

Party's Name:
William Taylor

Attorneys' Names and Address
Jeffrey C. Fereday
Michael C. Creamer
GIVENS PURSLEY & HUNTLEY
277 North 6th Street, Suite 200
P.O. Box 2720
Boise, Idaho 83701-2720
(208) 342-6571
(208) 343-8920 (facsimile)
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MAY 01 1995

Department of Water Resources
Adjudication Bureau

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 MOTION TO
PARTICIPATE**

Descriptive Summary

This document constitutes Petitioner William Taylor's arguments in support of Petitioner's Motion to Participate in Subcase Nos. 33-00134A and 33-00135B as a full party.

I. **INTRODUCTION**

Petitioner, William Taylor, through his counsel Givens Pursley & Huntley, and pursuant to SRBA Amended Administrative Order No. 1, hereby submits his Memorandum in Support of Motion to Participate in Subcase Nos. 36-00134A and

36-00135B. These subcases involve claims filed by Walter and Margaret Candy ("Candy") in the Snake River Basin Adjudication to divert water from the Curren Tunnel in Basin 36. Petitioner seeks to participate as an intervenor in these subcases as a full party for all purposes.

II. STATEMENT OF INTEREST

Petitioner holds licensed water rights to divert ground water from the Eastern Snake Plain Aquifer ("ESPA"). Petitioner's licenses include but are not limited to water rights claimed in the Snake River Basin Adjudication as described in the Affidavit of William Taylor filed contemporaneously herewith. Candy's claimed water rights¹ are diverted from the Curren Tunnel, which is constructed into the basalt canyon wall of the Hagerman Valley. The source of water to the Curren Tunnel presumably is the ESPA, which is described in the report entitled Hydrology and Digital Simulation of the Regional Aquifer System, Eastern Snake River Plain, Idaho, U.S.G.S. Professional Paper 1408-F. The ESPA has been designated by the Idaho Department of Water Resources ("Department") as an area of common ground water supply.

As a result of this designation, the Department's recent promulgation of conjunctive management rules, and recent delivery calls by water right claimants with points of diversion in the Curren Tunnel, the determination of various elements of Candy's water rights, including the quantity of the right, the period of

¹ The water rights claimed by Candy are numbered 33-00134A and 33-00135B.

use and duty of water, may affect Petitioner's ability to exercise his own water rights, which are junior to those claimed by Candy. Petitioner, therefore, has a strong interest in ensuring that those persons who may be eligible to implement a delivery call against Petitioner's rights are not adjudicated water rights in excess of the amount that actually is, or can be, placed to beneficial use, or which otherwise is a lawful amount. In other words, Petitioner should not be forced to curtail his diversions of ground water, or to provide mitigation, to honor a call made by a water right holder who claims unreasonable rates of diversion or periods of use.

III. PETITIONER'S MOTION TO PARTICIPATE IS TIMELY

Petitioner has moved to participate in Candy's subcases as soon as the issues raised by those subcases were reasonably identifiable. Moreover, to the extent that the current parties to these subcases contemplate that they will serve as test cases to address specific issues that may affect Petitioner's ability to exercise his own water rights, intervention by Petitioner at this point is particularly appropriate.

The Director's Report for Basin 36 ("Report") was filed with the Court by the Department on November 2, 1993. The Director's Report contained the Department's recommendations for over 7000 water rights for Basin 36. Objections to the Director's Report for Basin 36 were due on May 1, 1994, and Responses to Objections were thereafter due on September 1, 1994. Over 160

Objections to water rights in the Hagerman area were filed on behalf of various members of the Hagerman Water Right Owners ("HWRO"). Each of these Objections included a standard 22 page supplement asserting sundry admissions, denials and affirmative defenses.

