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DEPARTMENT OF
WATER RESOURCES

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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**

In Re SRBA	)	
	)	
	)	Subcase Nos. 63-127B, 63-128B, 63-129B,
	)	63-130B, 63-131B and 63-178B
	)	
Case 39576	)	GREG OBENDORF AND/OR
	)	THE ESTATE OF TINA IEST'S RESPONSE
	)	TO JOINT MOTION FOR APPROVAL OF
	)	SEASON OF USE
	)	

COME NOW Objector/Respondent Greg Obendorf and/or the Estate of Tina Iest, by and through their counsel of record, Dana L. Hofstetter of Hofstetter Law Office, LLC, and hereby respond to the Joint Motion for Approval of Season of Use ("Joint Motion"). This Response is supported by the contemporaneously filed Affidavit of Greg Obendorf and the record.

I. BACKGROUND.

Greg Obendorf is a claimant of water rights in the SRBA who farms both his own property and leased property in Basin 63. Affidavit of Greg Obendorf. Mr. Obendorf owns

and farms property in the vicinity of the places of use for the subject water rights and also leases the “Tina Iest” property associated with Water Right No. 63-178C which is served by the same Andrews Ditch as the subject water rights. *Id.* The property which Mr. Obendorf farms also includes property irrigated with Boise Project water rights. *Id.*

Mr. Obendorf filed timely Objections to the subject water rights’ quantity element and timely filed Responses, along with the Boise Project Board of Control and the U.S. Bureau of Reclamation to the Claimant’s Objections to the purpose of use and period of use elements.¹ Tina Iest who is listed as the holder of Water Right No. 63-178C passed away on December 14, 2008. *Id.* Her Estate intends to file Motions to join in Mr. Obendorf’s Objections/Responses in the subject Subcases and a Motion to File Late Objection in SRBA Subcase No. 63-178C very soon. Because of the Estate’s interest in the Joint Motion, it is joining Mr. Obendorf in this Response to the Joint Motion as an SRBA party pending its efforts to more formally participate in these particular subcases.

Without the involvement of Mr. Obendorf’s counsel, the other parties to the subject Subcases negotiated and executed the Joint Motion. No effort was made to approach Mr. Obendorf’s counsel regarding participation in these negotiations or for review and consideration of the terms of the Joint Motion. Mr. Obendorf’s counsel learned of the following proposed season of use remark revisions only after receipt of the Joint Motion:

Diversion ~~for~~ of irrigation under this water right prior to April 1 and after October 31 shall occur only when the natural flow in the Boise River below the Star Bridge in Township 04 North, Range 01 West, Section 18, NE1/4 of the SE1/4 of the SE1/4, Boise Meridian (approximate river mile 33.9) is sufficient for water to be available for diversion at the point of diversion described above, provided that any such use of this water right prior to

¹ Obendorf additionally responded to the Claimant’s objections to the place of use element.

April 1 and after October 31 shall be subordinated to water rights for storage in Lucky Peak Reservoir, Lake Lowell, Arrowrock Reservoir, and/or Anderson Ranch Reservoir, as decreed in SRBA Case No. 39576 not interfere with storage of water under water rights for Lake Lowell, Lucky Peak, Arrowrock, or Anderson Ranch Reservoirs.

The Joint Motion provides no substantive explanation as to why these proposed language changes are appropriate but simply asks this Court to approve the proposed revisions to the season of use language simply “in the interest of judicial economy.” Yet, approval of these revisions for the subject water rights would have dramatic implications and would affect, not only Boise Project water rights, but the numerous other Basin 63 water rights, like Iest Water Right No. 63-178C, that would continue to have the original standard period of use remark originally recommended by IDWR.

