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Department of Water Resources

DISTRICT COURT - SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
JUL 21 1995	
By _____	Clerk
Deputy Clerk	

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: 36-00134A and 36-00135B
	)	
Case No. 39576	)	AMENDED ORDER GRANTING MOTION
	)	TO PARTICIPATE CONDITIONALLY
	)	and
	)	ORDER REQUIRING ATTENDANCE OF IDWR
	)	WITNESSES WITH SUPPORTING
	)	DOCUMENTATION
	)	

BACKGROUND

On July 18, 1995, the Special Master reconvened a pretrial conference. The claimants, Walter and Margaret Candy, were present in person and with their attorney, Patrick D. Brown. Jeffrey C. Fereday was present on behalf of Howard Taylor & Sons, Inc. (Taylor). The United States was represented by R. Lee Leininger and William Ferry. Deputy Attorneys General Cheri Jacobus and A. Lynne Krogh were present and offered comments.

At the pretrial conference, the claimants, the United States and Taylor lodged their pretrial memoranda. At the Special Master's request, IDWR submitted a list of witnesses and documents to support recommendations in the Director's Report.

The pretrial conference was reconvened in part to consider two motions. Both motions concerned an order entered three weeks before. On June 26, 1995, the Special Master entered an *Order Granting Motion to Participate Conditionally (Order)* in response to a *Motion to Participate* filed by Taylor. That *Order* permitted Taylor to participate as an *amicus curiae* and spelled out the limits of its participation.

On July 14, 1995, Taylor filed its *Motion for Reconsideration of Order Regarding Taylor's Status* seeking full party status. On July 18, 1995, the claimants filed their *Motion to Reconsider Order Granting Motion to Participate Conditionally*. They asked that Taylor not be allowed to engage in discovery, participate at trial or serve as co-counsel with another party.

The claimants and Taylor argued in support of their respective motions. The United States took no position on the motions but questioned the role of Idaho's Deputy Attorneys General. The motions were taken under advisement. Other matters in preparation for trial were then considered, including how evidence in support of recommendations in the Director's Report will be presented.

DISCUSSION

The *Order* allowing Taylor to participate in these two subcases was entered upon the findings that (1) Taylor was a party to the SRBA and, (2) the *Motion to Participate* was timely filed. However, its participation was limited to that of an *amicus* in part because it elected to file no objection or response. Its stated interest was limited to issues of law which might be established in the proceeding that could affect its ground water rights.

Another reason why limits were placed upon Taylor's participation in the subcases was the timing of its *Motion to Participate*. It was filed on May 1, 1995. Three weeks later at a scheduling conference, a discovery cut-off date of June 30, 1995, was ordered and a trial date of August 28, 1995, set. That schedule left virtually no time for independent discovery by a "new" party. Hence, to avoid undue delay or prejudice to the original parties, Taylor took the subcases as it found them.

In the June 26, 1995 *Order*, Taylor was permitted to:

- A. Receive all pleadings for purposes of scheduling hearings and depositions;
- B. Engage in discovery conducted by the other parties;
- C. Be present at all depositions;
- D. Serve as co-counsel with another party;
- E. Participate in trial, including presentation of witnesses and other evidence;
- F. Participate in oral argument; and
- G. Submit briefs in support of or opposition to motions.

The *Order* was entered just *after* the Idaho Supreme Court's June 23, 1995 opinion effectively removing the Director of the Idaho Department of Water Resources as a party to the

SRBA. But when the *Order* was drafted and signed, the Special Master was not aware of this change in the Director's status. Hence, like the parties, the Special Master presumed that the Director would be a party at trial with whom Taylor would likely be aligned. By his previous testimony, Howard Taylor knew of no errors in the Director's Report recommending the claimants' water rights.

Now that the Director is no longer a party, Taylor argued that it needs to be in a position to file motions, call witnesses and otherwise participate as a full party. Taylor suggested that it is unfair and inappropriate to limit its participation.

The Special Master is sensitive to protecting the rights of all parties to the SRBA. In the last analysis, that is why the contested *Order* was entered in the first place. No other ground water appropriators sought participation in these subcases and it seemed appropriate to invite that viewpoint. At the same time, intervention in subcases by SRBA parties based solely on a general interest in legal issues can be granted only when intervention will not unduly delay or prejudice the adjudication of the rights of the original parties.

In these subcases, given the scheduling deadlines and trial date, it is clear that Taylor's participation must remain limited. To grant Taylor full participation as a party would unduly delay the proceedings and cause the claimants substantial prejudice. As noted before, the intervenor can not control the course of litigation.

For these reasons, it is fair, just and equitable that as an *amicus*, Taylor should *not* be allowed to conduct discovery, serve as co-counsel with another party or present witnesses and other evidence at trial. To hold otherwise would unavoidably lead to further discovery beyond the discovery cut-off date and delay the trial. On top of that, the claimants would expend considerably more time and money to have their water rights adjudicated.

At the July 18, 1995 Status Conference, the Presiding Judge discussed a twenty-one day period during which parties to the SRBA may be granted the opportunity to file motions to file late objections or responses in subcases. This was suggested as a remedy for parties who chose not to file objections or responses relying on the Director being a party. However, it was clear from the Judge's comments that such a remedy is not available to Taylor in these subcases. Taylor has already elected not to file a motion to file a late objection or response and has been allowed to participate as an *amicus*.

ORDER

THEREFORE, IT IS ORDERED that:

1. The *Order* dated June 26, 1995, is amended in the following respect- Howard Taylor & Sons, Inc., may:

- A. Receive all notices and pleadings;
- B. Submit briefs in support of or opposition to motions filed by other parties;
and
- C. Participate in trial limited to cross examination of witnesses and joining in oral argument; and

2. IDWR shall make available for trial of these subcases before the Special Master beginning on August 28, 1995, the witnesses and documents contained in its *IDWR's Witness and Exhibit Lists* lodged with the Court on July 18, 1995.

DATED July 21, 1995.



TERRENCE A. DOLAN
Special Master, Reporting Area 3
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the **AMENDED ORDER GRANTING MOTION TO PARTICIPATE CONDITIONALLY and ORDER REQUIRING ATTENDANCE OF IDWR WITNESSES WITH SUPPORTING DOCUMENTATION** was sent by first-class mail on July 21, 1995, to the following:

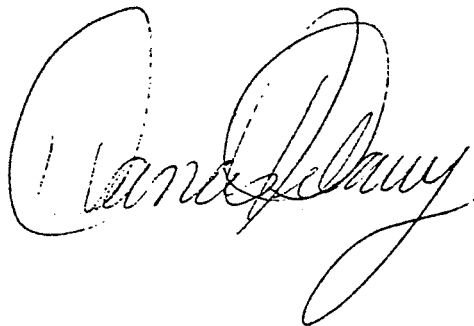
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A handwritten signature in cursive script, appearing to read "Cheri Jacobus", is written over a faint, dotted outline of the same signature.