As these events transpired, Petitioner, whose own claims have yet to be considered or recommended by the Department, had no reason to review the Report for Basin 36 generally, the recommendation of Candy's rights in particular, or the objections and responses thereto, because the Petitioner then had no reasonable expectation that water right claimants with sources from the Snake River or the Hagerman area in Basin 36 might assert a priority call on junior groundwater rights in the Snake Plain Aquifer.²

The Petitioner first became aware of this possibility after a complaint was filed in this court on behalf of Alvin Musser and others seeking an order commanding the Director of the Department to deliver water to Mr. Musser at his point of diversion at the Curren Tunnel. This Court's order requiring the Director to deliver water to Mr. Musser's point of diversion was affirmed by the Idaho Supreme Court on February 28, 1994. At that time it became apparent that claimants in Basin 36, particularly those in the Hagerman Valley area who divert from springs, might assert their water right priority against holders of junior ground water rights throughout the Eastern Snake Plain Aquifer. Shortly

² Even if the Petitioner had reviewed the Report for Basin 36, Petitioner would not have had reason to object to the Reported claims then since the recommended quantities of water and season of use were based upon actual beneficial use and a duty of water of one inch or 0.02 cfs per acre-elements with which Petitioner agrees.

thereafter, on April 27, 1994, the SRBA court entered an order staying all further proceedings. That stay remained in effect until December 7, 1994.

While the stay remained in effect, the Department adopted final rules governing the conjunctive management of ground and surface waters. These rules took effect on October 7, 1994. The Conjunctive Management Rules were a direct result of the *Musser* litigation, and they provide the procedures by which holders of senior rights such as the Mussers and Candy may seek to implement a "delivery call" against junior ground water users such as the Petitioner.

On December 20, 1994, the Idaho Ground Water Appropriators, Inc. ("IGWA"), which is an organization of which Petitioner is a member, moved this Court for an order establishing a framework for addressing the issues raised by the objections to water right recommendations in the Hagerman Valley. IGWA urged that the objections raised by many of these subcases raised significant issues of concern to IGWA's members, including petitioner. The Hagerman Water Right Owners, of which Candy is a member, opposed IGWA's motion on the ground that IGWA was not a party to the subcases. IGWA's motion was stricken by Special Master Dolan for that reason. However, Special Master Dolan held out the possibility of intervention in those subcases through a motion to participate. An excerpt of the transcript of the Special Master's ruling on IGWA's Motion to Establish Framework is attached hereto as Exhibit A.

Petitioner, through his counsel, has subsequently learned that the HWRO and the Department have identified the Candy subcases as ones which raise

issues common to many of the HWRO member's claims, and that these subcases may be advanced as test cases in the interest of possible settlement of those common issues. The Petitioner's counsel has reviewed Candy's discovery requests and the Department's responses thereto, and attended Candy's depositions of Department personnel which took place on April 4-6, 1995.

Thus, developments within and without the SRBA court subsequent to the objection and response period have created both the need and the opportunity for Petitioner to efficiently participate in these Basin 36 subcases. It was not until early 1994, with the issuance of the *Musser* decision, that Petitioner had an opportunity to know of the implications of the Director's Report on his own water rights. It was not until December 1994, when the Court's stay was lifted, that Petitioner next had an opportunity to move to participate in any Basin 36 subcases. Petitioner, through IGWA, thereafter filed a motion in the SRBA for an order establishing a framework for addressing the Basin 36 claims. Still, it was not until the HWRO and the Department identified the Candy subcases as possible test cases that the Petitioner was afforded an opportunity to participate in subcases in a manner that would most efficiently address the issues of greatest concern to the Petitioner. Petitioner's Motion to Participate in the Candy subcases is timely, and should be granted.

