IGWA failed to remove reference to itself in the motion. While Idaho water law authorizes groundwater users to organize themselves into a groundwater district and, in turn, authorizes the groundwater district to represent the groundwater users in adjudications, such as the SRBA, the statutes do not authorize a groundwater district to represent a groundwater user in a proceeding in which the groundwater user is already represented by other legal counsel. To the extent that the members of groundwater districts are already represented by counsel in these proceedings, the amended motion to participate should be denied.

IGWA’s supplemental briefing also asserts that IGWA should be authorized to represent its membership either because (1) it has been joined in the SRBA, or (2) it has “associational standing.” In an August 28, 2007 Order, Special Master Dolan 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 now asserts, however, that its uncontested participation in previous SRBA proceedings somehow constitutes a global “joinder” into the SRBA and allows IGWA to continue to participate as a party in essentially any subcase it chooses. The law does not support this conclusion.

No statutory authority to participate 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 AO1 and the SRBA’s specific statutes under the auspices of associational standing is without merit. Recently, Special Master Dolan ruled against IGWA on this exact same issue. *See Order Denying IGWA’s Motion for Reconsideration* (January 3, 2008) (attached hereto as Attachment A, for the Special Master’s convenience) (the “*Dolan Order*”). IGWA has provided no new arguments to support its claim for participation in these subcases. Accordingly, IGWA’s amended motion should be denied.

ARGUMENT

I. Groundwater Districts may not Represent Water Users Who are Already Represented in the SRBA

Idaho Code section 42-5224(6) authorizes a groundwater district to “represent district members, with respect to their individual water rights, in general water rights adjudications and other legal and administrative proceedings.” The Coalition does not dispute a groundwater district’s authority to represent its membership in the SRBA. However, these statutes do not provide authority, as IGWA asserts, to participate “even where one or more district members participate individually.” *IGWA Supp. Br.* at 2. IGWA provides no legal support for this contention, except for a general citation to section 42-5224. That section has 21 sub-sections and none authorize the groundwater district to provide double representation to a groundwater users in the same proceeding. The Coalition does not oppose participation by the groundwater district in these proceedings *except to the extent that* the membership is already represented by legal counsel in these proceedings. To that extent, the motion should be denied.

II. IGWA “is not a party to the adjudication” and “may not participate in these subcases.”

On November 8, 2007, a hearing was held before Special Master Dolan to address IGWA’s arguments that it had been joined in the SRBA, or, alternatively have met the requirements of associational standing. IGWA concluded that it was therefore entitled to participate in a group of cases involving the identical legal issues presented in these subcases before Special Master Bilyeu. Special Master Dolan denied IGWA’s *Motion for Reconsideration of Order Denying IGWA’s Motion to Participate*:

The IGWA has failed to show that the *Order Denying Motion to Participate* is erroneous. The ***IGWA is not a party to the adjudication or a claimant and hence, may not participate in these subcases.*** [emphasis added] Neither is IGWA entitled to intervene of right or by permissive intervention because it has not asserted ownership of rights to the use of water nor has such ownership been asserted on its behalf. As noted before, the IGWA merely **represents** water right holders. (emphasis in original).

The argument that IGWA “has been joined in the Adjudication on multiple occasions and has been recognized and participated in a multitude of administrative proceedings, SRBA and District Court cases, and the Idaho Supreme Court appeal” is of no consequence. Here, unlike before, the issue of participation is squarely contested and the plain language o AO-1 and I.C. § 42-1401A limit participation in SRBA subcases to parties to the adjudication and claimants.

Dolan Order at 3. For the same reasons, IGWA’s orally amended *Motion to Participate* should be granted in these subcases.

III. As Special Master Dolan Correctly Determined, Prior Participation in Certain Subcases Before the SRBA Court does not Constitute IGWA’s Joinder for the Entire SRBA.

In its briefing regarding IGWA’s participation, IGWA argues that it is authorized to participate in these proceedings. As Special Master Dolan correctly determined, these arguments are legally flawed. IGWA fails to provide any order or other proof that it has been joined. 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.

IGWA’s briefing attempts to blur the lines between intervention/participation and joinder. Indeed, IGWA asserts “IGWA is a party to the SRBA because it has been ‘served or joined’ in the adjudication. IGWA has *participated* in multiple SRBA cases and subcases.” *IGWA Supp. Br.* at 8 (emphasis added). IGWA even goes so far as to argue “That IGWA has *participated* in multiple SRBA cases is prima facie evidence that it has been joined in the

SRBA.” *Id.* at 9 (emphasis added). IGWA’s attempts to blur the vital distinction between participation and joinder are not supported by the law or rules. Indeed, IGWA has never even argued that it can meet the requirements of joinder. Given these distinctions, along with IGWA’s failure to provide any arguments relative to the required showing for joinder and the lack of prior objection, it is clear “how IGWA could participate in numerous SRBA proceedings without being joined in the SRBA.” *Id.* at 9.

