

8-18
RECEIVED

AUG 21 1995

Department of Water Resources
Adjudication Bureau

Movant: State of Idaho

**ALAN G. LANCE
ATTORNEY GENERAL**

**CLIVE J. STRONG
CHERI C. JACOBUS
THANE T. TWIGGS
Deputy Attorneys General
Natural Resources Division
P.O. Box 44449
Boise, Idaho 83711-4449
Telephone: (208) 334-2400
FAX: (208) 334-2690**

**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: 36-02018

**STATE OF IDAHO'S MOTION
TO FILE LATE RESPONSE**

95-08-0041

DESCRIPTIVE SUMMARY

The State of Idaho¹ ("State"), in its proprietary capacity, by and through the Office of the Attorney General, hereby moves this Court for leave to file a late response in this subcase

¹ The State of Idaho is appearing in its proprietary capacity on behalf of those agencies that filed claims in the Snake River Basin Adjudication: Idaho Department of Transportation, Idaho Department of Fish and Game, Idaho Department of Parks and Recreation, Idaho Department of Lands, Idaho Department of Health and Welfare, Idaho Board of Education, Idaho Water Resource Board, Idaho Division of Military.

STATE OF IDAHO'S MOTION TO FILE LATE RESPONSE

pursuant to this Court's *Order Granting in Part, Joint Motions for Amendment of Administrative Order 1*, dated July 28, 1995 ("Order"). *Order Granting in Part, Joint Motions for Amendment of Administrative Order 1*. As required by that Order, attached is a completed response form.

INTRODUCTION

On July 28, 1995, this Court granted all parties to the Snake River Basin Adjudication ("SRBA") the opportunity to file motions to accept late objections and responses² in existing subcases in recognition of the change in the Director's status.

The change in the Director's participation occurred on June 23, 1995, when the Idaho Supreme Court upheld the 1994 Amendments to the adjudication statute. *Idaho v. U.S.*, S. Ct. Opinion No. 74, June 23, 1995 (1995 WL 371258 (Idaho)). Those amendments specifically removed the Idaho Department of Water Resources' ("IDWR") authority to appear as a party in the Snake River Basin Adjudication. *See* I.C. §§ 42-1401A(4), 42-1401B(3). In response to that decision, on July 27, 1995, this Court dismissed the Director from the caption and ruled:

Following the Idaho Supreme Court's decision in *Idaho v. U.S.*, S.Ct. Opinion No. 74, June 23, 1995 (1995 WL 371258 (Idaho)), the Director of the Idaho Department of Water Resources (IDWR) is no longer a party to the Snake River Basin Adjudication (SRBA). Idaho Code §42-1401B (3) (Supp. 1995) states that "[t]he director shall not be a party to an adjudication." Accordingly, the director shall be eliminated from the caption in Twin Falls County Case No. 39576, the SRBA.

Order Granting State's Motion To Withdraw Pleadings and Deem Director's Reports Filed Nunc Pro Tunc Granting State's Motion To Remove Director From Caption.

² The parties cannot "enlarge or add to existing issues." Order, p. 2.

In response, several parties³ requested the Court to create a procedure by which the parties could participate in subcases where they had relied on the Director to present the evidentiary foundation for his recommendations found in his Report and ensure that the record before the Special Master is complete and sufficient to support the Special Master's report. The Court's Order authorizes all parties to the SRBA to file motions to file late objections or late responses by August 18, 1995. The motion is therefore timely because it is filed within the time limits set by the Court in its Order and within a reasonable time after the Director's participation changed.

In this case, while the State is filing a motion to accept late response, it does not intend (and its Response Form 2 so reflects) to challenge the individual statutory elements of the claimant's claim but rather is filing its response to the claimant's objections to certain general provisions. The Director's Report and his response remain part of the record and are still accorded the statutory presumptions. I.C. § 42-1411(4)-(5) (1994 Supp.) The claimant continues to have "the ultimate burden of persuasion for each element" of the claimant's water right, and any party filing an "objection to any portion of the director's report [has] the burden of going forward with the evidence to rebut the director's report as to all issues raised by the objection." Id. The State's only concern is to provide an easy mechanism for early resolution of all

³ The parties include Idaho Power Company, A & B Irrigation District, Falls Irrigation District, Burley Irrigation District, Aberdeen-Springfield Canal Company, Big Lost River Irrigation District, Fremont-Madison Irrigation District, Mitigation Group, North Side Canal Company, Twin Falls Canal Company, Water Resource Coalition, and J.R. Simplot Company.

objections to the general provisions.⁴ Its participation for this limited purpose will not add additional time or expense to the proceedings.

