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DISTRICT COURT-SRBA
TWINFALLS CO., IDAHO
FILED _____

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

Case No. 39576

) Subcase No. 34-00012, 34-00013,
) 34-02507 and 34-10873
)
) ORDER GRANTING MOTIONS TO
) PARTICIPATE and ALLOWING
) FILING OF LATE RESPONSES
)

W.T. Sowards (Sowards) filed *Motions to File Late Responses (Motions)* in the above subcases on February 4, 1994. The *Motions* were filed after the subcases had been referred to the Special Master. Under the rules of procedure established by *SRBA Administrative Order 1 (A.O. 1)*, a party may be granted leave to participate in a subcase if a Motion to Participate is granted by the Special Master. *A.O. 1*, Section 6g. Once a subcase has been referred to a Special Master, an individual seeking to intervene must have leave of court to participate. An order granting leave to participate is ordinarily a prerequisite to filing any pleading which sets forth the intervenor's position on the issues. Therefore, the court shall treat the *Motions* as "Motions to Participate" under *A.O. 1*, Section 6g, and will treat the proposed late responses which were attached to the *Motions* as pleadings Sowards seeks leave to file if the *Motions to Participate* are granted. Under the rules of procedure established by *A.O. 1*, *Motions to Participate* in a subcase will be treated like *Motions to Intervene* under I.R.C.P. 24. *A.O. 1*, Section 6g. Sowards seeks to participate or intervene because the issues posed by these subcases, and the determination of whether any water rights are granted to the claimant, may affect the water rights of Sowards.

I. STANDARD OF REVIEW UNDER I.R.C.P. 24(a)

The Idaho Rules of Civil Procedure set forth the criteria for allowing a party to intervene in an existing action. Rule 24(a) establishes the requirements for intervention as of right:

Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the state of Idaho confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The Idaho Supreme Court has established a four-part test for intervention under Rule 24(a). In order to prevail on a motion to intervene:

1. The application must be timely;
2. The applicant must show a demonstrable interest in the subject of the litigation;
3. The applicant must show that disposition of the action may impair or impede the applicant's ability to protect its interest; and
4. The applicant must show that the existing parties may not adequately represent the applicant's interest.

Duff v. Draper, 96 Idaho 299, 527 P.2d 1257, 1259 (1974).

Under the criteria established by the Idaho Supreme Court, Sowards must be allowed to intervene, and will be granted leave to participate under both I.R.C.P. 24 and A.O. 1, Section 6g.

A. The Motions Were Timely.

The Idaho cases which have analyzed timeliness of motions to intervene have given latitude to applicants. *Duff v. Draper*, 96 Idaho 299, 527 P.2d 1257 (1974) *aff'd*, 98 Idaho 379, 565 P.2d 527 (1978). In this case, Sowards filed his *Motions* after the time period to file objections and responses. The *Motions* were filed, however, before any trial dates or other deadlines were established. In addition, none of the parties to the subcase has objected to the timeliness of the

Motions. There has been no showing that the *Motions to File Late Responses* would result in any delay of the action. The *Motions* are timely.

B. Sowards Claims an Interest in the Water Right at Issue in This Subcase.

Sowards appears to seek intervention under I.R.C.P. 24(a)(2). Under this rule, it is sufficient to show that the applicant has claimed an interest relating to the property or transaction which is the subject of the action. Sowards essentially seeks to respond to objections he claims are related to storage water allocations which may impair his water rights. In addition, none of the parties to this water right has challenged Sowards' interest in this subcase. Thus, Sowards has alleged "an interest relating to" these water rights sufficient to comply with the requirements of Rule 24(a)(2).

C. The Disposition of This Water Right Could Impair or Impede Sowards' Ability to Protect His Interests.

The Idaho Supreme Court held in *Pittock v. Pittock*, 15 Idaho 47, 96 P. 212, 214 (1908), citing *People ex rel. Glidden v. Green*, 1 Idaho 235 (1869), that in order to be sufficient to intervene as a matter of right, an applicant's claimed interest "must be in the matter in litigation, and of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment." *Pittock* at 54.

In 1974, the Court refined this view, further explaining the requirements of Rule 24(a)(2):

The language of Rule 24(a)(2) indicates that the drafters did not contemplate that the petitioner in intervention be required to show that . . . the petitioner in intervention "is" bound by the judgment It was sufficient that the petitioner show that . . . the applicant "may" be bound by a judgment in the action.

Duff v. Draper, 527 P.2d at 1260.

These subcases will presumably result in decrees establishing whether the water rights can be decreed and to whom they will be decreed. The determination of the existence and ownership of these water rights may impair Sowards' ability to protect his interest.

D. The Sowards' Interests Are Not Adequately Represented by Existing Parties.

The court in *Duff v. Draper* ruled that the language of Rule 24(a) shows that the drafters of the rule did not contemplate that the applicant for intervention must show that the existing representation "is" inadequate to protect the applicant's rights. It is sufficient that the applicant show that the representation "may" be inadequate. *Id.* at 1260. The interests which Sowards seeks to protect are the economic and "ownership" interests in his water rights. No other party will represent the interests of Sowards as adequately and vigorously as he can.

II. THE MOTIONS TO FILE LATE RESPONSES

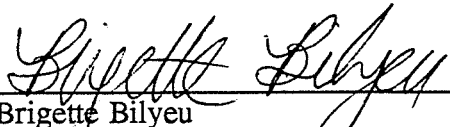
Sowards attached his proposed late responses to the *Motions*. The responses were lodged but not filed. Mr. Sowards will be allowed to file the late responses attached to the motions.

III. CONCLUSION

The *Motions to File Late Responses* brought by Sowards and treated as *Motions to Participate* are timely. Sowards has made the proper showings of interest, impairment and representation required by Rule 24(a)(2). None of the parties to the subcases objected to Sowards' *Motions*. IT IS ORDERED that Sowards' *Motions to Participate* are GRANTED.

None of the parties to the subcases objected to Sowards' request that his responses be filed in the subcases. IT IS FURTHER ORDERED that the responses previously lodged with this Court shall be deemed to be filed as of April 11, 1994.

Dated April 14, 1994.



Brigitte Bilyeu
Special Master, Reporting Area 34
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the **ORDER GRANTING MOTION TO PARTICIPATE AND GRANTING MOTIONS TO FILE LATE RESPONSES** was mailed on April 14, 1994, with sufficient first-class postage to the following:

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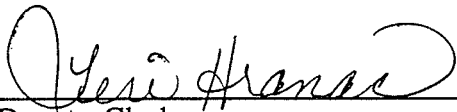
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