IV. PETITIONER'S RIGHTS MAY BE IMPAIRED OR IMPEDED BY THE DISPOSITION OF THE CANDY SUBCASES.

Based upon the areas of inquiry covered in discovery, and the objections and responses in the record, it now is apparent that the Candy subcases raise specific issues, the determination of which may impede or impair substantial rights of the Petitioner. As a party to the SRBA, the Petitioner will be bound by the determinations made therein respecting these issues. The issues raised by the Candy subcases include:

1. Whether the Petitioner, the Department or the SRBA court are bound by the findings of fact, conclusions of law and judgment contained in prior water right decrees adjudging the rights of SRBA claimants.
2. Whether the water rights of SRBA claimants are to be recommended and decreed based upon the amount of water that actually can be diverted, or upon the amount of water that actually can be beneficially used.
3. Whether an irrigation water right recognized in a prior decree without a prescribed season of use is entitled to a decree authorizing year-round use in the SRBA.
4. Whether the Department is entitled to establish a standard period of use or duty of water for various basins or subbasins.
5. Whether the Department's methodology and rationale for establishing a standard season of use for various basins and subbasins is reasonable?
6. Whether the Department's methodology and rationale for recommending a standard duty of water of one miner's inch or 0.02 cfs per acre for

flood and sprinkler irrigated lands is reasonable?

7. Whether a claimant has a burden of coming forward with substantial reliable evidence to establish his or her entitlement to a season of use or duty of water greater than the standard applied by the Department?³

The above issues derive from Candy's apparent intent to assert the sanctity of a prior decree, regardless of beneficial use, and thereby preserve a right to divert more water than the Department has found actually can be applied to beneficial use. Because a future delivery call by claimants such as Candy could result in the Petitioner being required to curtail all or a portion of his own diversions, or to provide some level of mitigation, the disposition of those claims and the manner by which they are determined will directly affect Petitioner's water rights. Petitioner reasonably does not wish to reduce his diversions, or contribute to mitigation to support unreasonably and unnecessarily large diversions from the Curren Tunnel or elsewhere. The larger the water rights decreed to Hagerman Valley right holders, presumably the more water and money must be contributed by the Petitioner to maintain spring flows in the event of a delivery call.

If a claimant may rely on an ambiguous decree to obtain a year-round season of use, then the duration and extent of curtailment or mitigation that might be imposed on the Petitioner is necessarily increased. If a claimant may

³ In addition to these issues, an entire series of other issues are raised by Candys' objections, which were outlined in IGWA's Motion and Supporting Memorandum for the Establishment of a Framework for the Orderly Resolution of Issues Raised by Objections to the Director's Report in Basin 36. A copy of this Motion containing a summary of the issues raised by the HWRO objections is attached hereto as Exhibit B for reference.

rely on the findings of a prior decree to obtain a place of use that is greater than actually irrigated, and then command a larger diversion rate than necessary to irrigate it, Petitioner will be similarly impacted. If a claimant may change to a modern and efficient irrigation system yet demand a quantity of water that could be justified only by diversion facilities that were in place sixty years ago, Petitioner may be forced to limit his diversions, limit his production, limit his income, and increase his expenditures to sustain another's profligacy.

In a less direct but equally important sense, Petitioner has an interest in the efficient and orderly administration of justice and government regulation. Petitioner is entitled to a speedy resolution of the relative rights of the parties so that all may be properly administered by the Department. Contrary to the apparent position of Candy and other HWRO claimants, the Petitioner contends that claimants must shoulder the burden of proving their entitlement to a recommendation and decree that deviates from reasonably established standards. As a matter of procedure, a claimant may not simply object to a recommendation with the bare assertion that the claimant requires more water, or a longer season of use, and without advancing supporting evidence. To demand that the Department prove that the standard recommendations do not apply will place an unreasonable burden on the State.

Rational standards for recommending certain water right elements, which are generally applicable in a particular basin or subbasin, are imperative if SRBA claimants are to see an end to this adjudication. Further delays in obtaining relief

are intolerable for the Petitioner, whose rights are imminently subject to a delivery call under the conjunctive management rules.

Petitioner seeks to intervene in the Candy subcases because issues affecting his rights and interests are raised and about to be litigated on an expedited basis in those subcases, and likely will establish precedent in the SRBA for other subcases to follow. As a claimant to a water right—a property right subject to determination in this case—Petitioner is entitled to intervene and advance arguments and evidence on those issues. Therefore, Petitioner’s Motion to Participate should be granted.

