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Department of Water Resources
Adjudication Bureau

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OFFICE OF THE
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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

) RESPONSE OF KIM BODILY AND THE FORT
) HALL WATER USERS ASSOCIATION TO JOINT
) MOTION TO DISMISS OBJECTIONS TO 1990
) FORT HALL INDIAN WATER RIGHTS AGREEMENT
)
) 1990 FORT HALL INDIAN WATER RIGHTS AGREEMENT
) AND SUBCASE Nos. 01-10223; 01-10248; 25-02160
) 25-13615; 27-02007; 27-11560; 27-11561
)

Statement of Facts

Pursuant to I.C. § 42-1411, the Director of the Idaho Department of Water Resources filed his "Director's Report for the 1990 Fort Hall Indian Water Rights Agreement (Reporting Area 25)" on March 31, 1994. The Report sets forth the water rights for the Shoshone Bannock Tribes upstream of Hells Canyon Dam, the water rights for the Fort Hall Irrigation Project, and the rights for the Bureau of Indian Affairs, Fort Hall Agency. On May 31 and June 1, 1994, Mr. Kim Bodily, on his own behalf as a water user in the Fort Hall Irrigation Project, and Mr. Floyd Johnson, acting on behalf of the Fort Hall Water Users Association as its President, timely

filed objections to the Tribes' rights and to the rights of the United States for the Fort Hall Irrigation Project.

The Fort Hall Irrigation Project was initially authorized by the Act of August 5, 1894, 28 Stat. 305. The Act directed the Secretary of the Interior to contract for the construction of canals and the acquisition of water rights for the development of an irrigation project on lands within the Fort Hall Indian Reservation, as well as on lands that had been ceded by the Indians. Pursuant to the Act, the United States entered into an agreement with the Idaho Canal Company. Shortly after the main canal was completed in 1896, the Idaho Canal Company failed. The project was operated by a receiver until 1908 when the company holdings, including the project water rights, were purchased by the United States. The water rights were initiated under state law in Permit No. 3117 and adjudicated as state law rights in Rexburg Irrigation Company v. Teton Irrigation Company, District Court of the Sixth Judicial District, State of Idaho, County of Fremont.¹

From its inception, the Fort Hall Irrigation Project was a combined Indian, non-Indian project. Indians, however, were granted the right to receive project water without cost for construction, operation, or maintenance. See Act of March 1, 1907, 34 Stat. 1015 (the "Enabling Act"). Construction costs for the non-Indian component have been paid off, vesting rights in the individual non-Indian users. See Ickes v. Fox, 300 U.S. 82, 94-95

¹ The United States' Notice of Claim in the Director's Report claimed the rights under state law in accord with the Rexburg Decree.

(1937). The total irrigable land base of the project is 46,480 acres, 33,259 being Indian and 13,221 being non-Indian. The non-Indians continue to pay operation and maintenance costs based on assessments for 13,221 acres.

Prior to the 1990 Fort Hall Indian Water Rights Agreement, the project held natural flow rights to the waters of the Snake River for 600 cfs with a priority date of December 14, 1891. The rights included an additional component of natural flow from Sand Creek and the Blackfoot River. The United States also held storage rights pursuant to state law in the amount of 448,000 acre feet from Blackfoot Reservoir and Gray's Lake Reservoir, which had been proportionately available in the ratio of Indian, non-Indian acreage, i.e., 72:28. The Indians were entitled to 322,560 acre feet, and the non-Indians were entitled to 125,440 acre feet. The duty of water for all project lands, Indian and non-Indian, has been set by Congress at 3.5 acre feet per acre. Act of August 17, 1961, 75 Stat. 390.

In the 1990 Fort Hall Indian Water Rights Agreement, the Fort Hall Irrigation Project is split apart. The Indian portion of the project, i.e., 33,259 acres, is deemed to have a federal reserved water right, no longer subject to beneficial use or forfeiture provisions, with a priority date of June 14, 1867, the date of the first Executive Order creating the Fort Hall Reservation. The legal basis of the right is presumed to be the Winters Doctrine.

See Winters v. United States, 207 U.S. 564 (1908).² In changing the priority of the right from 1891 to 1867, the Indian portion of the Fort Hall Irrigation Project became paramount to the non-Indian portion of the project and leapfrogged 7,886.62 second feet of intervening non-Indian rights to divert the natural flow of the Snake River. Shortages of supply are no longer shared equally with the non-Indian component of the project, which, along with the intervening rights, become subject to the priority of 1867.

Under the 1990 Agreement, other changes were made to the non-Indian component of the Fort Hall Irrigation Project. The acreage was reduced from 13,221 acres to 12,667 acres, effectively raising the operation and maintenance costs by 10%. The storage right of 125,440 acre feet was reduced to 25,500 acre feet, and the non-Indians are given a right of first refusal to purchase (termed "lease") the same storage water that they received under state law in excess of 25,500 acre feet.

