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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

Case No. 39576

Subcase Nos. 36-00134A
36-00135B

**MEMORANDUM IN SUPPORT
OF TAYLOR'S MOTION FOR
PRE-TRIAL CONFERENCE**

Howard Taylor & Sons, Inc. ("Taylor"), through its counsel Givens Pursley & Huntley, hereby submits its Memorandum in Support of Taylor's Motion for Pre-Trial Conference in the above-captioned subcases ("Candy Subcases").

By its Motion to Participate in the Candy Subcases, Taylor has sought to intervene to protect Taylor's interests as a water right holder from potentially adverse decisions by the SRBA court on issues raised by the common statements of objection filed by numerous claimants in the Hagerman Valley (the "Hagerman Objections"). Taylor sought to participate in the Candy Subcases in particular

because Taylor understood that they were intended to serve as "test cases" by which certain of the issues common to the Hagerman Objections could be efficiently determined, thereby aiding in settlement or other disposition of the remaining Hagerman Objections. Recent arguments by counsel for the Candys before the Special Master have suggested that the Candy Subcases may not now be considered as "test cases" by the Candys or other Hagerman Valley claimants with common objections, and that some, if not all, issues raised by the Hagerman Objections no longer are issues in the Candy Subcases.

By order of the Special Master, Taylor has been permitted to participate at trial, present its own witnesses, and to submit briefs on issues before the court. However, it is not clear from the Court's Order that Taylor may submit and brief motions in the Candy Subcases. It also is not clear at this point who else will be an active participant in the subcases, who may submit motions for summary judgment, and what issues remain relevant to these cases.¹

1. Who Is a "Party" to the Candy Subcases, and To What Extent May They Participate?

Recent developments in the SRBA raise questions regarding the role of the Department in specific subcases. The Supreme Court's decision in Basin-wide Issue No. 3 upholds most of the legislative amendments to the SRBA statutes, including I.C. § 42-1401B, which provides that the Department's role in the SRBA is that of an "independent expert and technical assistant to assure that claims to water rights acquired under state law are accurately reported. . . [who] shall not

¹ Taylor believes that, as a party to the SRBA, it is entitled to participate fully, and cannot be limited to an amicus. In any event, Taylor reads the Court's Order as allowing it to participate fully, even as an amicus.

be a party to an adjudication."

On June 30, 1995, Judge Hurlbutt issued two orders implementing this statute, which now create confusion about how the Candy Subcases are to proceed. The Court's Order Directing IDWR to Attend Hearings states that the Director's function at evidentiary hearings on the merits and all other hearings before the Special Masters shall be that of a disinterested non-party fact witness consistent with the Idaho Rule of Civil Procedure *subject to the direction of the Special Masters*. (Emphasis added). Further, the Court's Order Naming State Agencies as Parties and Request for New Designation of Lead Counsel rescinds the designation of State of Idaho's designation of lead counsel.

As a procedural matter, it currently is uncertain whether there now are adverse parties in the Candy Subcases other than the United States and the Candys. It is uncertain whether the State of Idaho may appear, or intends to appear, to defend the Director's Report, whether counsel for the Department will continue in that role, or whether other counsel for the State, or other state agencies, may appear. If neither the State of Idaho nor the Department will be directly involved as parties to the Candy Subcases, and *if* Taylor is deemed a mere *amicus*, without the right of other parties to submit its own motions, who will file the pre-trial motions upon which to decide the legal issues we all are here to determine? Is there a "party" in these subcases with whom the Candys can pursue settlement?

These are issues of utmost importance in the litigation of the Candy Subcases. Their resolution will most certainly affect the trial strategy, and the

roles and responsibilities of all involved. Indeed, Taylor doubts that trial preparation, or the trial itself, can go forward until they are resolved.

2. What Issues Remain Before the Court for Resolution on Summary Judgment, or at Trial?

According to the schedule established by the Court prior to its granting of Taylor's Motion to Participate, all pre-trial motions are due by July 21, 1995. The parties anticipated that these would include motions for summary judgment on various legal issues; including motions filed by the Department. To date, Taylor is not aware of any admissions or stipulation of facts that would aid the parties in their briefing of these issues. Further, the Hagerman Objections list the following legal issues that ostensibly are pending before this court:²

1. Whether the SRBA decree will supersede prior decrees affecting the Candy water rights. Objection at 12.
2. Whether rights not claimed or decreed in the SRBA cease to exist after entry of the SRBA decree. Objection at 12.
3. Whether the Department may require measuring devices and control works for rights decreed in the SRBA. Objection at 14.
4. Whether the Department may recommend a consumptive use component of water rights recommended to the SRBA Court in the Director's Report. Objection at 15, 18.
5. Whether the Department's establishment of a standard setting the maximum annual volume of water reasonably required at the field headgate for irrigation is ambiguous, subjective, and indefinite, and therefore void. Objection at 17.

²

Numerous of the Hagerman Objections are directed towards general provisions contained in the Director's report, which provisions have been stricken by the SRBA court. However, to the extent that the general provisions were a reflection of actual elements of the Candy's water rights, or the rationale by which the Candy water rights were recommended, the Candy's objections to these general provisions raise issues that remain before this Court.