V. THE PETITIONER IS NOT ADEQUATELY REPRESENTED BY ANOTHER PARTY TO THE SUBCASES.

The Petitioner’s interests in the issues raised by the Candy subcases are distinct from either Candy’s or the Department’s. The Petitioner is a claimant in the SRBA who claims a property right in the ability to divert ground water to beneficial use. That right may be impaired or impeded by the outcome of this case. Candy has asserted legal positions that, if upheld, will be adverse to the Petitioner. The Department holds no water rights, and seeks no specific relief from the Court. Moreover, the Department’s status in the SRBA remains unsettled pending a decision by the Idaho Supreme Court on Basin Wide Issue No. 2. And regardless of whether the Department ultimately is deemed an independent expert, a party or otherwise, it should not necessarily be expected to advance the same arguments as the Petitioner on various issues.

VI. GRANTING INTERVENTION WILL NOT PREJUDICE THE OTHER PARTIES.

Neither the Department nor Candy will be prejudiced by the granting of the Petitioner's Motion to Participate. The Petitioner's participation should not require extended discovery or additional time to conduct a trial on the merits. The legal issues that concern the Petitioner's interests are, to some extent, fairly framed by the facts already available.

Also, by participating in the Candy subcases, and such others as may ultimately become consolidated with them to deal with common issues, the Petitioners may be able to avoid filing multiple motions to participate. Thus, intervention by the Petitioner in the Candy subcases should help advance the overall resolution of Basin 36 subcases. This would be of obvious benefit to the parties and the Court.

Further, Petitioner's Motion to Participate currently is limited to those subcases identified as likely test cases for determining issues of particular concern to the Petitioner. This minimizes the potential impact of Petitioner's participation in subcases in Basin 36, and maximizes efficiency with which the legal issues raised by various Hagerman Valley area claims can be addressed. If additional subcases were to be consolidated with the Candy subcases, the Petitioner would reserve the right to seek intervention in those subcases as well.

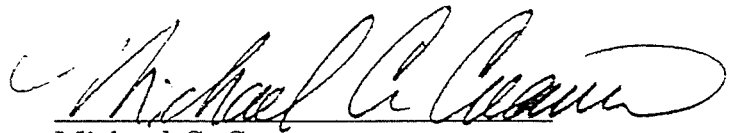
Finally, because Petitioner's interests are distinct from those of the current parties, Petitioner's participation as an intervenor would advance the litigation by providing the court with an important additional perspective of the legal issues.

VII. CONCLUSION.

For the above-stated reasons, Petitioner respectfully requests this his Motion to Participate in Subcase Nos. 33-00134A and 33-00135B be granted, and that Petitioner be permitted to participate as a full party for all purposes in those subcases.

DATED this 28th day of April, 1995.

GIVENS PURSLEY & HUNTLEY

A handwritten signature in cursive script, appearing to read "Michael C. Creamer", written over a horizontal line.

Michael C. Creamer
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of April, 1995, a true and correct copy of the within and foregoing instrument was served via the method noted below:

R. Lee Leininger
The United States Department of Justice
550 West Fort Street, Box 33
Boise, ID 83734

☒ U.S. Mail ☐ Fax ☐ Hand Delivery ☐ Federal Express

Alan G. Lance
Clive J. Strong
A. Lynne Krogh
Nicholas B. Spencer
Office of the Attorney General
Statehouse
Boise, ID 83720

☒ U.S. Mail ☐ Fax ☐ Hand Delivery ☐ Federal Express

Patrick D. Brown
Hepworth Lezamiz & Hohnhorst
P.O. Box 389
Twin Falls, ID 83303-0389

☒ U.S. Mail ☐ Fax ☐ Hand Delivery ☐ Federal Express



EXHIBIT A

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	)	REPORTER'S TRANSCRIPT
	)	
Case No. 39576	)	Basin 36 Subcases
	)	

D-a-t-e: Tuesday, December 20, 1994

T-i-m-e: 3:30 P.M.

