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DEPARTMENT OF
WATER RESOURCES

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Indian Creek Ranch Owners Association, Inc.

**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. 37-296A, 37-717, 37-1216,
	)	37-7854, 37-296B, 37-19740 and 37-21412
	)	
Case 39576	)	INDIAN CREEK RANCH OWNERS'
	)	ASSOCIATION, INC.'S RESPONSE
	)	IN OPPOSITION TO
	)	CITY OF HAILEY'S MOTION TO
	)	CONSOLIDATE
	)	
	)	

The Indian Creek Ranch Owners Association, Inc. ("ICROA") by and through its above-captioned counsel of record and pursuant to SRBA, Administrative Order No. 1, § 11 and Rule 42 of the Idaho Rules of Civil Procedure, hereby submits this Response in Opposition to City of Hailey's Motion to Consolidate City of Hailey SRBA Subcase Nos. 37-296A, 37-717, 37-1216 and 37-7854 with ICROA Subcase Nos. 37-296B, 37-21412 and 37-19740. This Response is supported by the *Affidavit of Dana L. Hofstetter Re: Consolidation* filed contemporaneously herewith and other matters of record.

I. Statement of Facts

SRBA Claim Nos. 37-296A, 37-717, 37-1216 and 37-7854 are the City of Hailey's municipal and power water right claims to Indian Springs. ICROA timely filed Objections in these four Subcases in November 2007. These Objections were based largely on ICROA's belief that the respective Director's Report Recommendations for these rights were not consistent with the terms of the Frost Decree and the 1983 Agreement between ICROA and the City of Hailey.

In 1988, ICROA timely filed its SRBA Claim Nos. 37-296B and 37-19740 in principal part for irrigation from Indian Creek. The Idaho Department of Water Resources ("IDWR") later created Water Right No. 37-21412 to address a claimed portion of 37-296B. ICROA timely filed Objections to the SRBA Director's Report Recommendations for 37-296B, 37-21412 and 37-19740 on November 13, 2007. The City of Hailey thus far has never sought to file Objections or Responses in these ICROA Subcases. Despite this history and the extended period of time for which SRBA Claim Nos. 37-296B, 37-21412 and 37-19740 have been pending in the SRBA, the City of Hailey is now asserting for the first time that these three ICROA Subcases should be consolidated with the City's Subcase Nos. 37-296A, 37-717, 37-1216, and 37-7854.

The City's stated basis for requesting consolidation is that ICROA's Claims and the City's Claims derive from the same "parent" rights. However, among these seven Claims, only 37-296A, 37-296B and 37-21412 derive from the 37-296 right originally decreed in the Frost Decree. The other rights involved in the Motion for Consolidation do not share the same "parents." Further, it should be noted that the City's portion of 37-296A is well defined as up to the first 131 miner's inches of the waters of Indian Creek during the irrigation season with the remainder of 37-296 belonging to ICROA, under Water Right No. 37-296B. *Affidavit of Dana*

L. Hofstetter Re: Consolidation. Thus, this is not the typical “parent” right situation where there is a question as to the relative apportionment of the “parent” right.

On December 14, 2009, the SRBA Court granted ICROA’s Motion to Amend Claims in Subcase Nos. 37-296B, 37-19740 and 37-21412, requiring the filing of the Amended SRBA Claims by February 19, 2010. On February 19, 2010, these three Amended SRBA Claims were filed with the Idaho Department of Water Resources (“IDWR”) and Amended Director’s Report Recommendations currently are pending for all three. *Affidavit of Dana L. Hofstetter Re: Consolidation.* Meanwhile, the City of Hailey Subcases are approaching the close of discovery in August 2010, the deadline for filing of summary judgment motions is September 3, 2010 and trial is scheduled for February 2011. The current trial scheduling is actually the second trial scheduling in the City of Hailey Subcases necessitated by the City of Hailey’s extended delays in responding to discovery requests. Also, it should be noted that the Court previously set a January 4, 2010 deadline for Motions to Consolidate in its original September 24, 2009 Trial Scheduling Order.