On September 1, 1989, the United States, the Shoshone Bannock Tribes, the State of Idaho, and the Committee of Nine agreed to the

² In Winters the United States had created the Ft. Belknap Indian Reservation, which included a 5,000 acre Indian irrigation project. The United States was silent with respect to water for the project. The resulting Winters Doctrine is a legal fiction standing for the proposition that when the United States reserves land from the public domain without expressly dealing with water rights, the Court will imply a water right sufficient to satisfy the purposes for which the land was withdrawn.

Contrary to the legal underpinnings of Winters, the United States expressly provided for the acquisition of water rights under state law in relation to the Fort Hall Reservation 14 years before the Winters Doctrine was promulgated. 34 Stat. 1015.

terms of the Agreement.³ On November 16, 1990, Congress approved the Agreement subject to its approval by the district court in the Snake River Basin Adjudication. By its terms, the Agreement can become effective only after a decree has been entered by the SRBA quantifying the waters rights of the United States and the Fort Hall Irrigation Project as set forth in the Agreement. Cf. Agreement § 18.1.

Introduction

The joint movants make two arguments in support of their motion to dismiss, viz., that neither Kim Bodily nor the Fort Hall Water Users Association is a party to the Snake River Basin Adjudication and that, assuming they are parties, their objections "fail to raise issues within the limited scope of the SRBA." Joint Memorandum at 2. Both arguments lack substance pursuant to law and common sense.

Point I: Kim Bodily and the Fort Hall Water Users Association are "claimants" Pursuant to the Plain Language of I.C. §42-1401A(1).

The joint movants' argument that the respondents are not parties in this case is a syllogism: 1) I.C. §42-1412 provides that objections may be filed by "[a]ny party;" 2) I.C. §42-1401A(7) defines a party as "the director, any person who is a claimant, or

³ The Committee of Nine is an advisory committee, created to represent the non-Indian interests in Water District 01. While a "party" to the Agreement, the Committee of Nine admittedly had no legal authority to execute the Agreement. Cf. Agreement §§ 4.11 and 5.7.

any person who is served or joined;" and 3) therefore, because the respondents have neither filed claims nor otherwise been joined as parties, they may not file objections in the SRBA. The joint movants' logic fails because their minor premise is flawed.

After referring to the definition of a party in I.C. §42-1401A(7), the joint movants ignore the related statutory provisions and conclude that a "claimant" can only be a person who has filed water claims in the SRBA. In I.C. §42-1401A(1), however, a claimant is defined as "any person asserting ownership of rights to the use of water within the state of Idaho or on whose behalf ownership of rights to the use of water is asserted." In its Notice of Claim in the Director's Report and by the express terms of the 1990 Fort Hall Indian Water Rights Agreement, the United States has asserted rights on behalf of Kim Bodily and all of the other non-Indian water users in the Fort Hall Irrigation Project who are represented by the Fort Hall Water Users Association.

Accordingly, the assertion that Kim Bodily and the Fort Hall Water Users Association are not parties in the SRBA is incorrect. The sequence of reasoning underlying the joint movants' syllogism neither compels nor suggests their conclusion. Mr. Shaw's affidavit attesting to the fact that neither Kim Bodily nor the Fort Hall Water Users Association has filed a water right claim in the SRBA is inapposite. See generally Young Harvey Walker v. Big Lost River Irrigation District, 124 Idaho 78, 856 P.2d 868 (1993).

While Kim Bodily and the individual members of the Fort Hall Water Users Association are claimants in the context of the SRBA,

it does not necessarily follow that the Fort Hall Water Users Association qua association is a party. As the joint movants note, once the status of Kim Bodily or any other individual member of the Fort Hall Water Users Association is established as a claimant in the SRBA, it must be demonstrated in the context of the motion to dismiss "that the FHWUA fulfills the requirements for the participation of unincorporated associations in litigation" under I.C. §53-707 in order to proceed.

I.C. §53-707 essentially codifies the common law principle that non-profit associations can participate in judicial, administrative, or other governmental proceedings. To meet the standing requirement, the Fort Hall Water Users Association need only show that one or more of its members are claimants in their own right, that the interests the Association seeks to protect are germane to its purposes, and that neither the claim asserted nor the relief sought requires the participation of a member.⁴ The main focus of I.C. §53-707 is the determination of whether the Association has standing to assert the interests of its members. See Official Comment 4.

⁴ Official Comment 4 to I.C. §53-707 explains when participation of an individual members is required: If participation of individual members is required, the nonprofit association does not have standing. If the injury for which a claim is made or the remedy sought is different for different members, their participation through testimony and presenting other evidence is required. The typical cases in which a nonprofit association has standing is where it seeks only a declaration, injunction, or some form of prospective relief for injury to its members. The Comment cites Warth v. Seldin, 422 U.S. 490 (1975).

The issue of standing was addressed in Warth v. Seldin, 422 U.S. 490, 95 S.Ct. 2197 1975), and the legislature has adopted this holding. In Warth, the Supreme Court held that an association may have standing solely as a representative of its members. Id. at 2211. To have standing:

The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit. So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction.

Id. at 2211-2212. The Court then looked to the type of relief requested as a final indication of whether an association has standing:

[W]hether an association has standing to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought. If in a proper case the association seeks a declaration, injunction or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured.

Warth, 95 S.Ct. at 2213.

