

W. F. RINGERT
D. V. STEENSON
RINGERT CLARK CHARTERED
455 S. Third St., P.O. Box 2773
Boise, Idaho 83701-2773
Telephone: (208) 342-4591

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Attorneys for Nampa & Meridian Irrigation District,
Grindstone Butte Mutual Canal Company, Rim View Trout
Company and others

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

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In Re the General Adjudication)
of Rights to the Use of Water)
from the Snake River Basin Water)
System)

The State of Idaho, ex rel. R.)
Keith Higginson in his official)
capacity as Director of the Idaho)
Department of Water Resources,)

Petitioner,)

-vs-)

The United States; the State of)
Idaho; and all claimants to the)
use of water from the Snake River)
Basin Water System,)

Respondents.)

Case No. 39576
Subcase No. A36-00134A
Subcase No. A36-00135B
Basin-Wide Case
No. 91-00002

OPENING BRIEF OF RIM
VIEW TROUT COMPANY
AND OTHERS ON BASIN-
WIDE ISSUE NO. 2

91-00002 -0001/
93-10-0097

DESCRIPTIVE SUMMARY

This document is the opening brief of Rim View Trout Company
and other claimants represented in this action by the law firm

Ringert Clark Chartered (Rim View) on Basin-Wide Issue No. 2, the role of the Director and the Idaho Department of Water Resources (collectively, IDWR) in the Snake River Basin Adjudication (SRBA).

1. DISCUSSION

The SRBA is a creature of statute, and the role of IDWR should be determined by an examination of the applicable provisions of Chapter 14, Title 43, Idaho Code.

Although the Director of IDWR is a party to the SRBA (I.C. § 42-1401A(7)), he is not, in this unique lawsuit, a party in the traditional sense, because he has no interest in any of the water rights that are the subject matter of the SRBA. Therefore, the Director, having no interest in any of the water rights, cannot be the real party in interest with respect to any water right involved in the SRBA. See Carrington v. Crandall, 63 Idaho 651, 124 P.2d 914 (1942). Thus, even though the Director's Report constitutes one of the pleadings (I.C. § 42-1412(5)), and the District Court is required to provide the Director, along with other parties, notice of the pretrial conference, we submit that IDWR's role is that of preliminary fact finder and provider of information and data for the benefit of the real parties in interest.

The stated purposes of the SRBA include the providing of "a more efficient method for adjudications," and the assurance "that state laws and procedures provide a fair and impartial forum for

the adjudication of the rights of all claimants." I.C. § 42-1401(2) and (3). To the extent water policy has not been established by the Constitution, the State Water Plan or existing statutes and case law, it is the responsibility of the people, through constitutional amendments, the Idaho Water Resource Board, through amendments (with legislative approval) to the State Water Plan, the Legislature, by the enactment of new statutes, and the courts, through the judicial process when necessary, to establish or modify the policy of state water law. This precept, coupled with the goal of impartiality expressed in I.C. § 42-1401(3) precludes IDWR from assuming an advocate's role in the SRBA for the purpose of using the SRBA as a vehicle to establish one policy or another in state water law.

And, there certainly is no basis for IDWR to assume an advocate's role with respect to the factual issues involved in the adjudication of any one of the thousands of water rights involved in the SRBA.

IDWR's role cannot be broadened by the inclusion of the Director's Report as one of the pleadings in the SRBA. The reality of this situation is that the state legislature has forced all water users in the Snake River Basin into a compulsory lawsuit in which the failure to file a notice of claim "will result in a court determination that no water right exists for the use of water for which the required notice of claim was not filed." I.C. § 42-1408A(1)(c). The examination that IDWR is

required to make under I.C. § 42-1410(1) is for the purpose of evaluating "the extent and nature of each water right for which a notice of claim has been filed." Idaho Code § 42-1410(1) (emphasis added). Even though the Director's Report is designated as a pleading, it is not the sort of pleading that contains the allegations of one party or the other which would give rise to factual issues. It is more in the nature of an impartial evaluation of the facts asserted by the claimant in support of his water right.

The Director "may conduct any fact-finding hearing necessary for a full and adequate disclosure of the facts." Id. (emphasis added).

The Director's next assignment is to prepare and file with the Court a report on the water system, in which he is to "determine the following elements with respect to all water rights acquired under state law:

- (a) the name and address of the claimant;
- (b) the source of water;
- (c) the quantity of water used in cubic feet per second or the quantity of water stored in acre-feet per year;
- (d) the date of priority;
- (e) the legal description of the point(s) of diversion; if the claim is for an instream flow, then a legal description of the beginning and ending points of the claimed instream flow;
- (f) the purpose of use;

(g) the period of the year when water is used for such purposes;

(h) a legal description of the place of use; if one (1) of the purposes of use is irrigation, then the number of irrigated acres within each forty (40) acre subdivision, except as provided in section 42-219, Idaho Code;

(i) the annual volume of consumptive use; and

(j) such other matters as are necessary to define the right.