IGWA provides a list of subcases in which it has previously participated. This is done, according to IGWA, to “prove” that it has been joined in the SRBA. Aside from the clear legal failings, the facts do not support IGWA’s claim. While IGWA provides this list of subcases, it conveniently fails to recognize that it filed a “*Notice of Intent to Participate*,” or similar pleading, in many, if not all, of the proceedings. Apparently, after these “Notices” were not contested, IGWA was allowed to participate in those subcases. This is not the situation here. “Here, unlike before, the issue of participation is squarely contested and the plain language of AO-1 and I.C. § 42-1401A limit participation in SRBA subcases to parties to the adjudication and claimants.” Attachment A, at 3. IGWA cannot now retroactively convert its participation/intervention motions and notices into a motion for joinder under Rule 19 or 20.

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 fact that it participated in some subcases, without contest, does not grant it authority to now participate in the subcases at issue. The Special Master should deny IGWA’s amended motion to participate.

IV. 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 AOI and Idaho Code section 42-1401A. This same argument was rejected by Special Master Dolan. *Dolan Order*. 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 statutes and 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.¹

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 42-1401A further support this conclusion by limiting participation in water right proceedings to

¹ IGWA had previously relied upon decisions from the SRBA Court and Supreme Court to demonstrate why it should be allowed to participate. In particular, IGWA cited to *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.

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.

Third, 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. 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 argument 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 common 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. Indeed, Special Master Dolan recently followed this line of cases in rejecting IGWA’s associational standing arguments.² Since IGWA has not met the requirements of Idaho Code section 42-1401A and Rule 10(k), its amended motion should be denied.

CONCLUSION

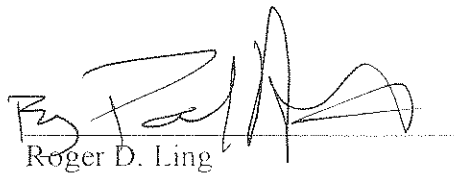
Idaho water law authorizes a groundwater district to represent it members in the SRBA adjudication. The code, however, does not authorize a district to provide double representation to members who are already represented in a proceeding. To the extent that the groundwater districts seek to represent members already participating in these proceedings, the amended motion should be denied.

IGWA cannot demonstrate that it has been joined in the SRBA Court under the Idaho Rules of Civil 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

² Although the “Conclusions” section of the *Dolan Order* does not specifically address the association standing arguments, it is clear that Special Master Dolan was aware of and reviewed IGWA’s arguments. *See Dolan Order* at 2 (reciting IGWA’s arguments, including the associational standing argument). With this recognition, the *Dolan Order* determined that IGWA could not participate in those subcases because it had not complied with the relevant law.

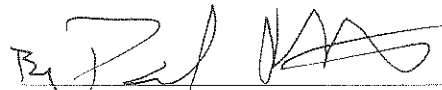
applicable to the SRBA. As recently recognized in the *Dolan Order*, the law clearly requires that any who participate in the SRBA must be either claimants or joined. IGWA cannot make either showing. Accordingly, the Special Master should deny IGWA's amended motion

Dated this 4th day of January, 2008.


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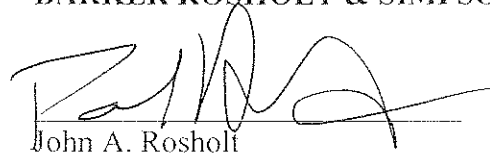
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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of January, 2008, I served a true and correct copy of the foregoing **RESPONSE TO IGWA'S SUPPLEMENTAL BRIEFING IN SUPPORT OF MOTION TO PARTICIPATE** on the person(s) listed below, in the manner indicated:

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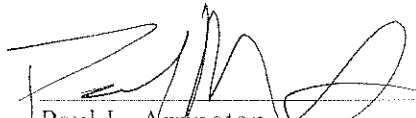
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Paul L. Arrington

ATTACHMENT A

FILED
JAN 3 2008
CLERK OF DISTRICT COURT

DISTRICT COURT-SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
JAN 3 2008	
By <u>[Signature]</u>	Clerk
Deputy Clerk	

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	) Subcases 01-1J, <i>et al.</i>
	) (see list of 51 subcases attached)
Case No. 39576	)
	) ORDER DENYING IGWA'S MOTION
_____	) FOR RECONSIDERATION

Background

Order Denying Motion to Participate

On August 28, 2007, the Special Master entered an *Order Denying Motion to Participate* denying the Idaho Ground Water Appropriators participation in the above subcases:

IGWA has not asserted ownership of rights to the use of water nor has such ownership been asserted on its behalf – it **represents** water right holders. Hence, IGWA is not and cannot be a party to the adjudication and is not entitled to intervene of right or by permissive intervention in the above subcases.