II. Legal Argument

A. Rule 42, I.R.C.P. and A.O. 1, § 11 do not provide for consolidation of the subject subcases as there is no identified common issue of law or fact.

SRBA Administrative Order 1, § 11 addresses the issue of subcase consolidation:

Any matter at issue in any proceeding in the adjudication, including portions of or entire subcases, may be consolidated with or separated from any other matter at issue in the adjudication. **Any party to a subcase may move for consolidation or separation of claims or issues.** The Presiding Judge or Special Master may order consolidation or separation on the basis of such motion or on their own. I.R.C.P. 42....

NOTE: A motion to consolidate subcases is appropriate in situations where **common issues of law or fact** present themselves in more than one subcase and resolution of those issues can be most expeditiously and effectively

achieved through presentation to the Presiding Judge or a Special Master in consolidated hearings.

Emphases added.

Similarly, Rule 42(a) of the Idaho Rules of Civil Procedure provides for consolidation of actions when common issues of law or fact are presented:

When actions involving a **common question of law or fact** are pending before the court, it may order a joint hearing or trial of any or all the matters at issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

Emphasis added.

The City of Hailey has not identified any common question of law or fact implicated in both the City of Hailey and ICROA Subcases. As mentioned above, the apparent basis for the City's Motion to Consolidate is a shared parent right, 37-296, from the Frost Decree; however, because of the severance of 131 miner's inches of that right and conveyance of that portion to the City's predecessors in interest, there is no apparent question of law or fact as to the apportionment of parent right 37-296 between the City and ICROA. *Affidavit of Dana L. Hofstetter Re: Consolidation.* Hence, independent portions of Water Right No. 37-296 are involved in the City's and ICROA's Subcases, and there does not appear to be any "common question of law or fact" involved in these currently separate proceedings.

The City of Hailey cites to former SRBA Judge Wood's November 23, 1999, decision in SRBA Subcase Nos. 36-00003A *et al.* as supporting consolidation here. However, in those Subcases, unlike the Subcases here, a total in excess of the previously decreed amount of the parent right had been claimed by a number of different parties and the apportionment of the parent right among the different subsequent owners was undetermined:

Claimants assert that because all claims to 03 water are not before the Court, it is now impossible to determine each Claimant's percentage share of the 03 right,

and therefore they should be allowed to prosecute their claims without regard to these partial decrees *Brief for Respondent* at 20. Implicit in Claimant's assertion is that some of the water decreed to Buckeye Farms and/or Cleve Lloyd may rightfully belong to some or all of the other Claimants. However, unlike the case of *Harvey v. Deseret Sheep Co.*, 40 Idaho 450, 234 P. 146 (1925), Claimants have not shown (or even attempted to show) facts which support the conclusion that water belonging to Claimants has been decreed to Buckeye Farms and/or Cleve Lloyd. Again, this cannot be determined until all of the deeds in the chain of title tracing back to the New Int'l Decree have been compared....

... Claimants are not required to object to competing claims to the 03 right, and failure to do so does not constitute a waiver of the right of each Claimant to object to IDWR's quantity recommendation for their own claim. The State has not directed the Court to any authority that dictates otherwise. To the contrary, competing claimants to a property right in Idaho are required to demonstrate their ownership of the property right on the strength of their own title, and not on the weakness of the competitor's title. *Rice v. Hill City Stock Yards Co.*, 121 Idaho 576, 582, 826 P.2d 1288 (1991), rehearing denied March 27, 1992, citing *Owen v. Boydston*, 102 Idaho 31, 624 P.2d 413 (1981); *Pincock v. Pocatello Gold and Copper Min. Co., Inc.*, 100 Idaho 325, 597 P.2d 211 (1979); *Nelson v. Enders*, 83 Idaho 285, 353 P.2d 401 (1960).