II. STANDARD OF REVIEW.

A general water right adjudication like the SRBA is “an action ... for the judicial determination of the extent and priority of the rights of all persons to use water from any water system ... that is conclusive as to the nature of all rights to the use of water in the adjudicated water system.” *Idaho Code § 42-1401A(5)*. Since the SRBA essentially is an *in rem* proceeding, it is in certain respects akin to a class action lawsuit where a court has an obligation to approve settlements that may affect third parties. *See Rule 23(e), I.R.C.P.*

The SRBA Court, even for unobjected water rights, has the inherent obligation to ensure that the water right decrees issued comply with the law:

The provision in the 1994 statutes that the district court shall

decree the unobjected to portions of the Director's report as those provisions are reported removes the authority of the courts to apply the facts to the law and render a conclusion. The removal of this authority contradicts the rules established by this Court for entry of default judgment and divests the court of the power to correct even an egregious error that might eliminate or impair constitutionally recognized water rights. As this Court observed in an early case involving the adjudication of water rights, "the plaintiff, after taking default, must apply to the court for the relief demanded in the complaint; in other words, must establish by proof the material allegations of his complaint." *Joyce, 23 Idaho at 304, 130 P. at 796.*

The procedure to be followed by the district court where no objection has been raised is established by the rules for entering a default judgment in civil actions, set out in I.R.C.P. 55. In addition to providing for the entry of judgment by default, that Rule retains in the district court the inherent power to apply law to facts and render a decision. That Rule states: 'If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper. I.R.C.P. 55(b)(2).'

In Re SRBA, 128 Idaho 246, 258, 912 P.2d 614, 626 (1995).

In the SRBA, the water right claimant has the duty to establish the *prima facie* case for the Court:

Each claimant of a water right established under federal law has the ultimate burden of persuasion for each element of a water right. Since no independent review of the notice of claim has occurred as provided for water rights acquired under state law in a director's report, a claimant of a water right established under federal law has the burden of going forward with the evidence to establish a *prima facie* case for the water right established under federal law. All such proceedings shall be governed by the Idaho rules of civil procedure and Idaho rules of evidence.

Idaho Code § 42-1411A(12). See also Idaho Code § 42-1411A(14). However, here, the Claimant has provided no substantive basis, legal or factual, in support of the proposed revised season of use language. For this reason alone, the Joint Motion cannot be granted.

It is well established that in the SRBA, the appropriate procedural mechanism for a party to involve itself in a subcase in support of a Director's Report Recommendation is by the filing of a Response:

In those cases where they disagree with the Director's Report, they can file an objection. I.C. § 42-1412(1). In contested subcases where NSGWD agrees with the Director's Report ..., they can file a Response (Standard Form 2) which, in essence, would state: "We agree with the Director's Report." I.C. § 42-1412(2). By doing this, NSGWD, with minimal effort, would become a party to the subcase, and an SF5 could not be entered into without their involvement....

Memorandum Decision and Order on Challenge (SRBA Subcase Nos. 36-00061, 36-00062 and 36-00063 (September 27, 1999) at 16. See also, Order on Challenge of "Facility Volume" Issue and "Additional Evidence" Issue, SRBA Subcase Nos. 36-2708 et al (December 29, 1999) at 24. Mr. Obendorf has filed timely Responses to the Claimant's purpose and period of use element Objections and has a right to be fully heard in connection with the matters raised by the Joint Motion.

III. THE WORD CHANGE "FOR" TO "OF" AT THE BEGINNING OF THE PROPOSED REMARK, WHETHER INTENTIONAL OR OTHERWISE, COULD ALTER THE MEANING OF THE REMARK AND SHOULD BE REJECTED.

The proposed remark changes the second word "for" to "of." The proposed remark now refers to "diversion of irrigation," rather than "diversion for irrigation." Diversion "of irrigation" water means something very different than the "diversion for irrigation." Again without any explanation, the reason for this revision, if any, is unclear. Nevertheless, this revision appears unwarranted as it would allow the remark to apply to other uses of water besides just irrigation.

Under the proposed formulation, the diversion "of irrigation water" (even someone else's irrigation water) could occur during the extended irrigation season for other uses besides irrigation. This area has numerous water rights for non-irrigation season wildlife uses. Potentially, this remark could be interpreted to allow a portion of this right during the extended irrigation season to be diverted for another use (or transferred to another use), such as wildlife purposes. However, other parties in the area, such as the Estate of Tina Iest and Greg Obendorf, with water rights having the standard "diversion for irrigation" language potentially would not be able to use water during the extended irrigation season for another purpose besides irrigation.

To avoid the potential preferential broadening of uses allowed under the subject water rights (beyond just irrigation) during the extended irrigation season, the proposed change of the second word in the remark, "for," should be denied.