Like other claimants who did not object to the General Provisions found in the Director's Report of their claims, the State relied on the inclusion of all general provisions and remarks in all claims within this basin and did not object to them or to other claims, including this one, on that basis. It also relied on the Director's participation in the subcase to protect the record and to bring this issue to the adjudication as a basin-wide issue. Therefore, the State on behalf of the agency proprietary claims has an interest in ensuring that certain general provisions remain in any final decree and that they remain applicable to this particular claim, as well as to all others to which they apply. In addition, it is in the interest of all claimants to quickly address the objections to the general provisions in a manner designed to produce a defensible partial decree. Therefore, the State moves to file a late response in this case and will also file a motion to consolidate⁵ consideration of the objections to the general provisions and remarks with the following subcases:⁶

36-00003F-0002
36-00022-0002

36-00133-0002
36-00134A-0002

36-00192-0002
36-15384-0002

⁴ The Court recently ordered the parties to "brief issues relating to 'General Provisions' and how they may be dealt with in contested cases and decrees." *Order Setting Briefing Schedule For September Status Conference*.

⁵ Motions to consolidate are controlled by Rule 9 found in Administrative Order 1.

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.

⁶ In all of these sub-cases, an objection to one or more general provisions has been filed.

36-00046-0002	36-00134B-0002	36-15450-0001
36-15452-0001	36-14909-0001	36-02048-0001
36-02703-0001	36-02708-0001	36-04013A-0001
36-04013B-0001	36-04013C-0001	36-07040-0001
36-07083-0001	36-07148-0001	36-07151-0001
36-07201-0001	36-07218-0001	36-07568-0001
36-00047-0001	36-00050D-0001	36-10223-0001
36-00003C-0001	36-02038-0001	36-10906-0001
36-02008-0001	36-02009-0001	36-10283A-0001
36-00065-0001	36-00066B-0001	36-00067-0001
36-07298-0001	36-10169-0001	36-00133-0001
36-00192-0001	36-02007-0001	36-00022-0001
36-00023-0001	36-00108B-0001	36-00103C-0001
36-00039F-0001	36-00039P-0001	36-00079-0001
36-04260B-0001	36-07346-0001	36-00041C-0001
36-00042A-0001	36-00134A-0001	36-00135B-0001
36-00089A-0001	36-00110B-0001	36-00111B-0001
36-00112B-0001	36-00113H-0001	36-00134C-0001
36-00135C-0001	36-10141-0001	36-00090D-0001
36-10409-0001	36-10815-0001	36-00055AF-0001
36-00041A-0001	36-00092-0001	36-00064B-0001
36-10446-0001	36-15094-0001	36-00110A-0001
36-00111A-0001	36-00112A-0001	36-10168-0001
36-00086C-0001	36-00003B-0001	36-00003J-0001
36-00101-0001	36-00021B-0001	36-00077C-0001
36-00039E-0001	36-10283B-0001	36-00033F-0001
36-15168-0001	36-00198A-0001	36-15157-0001
36-15461-0001	36-00011A-0001	36-07142-0001
36-15463-0001	36-00068-0001	36-00069-0001
36-00070-0001	36-07071-0001	36-00071A-0001
36-00075-0001	36-00039N-0001	36-00051D-0001
36-07089-0001	36-00121-0001	36-00003G-0001
36-04142-0001	36-00055W-0001	36-00104A-0001
36-00048A-0001	36-00049-0001	36-02169-0001
36-00051A-0001	36-00054A-0001	36-07323-0001
36-00085A-0001	36-00061-0001	36-00062-0001
36-00063-0001	36-00035J-0001	36-00103D-0001
36-15176-0001	36-15184-0001	36-00029B-0001
36-00048C-0001	36-00099-0001	36-00100-0001
36-07172-0001	36-07233-0001	36-04071-0001
36-00064A-0001	36-00039J-0001	36-00123A-0001
36-00003A-0001	36-00033E-0001	36-04091-0001
36-00089C-0001	36-00090E-0001	36-10588-0001
36-07142A-0001	36-00090F-0001	36-00094A-0001

STATE OF IDAHO'S MOTION TO FILE LATE RESPONSE

36-00136A-0001	36-00136B-0001	36-00194-0001
36-02046-0001	36-02166-0001	36-02178-0001
36-10033-0001	36-10035-0001	36-00034B-0001
36-00003F-0001	36-00096A-0001	36-00123E-0001
36-00004-0001	36-00055AD-0001	36-00006-0001
36-00007-0001	36-00008-0001	36-00033D-0001
36-02588-0001	36-10706-0001	36-00039C-0001
36-00003E-0001	36-00085B-0001	36-07369B-0001
36-00039D-0001	36-00106-0001	36-08099-0001
36-00097-0001	36-02002-0001	36-07081-0001
36-07229-0001	36-15384-0001	36-00039M-0001
36-00051C-0001	36-00051E-0001	36-00103F-0001
36-02229-0001	36-07460C-0001	36-10383-0001
36-02517-0001	36-07460D-0001	36-10387-0001
36-07377-0001	36-07534A-0001	36-10916-0001
36-07460A-0001	36-07547-0001	36-10926-0001
36-07460B-0001	36-10382-0001	36-15219-0001
36-02659-0001	36-07080-0001	36-07725-0001
36-02708-0002	36-07201-0002	36-07731-0001
36-07004-0001	36-07218-0002	36-07800-0001
36-07510-0001	36-10819-0001	36-02013-0001
36-02478-0001	36-15221-0001	36-02018-0001
36-02704-0002	36-15357-0001	36-02026-0001
36-02710-0001	36-15358-0001	36-02037-0001
36-07487-0001	36-15387-0001	36-02082-0001
36-07587-0001	36-15388-0001	36-14900-0001
36-14903-0001	36-14906-0001	36-14901-0001
36-14904-0001	36-14907-0001	36-14902-0001
36-14905-0001	36-14908-0001	