P-l-a-c-e: SRBA Courthouse, Twin Falls, Idaho

B-e-f-o-r-e: TERRY DOLAN, Special Master

H-e-a-r-i-n-g: IGWA MOTION TO ESTABLISH A FRAMEWORK FOR
THE ORDERLY RESOLUTION OF ISSUES RAISED BY
INDIVIDUAL MEMBERS OF HWRO AND THEIR
VARIOUS OBJECTIONS TO THE DIRECTOR'S
REPORT FOR BASIN 36; HWRO MOTION TO STRIKE
IGWA MOTION TO ESTABLISH FRAMEWORK

1 what this is all about.

2 Thank you, Your Honor.

3 MASTER DOLAN: Thank you. Anything
4 further on the motion to strike?

5 (NO RESPONSE)

6 MASTER DOLAN: Well, having heard all the
7 arguments -- and they were all well made, and I
8 certainly appreciate your efforts.

9 I know, Mr. Creamer, it is kind of
10 frustrating when you get into a new lawsuit
11 here. You get new people, and there are a lot of
12 issues that are extremely complicated.

13 And we are very frustrated in trying to get
14 this thing on the road. We spent so much time
15 trying to describe the car; we just can't get the
16 thing to move yet. We're still describing the
17 car. We have been taking wheels off and putting
18 them back on, and changing things and change
19 color here, maybe. But it is a seamless web, and
20 at some point we have to start.

21 And I know your clients are frustrated by
22 the fact you can't get a handle on this thing.
23 It is so big, so giant.

24 When we were doing scheduling conferences
25 over in Rupert with Mr. Ling and some of the

1 other attorneys over there, we kind of
2 back-doored a lot of these things, kind of
3 guessing how we would approach them. We ended
4 up, I think, on some cases setting a whole bunch
5 of them on the same date when we saw common
6 issues. We were in a way consolidating some of
7 the issues. We were struggling with what you're
8 going through right now.

9 But back to your motion. When I first saw
10 it, I noticed it was filed with the court; but it
11 specifically addressed the basin 36 objections.
12 And for that reason, the judge felt it was
13 appropriate to treat this as a matter before a
14 special master rather than before the SRBA
15 court. So that the judge, in other words, did
16 not treat it as a motion to designate basinwide
17 issues; but rather it's a motion to talk about
18 issues within a particular subcase.

19 And in our SRBA we have the procedures
20 already set up that you have to be a party to a
21 subcase to participate in issues within that
22 subcase. And because this raises issues in
23 basin 36, that's why I would essentially have to
24 find that you are a party to these subcases
25 before you can raise issues in those subcases.

1 Let me get right to the point here. I
2 think the motion to strike -- I frankly have to
3 grant it because there's no way to treat your
4 motion as anything other than attempting to raise
5 motions within a subcase without being a party to
6 the subcase. So, in other words, your remedy at
7 this point would be to somehow become a member, a
8 party to a subcase and then raise those very
9 issues.

10 Now, having said that, having denied -- or
11 granted the motion to strike, let me go on and
12 explain because I think Mr. Spencer's point is
13 well made. You can turn around, relabel your
14 thing, come back here and say this is a motion to
15 designate basinwide issues; and we're right back
16 in here doing the same thing, except it would be
17 Judge Hurlbutt hearing it.

18 So let me give you a little bit further --
19 now, this may get me into some problems. But I'm
20 hoping we can get this car moving down the road a
21 little quicker.

22 First of all, the way I've structured
23 subcases within basin 36, and we'll probably go
24 back to the same structure, the first hearings
25 will be in the Rupert area cases. The second

1 group we are going to handle would be handled in
2 the Jerome area, and the third group would be in
3 Hagerman. And they were going to go in serial.
4 There will be some overlapping, but generally the
5 Hagerman subcases are going to go well after the
6 Rupert cases.