IV. THE WORDING CHANGE FROM “SUBORDINATED TO WATER RIGHTS FOR STORAGE” TO “NOT INTERFERE WITH STORAGE OF WATER” DRAMATICALLY ENLARGES THE ALLOWABLE SEASON OF USE FOR THE SUBJECT WATER RIGHTS TO THE DETRIMENT OF BOISE PROJECT RIGHTS AND ALSO WOULD BE AN UNFAIR ADVANTAGE *VIS A VIS* OTHER PRIVATELY HELD BOISE RIVER RIGHTS .

Additionally, the proposed remark deletes the language subordinating the extended irrigation season use to Boise Project storage rights in favor of language limited to “not interfere with the storage of water” under Boise Project water rights. Again, this proposed revision unfairly gives the subject water rights an unfair advantage under other private water right holders and places Boise Project water rights at an unfair disadvantage.

The original formulation would subordinate the subject rights during the extended irrigation season to water rights like 63-3618, a water right for irrigation storage and streamflow maintenance storage in Lucky Peak. This water right, having year around uses and a priority of 1963, could be dramatically affected by the wording change proposed. Under the original language, the subject water rights would be subordinated to this Lucky Peak right during the extended irrigation season which means that the subject rights could only be diverted during the extended irrigation season if quantities of water above the storage requirements and the streamflow maintenance rights were available. Under the new proposed language, the Claimant would be able to divert water under the subject water rights’ priorities in the 1800’s from the River during the extended irrigation season even if such diversions would reduce flows below the River’s authorized streamflow maintenance quantities.

Extended irrigation season diversions under the subject rights, far down river from the reservoirs themselves, physically could not “interfere with the storage of water” in Lucky Peak and, therefore, would be allowable under the proposed new language as long as any water was

available at the point of diversion. Under the original subordination language, however, such diversions would be treated as junior to the Lucky Peak storage rights and, therefore, would not be allowed when there were insufficient quantities of water to meet the Lucky Peak streamflow maintenance uses.

Further, the proposed language would place the Claimant at an unfair advantage *vis a vis* other holders of Boise River rights, including the Estate of Tina Iest which holds Water Right No. 63-178C, diverted from the same ditch as the subject water rights. Under the proposed language, the Claimant would be able to divert water during the extended irrigation season when users like the Estate of Tina Iest, may not be able to divert. As described above, the proposed language would allow the Claimant of the subject rights to divert water even when this would interfere with streamflow maintenance quantities. However, other parties having the standard original subordination language in their water right decrees would not be able to divert when the stream flow maintenance quantities were not being met. Thus, the proposed formulation could result in an unfair advantage for the Claimant *vis a vis* other water users in the area.

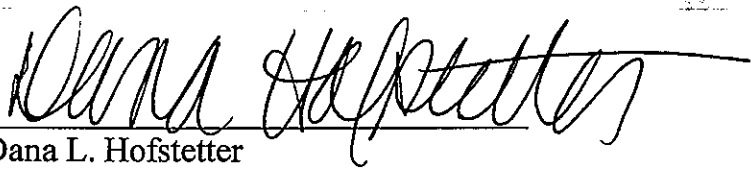
Further, with the different language, the watermaster could be put in the difficult position of having to interpret the different language and deliver the water on a preferential basis to the holder of the subject water rights. Yet, the Claimant provides no legal or factual support in the Joint Motion for the proposed language or why preferential treatment should be afforded in this instance.

V. CONCLUSION

For the foregoing reasons, Greg Obendorf and the Estate of Tina Iest respectfully request that the Special Master deny the Joint Motion and maintain the original language proposed by IDWR.

DATED this 3rd day of February, 2009.

HOFSTETTER LAW OFFICE, LLC


Dana L. Hofstetter

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of February, 2009, I caused to be served a copy of the foregoing document on the following persons by the pre-paid method(s) below:

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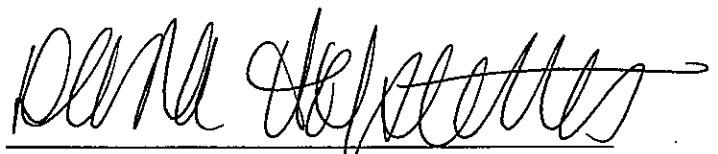
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