OBJECTIONS TO GENERAL PROVISIONS CANNOT BE RESOLVED WITHIN SUBCASES

Objections to general provisions cannot be resolved within subcases for two very important reasons. First, there are significant due process concerns if the appropriateness of a provision is decided in one or more individual subcases. Second, the Court's Administrative Order 1 clearly anticipates a global proceeding to resolve objections.

**Due Process Requires That All Claimants Have The Opportunity To Participate In
Any Proceeding To Resolve Objections To General Provisions**

General provisions, by their nature, apply to all water rights or to discrete classes of water rights.⁷ The resolution of objections to one general provision directly affects all water rights, including uncontested water rights, subject to that provision. Therefore, to avoid due process concerns and to ensure timely and inexpensive resolution of the outstanding objections, all objections to general provisions should be addressed in a basin-wide hearing or series of hearings where all claimants have appropriate notice and can choose to participate, thereby binding themselves to the decision. This allows the Court to quickly and decisively resolve the objections for all claimants within a sub-basin.

Partial Decrees Cannot Be Issued Where There Are Outstanding Objections To General Provisions

This Court's Administrative Order 1 decisively answers the question of whether the general provisions can be resolved within a subcase. The answer is no.

11. SPECIAL MASTERS

⁷ For example, in the Director's Report for Basin 57 the following general provisions apply to the stated classes of water rights:

GENERAL PROVISIONS 1-9 APPLY TO ALL WATER RIGHTS IN BASIN 57.

....

GENERAL PROVISION 10 APPLIES TO WATER FROM REYNOLDS CREEK WATER SYSTEM

....

GENERAL PROVISION 11 APPLIES TO ALL WATER RIGHTS IN BASIN 57 SHOWN WITH DOMESTIC USE AS A PURPOSE OF USE

....

GENERAL PROVISION 12 APPLIES TO ALL WATER RIGHTS IN BASIN 57 SHOWN WITH STOCK WATER USE AS A PURPOSE OF USE

....

GENERAL PROVISIONS 13-17 APPLY TO ALL WATER RIGHTS IN BASIN 57 SHOWN WITH IRRIGATION AS A PURPOSE OF USE

.....
e. No report of the special master *shall* include general provisions or other statements *until all objections to any general provision or other statement in a director's report have been resolved.*

f. *Where there are outstanding objections to any general provision or other statement in the director's report, the special master may resolve objections to the statutory elements of a claim and prepare a preliminary report which shall be served on the parties but not with the Presiding Judge.*

Therefore, while the Special Master in this subcase can clearly resolve any objections to the statutory elements of a claim, decisions on the objections to the General Provisions must be resolved in a forum that can resolve *all* objections. Likewise, no partial decrees can be issued until all the objections are resolved.

13. ENTRY OF PARTIAL DECREES

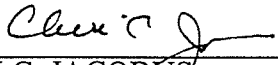
.....
c. No partial decree shall include general provisions or other statements until all objections to any general provision or other statement in a director's report have been resolved.

Therefore, in order to expedite the resolution of *all* objections to this claim, the State hereby moves to file this late response for the *sole* purpose of creating a mechanism for quickly and inexpensively addressing all objections to each general provision - ultimately as basin-wide issues. Otherwise, this claimant will have to wait until the Court's resolution of the objections at some future time in order to have a partial decree containing all the essential elements. This

Court's decision.

Dated this 18th day of August, 1995.

ALAN G. LANCE
ATTORNEY GENERAL



CHERI C. JACOBUS
Deputy Attorney General
Natural Resources Division

CERTIFICATE OF SERVICE

I certify that on this 18th day of August, 1995, I served a true and correct copy of the STATE OF IDAHO'S MOTION TO FILE LATE RESPONSE by placing a true and correct copy thereof in the United States mail, postage prepaid, addressed as follows:

JAMES C TUCKER
PO BOX 2139
BOISE ID 83701-2139

UNITED STATES DEPARTMENT OF JUSTICE
ENVIRONMENT AND NATURAL RESOURCE DIVISION
550 WEST FORT STREET
BOX 33
BOISE ID 83734

ALAN G. LANCE
ATTORNEY GENERAL



CHERI C. JACOBUS
Deputy Attorney General
Natural Resources Division

STATE OF IDAHO'S MOTION TO FILE LATE RESPONSE