Motion for Reconsideration

The IGWA filed its *Motion for Reconsideration of Order Denying IGWA's Motion to Participate* on September 6, 2007, because "(a) IGWA was previously served or joined in the SRBA, and (b) IGWA has standing under Idaho law to represent its members who indisputably qualify as a proper party to the adjudication." It lodged its *Brief in Support* on September 20, 2007, arguing:

Thus, IGWA clearly has standing to participate in the SRBA because it is a private entity that has been joined in the Adjudication on multiple occasions and has been recognized and participated in a multitude of administrative proceedings, SRBA¹ and District Court cases, and the

¹ Subcase 03-10022 (objector) and subcase 92-00021 (objector).

Idaho Supreme Court appeals,² served and joined as a party [footnotes added].

IGWA attached to its *Motion* a copy of its *Amended and Restated Articles of Incorporation* spelling out its primary purpose: “To represent the interests of Idaho’s ground water users and promote the efficient use and economic development of water resources.” It then argued that *Glengary-Gamlin Protective Association, Inc. v. Bonner County Board of Commissioners*, 106 Idaho 84, 87 (Ct. App. 1983), “firmly settled the question of whether an organization has standing to represent its members in Idaho courts.”

The IGWA’s final argument was that “the SRBA District Court should not eliminate associational standing in the SRBA when, as in this case, 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 interests of its members.”

Response to Motion

The “Surface Water Coalition”³ filed its *Response to IGWA’s Motion for Reconsideration of Order Denying IGWA’s Motion to Participate* on November 1, 2007. It argued that “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.” Further, it argued that despite the *Glengary-Gamlin* test for associational standing, SRBA procedural rules and Idaho statute limit participation in water right proceedings to **claimants** and **those who have been joined**: “The fact that the claims at issue in these proceedings may impact certain water claimants is of no relevance in light of the plain language of [*SRBA Administrative Order 1, Rules of Procedure*] Rule 10(k) and Idaho Code 42-1401A.”

Finally, the Coalition pointed out that “certain of its [IGWA’s] claimant members are already being represented or are already participating in similar subcases in Basins

² *Nez Perce Tribe v. State of Idaho*, 137 Idaho 654 (2002); *Fish and Wildlife Service v. State of Idaho*, 135 Idaho 655 (2001); and *A&B Irrigation Dist. v. Idaho Conservation League*, 131 Idaho 411 (1998).

³ 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.

21, 22, and 27.” Besides, “the SRBA Court has already decided that an association does not have standing to participate in a subcase, merely because it represents claimants [citing SRBA Presiding Judge Roger S. Burdick’s July 29, 2002 *Order on Motion to Participate / Intervene*, consolidated subcase no. 75-13316, Wild and Scenic Rivers Claims].”

Hearing

A hearing on IGWA’s *Motion for Reconsideration* was held by telephone on November 8, 2007. Candice M. McHugh appeared for IGWA; Travis L. Thompson and W. Kent Fletcher appeared for various entities collectively called the Surface Water Coalition; R. Lee Leininger appeared for the United States of America, Department of Interior, Bureau of Reclamation and Bureau of Land Management, along with E. Gail McGarry and Fredric W. Price; Gregory W. Moeller appeared for New Lavaside Ditch Company, Ltd., *et al.*; and Garrick L. Baxter appeared for IDWR.

Conclusions

The IGWA has failed to show that the *Order Denying Motion to Participate* is erroneous. The IGWA is not a party to the adjudication or a claimant and hence, may not participate in these subcases. Neither is the IGWA entitled to intervene of right or by permissive intervention because it has not asserted ownership of rights to the use of water nor has such ownership been asserted on its behalf. As noted before, the IGWA merely **represents** water right holders.

The argument that the IGWA “has been joined in the Adjudication on multiple occasions and has been recognized and participated in a multitude of administrative proceedings, SRBA and District Court cases, and the Idaho Supreme Court appeals” is of no consequence. Here, unlike before, the issue of participation is squarely contested and the plain language of *AO-1* and I.C. § 42-1401A limit participation in SRBA subcases to parties to the adjudication and claimants.

Order

THEREFORE, IT IS ORDERED that the IGWA's *Motion for Reconsideration of Order Denying IGWA's Motion to Participate* in subcases 01-1J, *et al.*, is **denied**.

DATED January 3, 2008

A handwritten signature in black ink, reading "Terrence A. Dolan". The signature is written in a cursive style with a horizontal line underneath the name.

TERRENCE A. DOLAN
Special Master
Snake River Basin Adjudication

EXHIBIT A

Subcase Nos:

01-00001J 01-10477
01-00002A
01-00047E
01-00048
01-00052A
01-00052B
01-00053A
01-00092A
01-00092B
01-00116BB
01-00131A
01-00132A
01-00133A
01-00141
01-00146A
01-00146B
01-00147
01-00148
01-00157A
01-00157B
01-00158B
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01-10091
01-10092
01-10471
01-10472
01-10474
01-10475
01-10476

(Subcase list: MTNPARTCI)
1/03/08

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER DENYING IGWA'S MOTION FOR RECONSIDERATION was mailed on January 03, 2008, with sufficient first-class postage to the following:

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NEW LAVASIDE DITCH CO LTD
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PEOPLES CANAL & IRRIGATION CO
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