Memorandum Decision and Order on Challenge, SRBA Subcase Nos. 36-00003A et al.

(November 23, 1999) at 34-36 (emphasis added). Thus, this decision does not provide a basis for consolidation where, as here, there is no issue as to the apportionment of a "parent" right between two "offspring" and the City is expected to proceed on the strength of its own title.

It is further noted that SRBA Administrative Order 1, § 11 suggests that a party can move for consolidation of issues or of entire Subcases only when they are a common party in the subcases they seek to consolidate: "Any party to a subcase may move for consolidation of claims or issues." Such an approach would make sense since without having party status in both matters, there may be limitations on participation in the consolidated proceedings. Thus, since the City of Hailey is not currently a party in any of

the ICROA Subcases, there may be an issue as to whether the City is in a position to move for consolidation of the ICROA Subcases with the City's.

B. Consolidation of the City of Hailey and ICROA Subcases would result in unnecessary delay, judicial inefficiency and prejudice to the parties.

Consolidation of issues or cases is intended to result in judicial efficiencies where there are common issues and parties:

Whatever the merits of the trial court's denial of the Harrison's motion, our review of this issue is controlled by the fact that the Harrisons *did* file another action on July 28, 1987, in Cassia County which named the remaining defendants. Since we are remanding the case, the district court should consider consolidating these separate actions pursuant to I.R.C.P. 42(a)....

Whenever the court is of the opinion that consolidation will expedite matters and will minimize expense upon the public and the parties, an order of consolidation should be made. *Branom v. Smith Frozen Foods of Idaho, Inc.*, 83 Idaho 502, 509, 365 P.2d 958, 965 (1961). It is the policy of the law to limit the number of trials as far as possible. *Nelson v. Inland Motor Freight Co.*, 60 Idaho 443, 92 P.2d 790 (1939). When claims arise out of the same accident and one trial is sufficient to determine all the facts, separate trials would be a waste of time and expense. *Id.*, 60 Idaho at 449, 92 P.2d at 796.

In this case, the two actions filed in Cassia County are prime candidates for consolidation. There is an identity of law and facts between the Harrisons, the partners, and the partnership. A fundamental axiom of partnership law provides that all partners are liable jointly and severally and the partnership is liable as an entity, for the wrongful act or omission of any partner acting in the ordinary course of business. *See*, I.C. §§ 53-313, -315 (1988). Here all the relevant facts arose out of the same accident, and consolidation should be ordered for this reason as well as for hearing any cross or counter-claims that may arise among the parties.

Harrison v. Taylor, 115 Idaho 588, 597-98, 768 P.2d 1321, 1330-31 (1989).

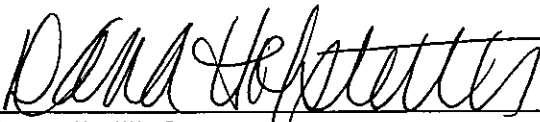
Here, the City of Hailey has identified no common issue that is actually in dispute in both the City and ICROA Subcases that militates in favor of consolidation. On the other hand, consolidation, at this stage is likely to greatly delay the City Subcase proceedings. Rather than

judicial efficiency, actually judicial inefficiency is more likely to result from the proposed consolidation. As indicated above, amended claims have been filed in the ICROA Subcases and Amended Director's Reports have not yet been filed for those Amended Claims. At the present time, it is not clear when those Amended Director's Reports are likely to be submitted to the Court. In any event, consolidation of the City of Hailey Subcases, which are currently scheduled for trial in February 2011, with the ICROA Subcases, which await Amended Director's Report Recommendations, would result in significant and unnecessary delay for the City of Hailey Subcase proceedings.

III. Conclusion

For the foregoing reasons, the City's Motion to Consolidate should be denied.

DATED this 1st day of July, 2010.


Dana L. Hofstetter
Attorney for ICROA

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a copy of the foregoing document (including any attachments) this 1st day of July, 2010, by the pre-paid method(s) indicated below to:

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