7 So from a practical standpoint, we're going
8 to be facing some of these issues and discussing
9 them and rediscussing them before we even get to
10 objections raised by the Hagerman water rights
11 association, organization. That will buy you a
12 little time to figure out where your clients want
13 to go.

14 But more specifically, and this gets even
15 closer to the substance of your motion, as I look
16 at it, you have enumerated those 18 objections
17 raised by HWRO. And they directly track the
18 general provisions in the director's report. In
19 other words, your No. 1 discusses the objections
20 to the director's report No. 1 which is the
21 effect of the adjudication. And these are all
22 under the director's report under general
23 provisions.

24 In case you haven't had a chance to read
25 the judge's decision in basinwide No. 3,

1 there's some -- and I'll just read three
2 paragraphs from that to kind of focus on what I
3 see as the determinative issue here. And I think
4 Mr. Ringert was getting to this, too.

5 At page 27 Judge Hurlbutt ruled that:
6 "This court has consistently ruled that it has
7 no authority over the regulation, distribution or
8 delivery of water."

9 At page 28 the judge said, "Under Idaho's
10 constitutional doctrine of separation of powers,
11 the only administration the SRBA court can
12 conduct is the enforcement of the decree and not
13 the regulation, distribution or delivery of
14 water."

15 At page 30, and this is the last quote, the
16 judge held that: "Any provision of a director's
17 report, whether contained in the general
18 provisions, elements of the rights, remarks, or
19 any other section which requires the court to
20 exercise the police power of the state, will be
21 stricken. These police powers have been
22 delegated to IDWR, and it is incumbent upon IDWR
23 to adopt the necessary administrative provisions
24 for the regulation or distribution of water under
25 the Administrative Procedures Act and not to have

1 them decreed by a court."

2 What Judge Hurlbutt was getting at there
3 was: If it is in a general provision, until all
4 of these matters are settled, there won't be any
5 of them in them. So, in other words, when I
6 submit my first report and recommendation in
7 basin 36, there won't be any administrative
8 matters in the general provisions because the
9 judge has already told me I can't. And the judge
10 won't decree them until all of these
11 administrative matters, general provisions are
12 taken care of.

13 So essentially I think the court has --
14 you've raised some terrific issues; and I know
15 some of these are going to be basinwide issues.
16 There's no doubt in my mind. I think Mr. Ling
17 would agree with me. For instance, season of
18 use, that almost has to be a basinwide issue in
19 my opinion. They are going to come up later on.
20 But for now your concern with general provisions
21 is premature.

22 Your remedy, of course, at this point, if
23 you want to file a late objection or late
24 response or motion to participate, then you'll
25 become a party to a subcase. And at that point

1 you could file a motion to consolidate or motion
2 to designate basinwide issue.

3 Now, if you choose not to become a party to
4 a subcase and remain, I think, as you are now, as
5 a party to the adjudication, you certainly have
6 the right to move the court to designate a
7 basinwide issue. And that's certainly your
8 prerogative.

9 But this gets back to what the court, I
10 think, intended with AO1. They wanted a
11 framework for the orderly resolution of all of
12 these issues. And they have done that, I think,
13 in AO1 and the Idaho Rules of Civil Procedure.

14 So we have the framework. I know it is
15 going to be frustrating to work with it. It is
16 difficult at best. But these things have simply
17 got to go in accordance with AO1.

18 I hope you can bear with us. We're going
19 to try to work through these as fast as
20 possible. I don't have all the answers, and the
21 court doesn't have all the answers. He has more
22 than I do.

23 But the point is we've got to get working
24 on these individual cases, and somehow we got to
25 get this thing moving along. And I hope we can

1 do that with the least expense to your clients,
2 the least frustration to them, and do it in an
3 orderly fashion, and fairly adjudicate everyone's
4 water right.

5 Mr. Creamer, do you have any questions?

6 MR. CREAMER: No, Your Honor. But I
7 want to thank you for taking the time and giving
8 me that guidance. And I understand the basis for
9 your decision.