The Fort Hall Water Users Association meets the requirements of I.C. §53-707 and Warth. The United States has asserted rights to the use of water on behalf of the individual members of the Association. Therefore, the individual members are claimants within the definition of SRBA. Accordingly, the Fort Hall Water Users Association meets the first requirement of having one or more members that have standing to assert a claim in their own right.

The next question is whether the interests the Fort Hall Water Users Association seeks to protect are germane to its purposes. The purpose of the Fort Hall Water Users Association is to represent and protect its members in their use of project water. The interest that the Fort Hall Water Users Association is seeking to protect in the objections is its water right. Therefore, the second requirement is satisfied.

Finally, the relief sought by the Fort Hall Water Users Association does not require the individual participation of members. The relief sought by the Fort Hall Water Users Association is the same for each member and will necessarily inure to the benefit of all members.

The Fort Hall Water Users Association's representation of its members falls squarely within the type of representation by an association that the Supreme Court recognized. Instead of each member filing an objection to the reallocation of water under the Agreement, the Fort Hall Water Users Association asserts the injury to the members at large. The relief, viz., protection of the water supply, will benefit all of the members of the Association. It is not only proper for the Fort Hall Water Users Association to represent its members, but also the most judicially economical way to proceed.

Point II: The Usurpation of the Water Rights for the Fort Hall Irrigation Project by the United States, the Shoshone Bannock Tribes, the State of Idaho, and the Committee of Nine in the 1990 Fort Hall Indian Water Rights Agreement is Precisely what the Snake River Basin Adjudication is All About.

It is undisputed that the 1990 Fort Hall Indian Water Rights Agreement, if approved by this court, would: 1) abrogate state water law and the decisions of prior adjudication courts with respect to the Indian component of the Fort Hall Irrigation Project; 2) consider as true the proposition that the legal basis of the water rights for the Indian component of the project is the Winters Doctrine, i.e., the federal reserved water right doctrine; 3) subordinate the priority of the non-Indian component, as well as 7,886.62 second feet of intervening non-Indian priorities, to the priority of 1867; 4) reduce the non-Indian acreage in the project from 13,221 acres to 12,667 acres; 5) increase the operation and maintenance costs to the non-Indian water users by 10%; 6) reduce the non-Indian' entitlement to storage water from 125,440 acre feet to 25,500 acre feet, and 7) give the non-Indians a right of first refusal to purchase storage water in excess of 25,500. Pursuant to the United States' Notice of Claim on behalf of the non-Indian users in the Fort Hall Irrigation Project, the Agreement would alter the elements of the right in I.C. §42-1411 as set forth in items 2,3,4,5,7, and 10 of the notice.

The joint movants characterize the respondent's objections as an "assertion that the United State has breached its contractual obligations to deliver water to the non-Indian water users within the Fort Hall Irrigation Project. . . ." Joint Memorandum at 6. Accordingly, the joint movants argue that the issues raised by the objection are water delivery matters pursuant to contracts "between the Bureau of Indian Affairs and the non-Indian water users,"

justiciable only in federal district court. Thus, in the collective wisdom of the joint movants, the objections are outside the "limited scope of the SRBA." Id. at 5.

The issues raised by the respondents' objections are not water delivery matters. If they were, they would still be justiciable in the SRBA. See Young Harvey Walker v. Big Lost River Irrigation District, supra. The issues go to the substance of the non-Indians' water rights, to the substance of the Indian rights, and to the newly created antagonism between the two inter sese by virtue of the 1990 Agreement. The joint movants' argument that these issues are not within the scope of the SRBA does little more than add a Kafkaesque touch to the McCarran Amendment, 43 U.S.C. §666, and the principles of due process that are normally associated with a comprehensive adjudication of water rights.

Conclusion

There are approximately 2,000 non-Indian water users in the Fort Hall Irrigation Project whose rights would be subject to an unexpected Darwinian twist if the 1990 Agreement is allowed to rearrange the genesis of their water rights and the rights of the Indian component of the project. According to the joint movants', however, this is not only a proper thing to do, but something that should be done without the presence of the non-Indian users. The proposal is novel, to say the least. If the water rights of the United States on behalf of the non-Indian water users in the Fort Hall Irrigation District are not addressed in the SRBA, no forum

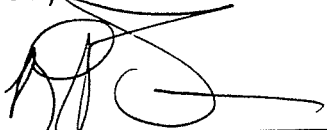
exists in which they may be addressed.

DATED this 3rd day of April, 1995.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that the copies of the foregoing RESPONSE OF KIM BODILY AND THE FORT HALL WATER USERS ASSOCIATION TO JOINT MOTION TO DISMISS OBJECTIONS TO 1990 FORT HALL INDIAN WATER RIGHTS AGREEMENT were served by placing the same with Federal Express Courier on April 3, 1995 for Delivery on April 4, 1995, as follows:

Peter Monson
C/O Candy Jackson, Tribal Attorney
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(Pursuant to the agreement of counsel of March 29, 1995)

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A handwritten signature in black ink, appearing to be 'RAS' with a long horizontal stroke extending to the right.

Richard A. Simms