6. Whether the Department has authority to establish a standard setting the maximum annual volume of water reasonably required at the field headgate for irrigation. Objection at 17-18, 24.
7. Whether the Department's recommendations limiting the combined diversion rate for water rights used for irrigation on common lands exceeds the statutory and regulatory authority of the Director or the Department to limit use and ownership of private property rights. Objection at 18, 24.
8. Whether the Department's determination that the rate of flow generally required at the point of diversion is 0.02 cfs per acre unless the claimant demonstrates that a higher diversion rate is reasonably required due to actual reasonable conveyance losses, irrigation methods, or field conditions is correct and within the Department's authority. Objection at 19.
9. Whether the actions of the Director in recommending, limiting and/or regulating the Candy's water rights is an unconstitutional infringement upon, and a taking of private property, without just compensation. Objection at 21, 23, 24.
10. Whether the procedures, rules, regulations, policies or standards, adopted, implemented and applied by the Department violate the equal protection and due process clauses of the United States and Idaho constitutions. Objection at 21-22, 24.
11. Whether the Department, in recommending, limiting and/or regulating the Candy's water rights, violates 42 U.S.C. § 1983. Objection at 22, 24.
12. Whether the Department's recommendations of the Candy water rights must conform to prior decrees, licenses or permits. Objection at 22.
13. Whether prior decrees adjudicating the Candy's water rights are binding upon the State of Idaho, the Department and the Director.
14. Whether the State of Idaho, the Department and the Director are precluded by the doctrines of *res judicata*, collateral estoppel, judicial estoppel "and the like" from relitigating or questioning the validity, existence or priority of the Candy's water rights, or taking any position which is inconsistent with such decrees. Objection at 22.
15. Whether there has been an abandonment, forfeiture or other loss of all or part of the Candy's water rights. Objection at 23.

16. Whether the Department's recommendations of the Candy water rights are based upon substantial evidence, are arbitrary and capricious, in excess of constitutional and statutory authority of the Department, made upon invalid procedure, or are clearly erroneous. Objection at 24.
17. Whether the Department's investigation and recommendation of the Candy water rights complied with the requirements of Idaho Code § 42-1416. Objection at 25.
18. Whether the Department's Claims Adjudication Manual, Adjudication Memoranda and other materials of a similar nature used or employed by the Department constitute rules which were subject to the Idaho Administrative Procedure Act in their adoption. Objection at 26.
19. Whether any recommendation of the Department is beyond the subject matter jurisdiction of the SRBA court to hear and determine. Objection at 26.
20. Whether the Department's recommendations of the Candy water rights amounts to a taking of private property by eminent domain, and as such is an action with an improper venue. Objection at 27.
21. Whether the Department is equitably estopped from reducing the quantity, quality or priority of the Candy's water rights by prior statements, representations and actions of the Department. Objection at 28.
22. Whether the Department is barred by laches or statutes of limitations from recommending the Candy's water rights. Objection at 28.

The above summary of issues raised by the Hagerman Objections, which include the Candy's objections, is not all-inclusive. However, it provides a fair outline of their flavor and extraordinary scope. The answers to these issues are important to Taylor. Taylor believes that the parties to these subcases, whomever they might ultimately be, will require some sideboards on the actual scope of issues the Candys intend to litigate, and which issues they now concede to be non-issues. Obviously, briefing (or litigating) each and every one of these issues to the Court would be time consuming, expensive, and quite likely, unproductive. Yet

wasted time and expense are precisely the problems Taylor understood could be avoided through Candy's designation of their sub-cases as test cases. A pre-trial conference should be held so that the scope of the trial can be determined.

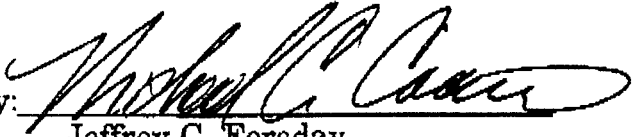
CONCLUSION

Given the uncertainty of the position that will be taken by the State of Idaho in the Candy Subcases, the still unsettled role of the Department, the extraordinary number of issues that the Candys have put forth, and the admittedly questionable utility of the Candy Subcases serving as test cases for possible settlement of other Hagerman Objections, the parties would clearly benefit from a pre-trial conference. At the pre-trial conference, these issues can be sorted out by the parties and the court, and if necessary, a revised briefing and trial schedule can be established that will maximize the efficiency of everyone's efforts in these and future subcases.

Wherefore, Taylor respectfully requests that the Court grant Taylor's Motion for Pre-Trial Conference, and set the Pre-Trial Conference on an expedited basis. To minimize the expense to Taylor, and perhaps other parties, Taylor also requests that Taylor's counsel be permitted, if necessary, to participate in such hearing by telephone conference. Attached hereto for the Court's consideration is a draft Order granting Taylor's Motion, scheduling the Pre-Trial Conference for 3:30 p.m., July 12, 1995, and authorizing the parties to participate by teleconference.

Dated this 7th day of July, 1995.

GIVENS PURSLEY & HUNTLEY

By: 

Jeffrey C. Fereday

Michael C. Creamer

Attorneys for

Howard Taylor & Sons, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of July, 1995, a true and correct copy of the within and foregoing instrument was served via the method noted below:

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