10 MASTER DOLAN: Well, thank you. I
11 appreciate it.

12 Any other discussion; hear any questions
13 you may have?

14 Mr. Ringert, I must have excited something
15 in your reasoning there.

16 MR. RINGERT: I'm just a casual
17 bystander, Your Honor.

18 MASTER DOLAN: I'd say a guilty
19 bystander. Well, I appreciate your time; and I
20 hope I haven't bored you too much by how I see
21 this. I am trying to give you some idea of where
22 I'm going to go in my hearings so no one is going
23 be surprised.

24 My general philosophy is nobody jumps out
25 of the bushes in these cases; nobody loses a

1 water right when they are actually entitled to
2 that water right; and we're all going to follow
3 the same rules. And we're going to get through
4 this one way or the other. We can do it the long
5 way or the short way, but we've got to get
6 through this. We owe it to the State of Idaho.

7 Thank you, everybody.

8 (PROCEEDINGS ADJOURNED)
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EXHIBIT B

Party's Name:

Idaho Ground Water Appropriators, Inc.

Attorneys' Names and Address

Jeffrey C. Fereday
Christopher H. Meyer
GIVENS PURSLEY & HUNTLEY
277 North 6th Street, Suite 200
P.O. Box 2720
Boise, Idaho 83701-2720
(208) 342-6571
(208) 343-8920 (facsimile)

3915\13\PLEADING\MOTION.P01

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

IGWA's MOTION AND
SUPPORTING
MEMORANDUM FOR THE
ESTABLISHMENT OF A
FRAMEWORK FOR THE
ORDERLY RESOLUTION OF
ISSUES RAISED BY
OBJECTIONS TO THE
DIRECTOR'S REPORT IN
BASIN 36

DESCRIPTIVE SUMMARY

Attorneys for individual members of Hagerman Water Right Owners, Inc.
("HWRO") have filed numerous objections to the Director's Report for Basin 36. In

their objections, they raise a number of general legal questions affecting virtually all parties in this case. In this motion, Idaho Ground Water Appropriators, Inc. ("IGWA") respectfully requests an opportunity to contest and brief these issues at an appropriate time.

MOTION

IGWA respectfully moves this Court to establish a framework for the orderly resolution of issues raised by individual members of HWRO ("HWRO Claimants") in their various objections to the Director's Report for Basin 36. Some of the issues may be suited best to resolution as basin-wide issues. Others may be suited to fact-specific test cases. Yet others may best be disposed of by affirmative determination of the Court that the issue need not be resolved at the time of water right adjudication.

MEMORANDUM IN SUPPORT OF MOTION

In support of its motion, IGWA states as follows:

Over the course of the last several months, attorneys for HWRO have filed over 160 objections on behalf of various individual members of HWRO with respect to water rights included in the Director's Report for Reporting Area 3 (Basin 36).¹ In each case, the objection consists of the standard form for

¹ Our reference to HWRO members is not meant to suggest that these claims are filed on behalf of HWRO. So far as we know, these statements are filed solely on behalf of individual claimants, all of whom are believed to be members of HWRO.

objections accompanied by an identical twenty-one page attachment labeled "Question 14., page 4, Other" (hereinafter "Question 14 Statement").

Part VI of the Question 14 Statements raises a series of general legal questions respecting the nature of water rights under Idaho law. Some of the questions raised are of fundamental importance to virtually all litigants in this case, because they go to the very nature of water rights.

For the convenience of the Court, we summarize below each of the eighteen issues raised in the Question 14 Statements. In doing so, IGWA does not seek to limit or interpret the points made by the individual HWRO claimants. Rather, the purpose is to provide a brief overview to the Court to assist in its consideration of this motion.

Those issues which, in IGWA's view, raise particularly significant legal questions, are marked with an asterisk. We begin each with a brief description of the position articulated in the Director's Report under the heading "*Director's Report.*" This is followed by a brief characterization of the response contained in the Question 14 Statements under the heading "*HWRO Claimants' Position.*"

Summary of Part VI Issues Raised in Question 14 Statements

*(1) Effect of SRBA Decree (two issues are included here: A and B):

Director's Report:

- (A) The Director asserts that once the Court issues its order on Basin 36, that order will supersede all prior decrees and extinguish all unclaimed water rights which were required to have been filed.
- (B) The Director also asserts that he has authority to administer water rights pursuant to state law.