Idaho Code § 42-1411(2)(a) through (j).

All of the elements identified in subsections a through i are factual matters, and the rules of statutory construction require that "such other matters as are necessary to define the right" be limited to factual matters and not legal principles.

The statute does not authorize the Director, in his Report, to impose conditions upon the exercise of any water right he is investigating in the SRBA. In this respect, there is an obvious and extremely important distinction between the administrative process for issuance of permits to appropriate water and thus establish a water right, and the determination of existing water rights which constitute vested interests in real property and are entitled to full due process protection. Constitutional issues aside, the Legislature obviously has some authority to prescribe rules for the appropriation of water, and it has done so in Chapters 2 and 15 in Title 42, Idaho Code. However, it is plain and clear that nothing in Chapter 14 of Title 42 authorizes IDWR to impose conditions upon the water rights that are subjected to

the adjudication process in the SRBA.

It also plain and clear that the Director's Report is not the place for affirmative defenses to be raised against any water right claimed in the SRBA. Facts supporting abandonment or forfeiture might appear in the Director's Report, but a recommendation of a finding of abandonment or forfeiture is not one of the elements included in I.C. § 42-1411(2). We submit that since the SRBA is an adversary proceeding among all claimants, it is the responsibility of other claimants to raise affirmative defenses against any notice of claim for which the Director's Report includes facts that might establish an abandonment or a forfeiture, just as it would be in a two party adjudication action. It is noteworthy that this statute does not require IDWR to make recommendations in the Director's Report.

The requirement in I.C. § 42-1412(2) that the Director file "a response to any objection to part I of the report within the time specified in the notice of filing the report" does not expand the role of IDWR beyond that of preliminary fact finder and supplier of data. One of the goals of the major overhaul of the adjudication statutes in 1986 was to provide a more efficient method for adjudications. I.C. § 42-1401(2). The method selected by the Legislature to achieve that goal was to expedite the presentation of facts by establishing for IDWR a sort of special master's function, and I.C. § 42-1412(2) does nothing more than require the Director to furnish the facts determined by

his investigation, as those facts pertain to the factual issues raised by an objection.

Finally, since the operations of IDWR are funded in large measure by the filing fees paid by claimants in the adjudication, it would border on a denial of due process for IDWR to advocate the position of one claimant against that of another, thus using the latter's filing fees to finance the opposition against his own claim.

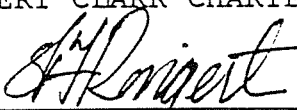
2. CONCLUSION

After the commencement of the SRBA, IDWR's role is that of preliminary fact finder, on essentially an ex parte basis, and supplier of data for use by the claimants of water rights. We recognize that IDWR has numerous additional duties, including those in the preliminary stages of the adjudication which, in large measure, have been completed, and in aspects of administration of water resources outside, or collateral to, the SRBA. However, we believe the stated conclusion addresses the central theme of Basin-Wide Issue No. 2.

Respectfully submitted this 25th day of October, 1993.

RINGERT CLARK CHARTERED

By


W. F. Ringert

CERTIFICATE OF SERVICE

I hereby certify that service of the within and foregoing Opening Brief of Rim View Trout Company and Others on Basin-Wide Issue No. 2, was made this 25th day of October, 1993, by mailing a copy thereof, postage prepaid, to each of the following:

Clive Strong
Chief, Natural Resources
Division
Office of the Attorney General
State of Idaho
P. O. Box 44449
Boise, Idaho 83711-4449

U.S. Department of Justice
Environment and Natural
Resources Division
550 West Fort Street, Box 33
Boise, Idaho 83724

Roger D. Ling
Ling, Nielsen & Robinson
615 H Street
P. O. Box 396
Rupert, ID 83350

Patrick Brown
John C. Hepworth
Hepworth Nungester & Lezamiz
P. O. Box 389
Twin Falls, ID 83303-0389

Peter C. Monson, Attorney
Indian Resources Section
Environment and Natural
Resources Division
U.S. Department of Justice
999 18th Street,
Suite 945 North Tower
Denver, Colorado 80202

Scott Campbell
Davis Wright Tremaine
702 W. Idaho St., Suite 700
Boise, ID 83702

Blair J. Grover
Grover Law Office, Chtd.
P. O. Box 36
Rigby, ID 83442-0036

Ray W. Rigby
Rigby, Thatcher, Andrus,
Rigby & Kam
P. O. Box 250
Rexburg, ID 83440-0250

James Tucker
Rosholt, Robinson & Tucker
P. O. Box 1906
Twin Falls, ID 83303-1906

Don Olowinski
Hawley Troxell Ennis & Hawley
P. O. Box 1617
Boise, ID 83701-1617

Richard Smith
P. O. Box 70
Rexburg, ID 83440

Laird Lucas
Idaho Office
Land and Water Fund of
the Rockies
P. O. Box 1612
Boise, ID 83701-1612



W. F. Ringert