HWRO Claimants' Position:

- (A) Claimant has no knowledge and therefore denies the Director's assertion about the SRBA decree overriding prior decrees and extinguishing unclaimed rights.
- (B) Claimant also denies the Director's assertion that he has authority to administer water rights pursuant to state law. Claimant states that the Director may administer water rights only on the basis of authority specifically "delegated" by the legislature which is consistent with claimants' constitutional rights.

(2) Definitions

Director's Report:

The Director defines "CFS," "AFY" and "Director."

HWRO Claimants' Position:

Admitted.

*(3) Conjunctive Administration

Director's Report:

The Director makes a limited observation regarding "conjunctive administration." The Director notes that where more than one water right is administered in a single system, juniors may be curtailed in order to satisfy seniors. In contrast, where two water rights are administered as separate systems, a junior will not be cut off to satisfy a senior.

HWRO Claimants' Position:

Claimant denies that the Director "has any statutory or regulatory authority for the 'conjunctive administration' as therein described."

*(4) Historic Pumping Levels

Director's Report:

The Director offers the blanket statement that ground water appropriators are not entitled to maintenance of their historic pumping levels.

HWRO Claimants' Position:

Denied.

*(5) More on Conjunctive Administration

Director's Report:

The Director offers observations about the factual circumstances under which he would conjunctively administer certain ground and surface rights within Basin 36. The Director says that the Snake Plain Aquifer, the springs, and the Snake River and its tributaries downstream of

Milner Dam are hydrologically interconnected. The Director says, however, that not enough is known about their interconnection to justify conjunctive administration. The Director speaks separately to the perched aquifer near Rupert, which will be administered conjunctively.

HWRO Claimants' Position:

Admits the existence of a hydrological connection, but denies the remainder of the statement.

(6) Small Domestic and Stock Water Rights

Director's Report:

The Director notes that small domestic and stock water rights are not currently subject to administration, but that they could be in the future if deemed necessary by the Director. The Director also notes that if appropriators of such rights chose to defer adjudication (which they are free to do), they will not be able to place a call and they may themselves be subject to curtailment.

HWRO Claimants' Position:

Admits that these rights are not currently administered, but denies the rest of the statement.

*(7) Measuring Devices

Director's Report:

The Director asserts his authority to require the installation of measuring devices and control works.

HWRO Claimants' Position:

Denied.

(8) Firefighting

Director's Report:

The Director notes the exemption of firefighting from ordinary administration of water rights.

HWRO Claimants' Position:

Admits, but denies any relevance to the claimants' rights.

(9) De Minimus Consumptive Use

Director's Report:

The Director states that when consumptive use is unstated, it is *de minimus*.

HWRO Claimants' Position:

Claimant lacks sufficient knowledge and therefore denies.

*(10) Domestic Water Right Size Limitations

Director's Report:

The Director recites the limitations on the size of domestic water rights set out in Idaho Code § 42-111 (13,000 gal/day or 2,500 gal/day). The Director adds a third option wherein the gal/day cap is lifted if the use is for homes.

HWRO Claimants' Position:

Claimant denies: (1) that the Director's report is consistent with the statute and (2) that the statute is "in force."

*(11) Stock Water Right Size Limitations

Director's Report:

The Director describes stock water rights as generally limited to 13,000 gal/day (but, again, adds a separate definition with no cap).

HWRO Claimants' Position:

Denied.

*(12) Irrigation Right Flexibility

Director's Report:

The Director describes certain flexibility rules governing irrigation rights: (1) stock watering is included, even if not so stated, (2) water may be applied before or after the irrigation season under certain circumstances, and (3) water in excess of the decreed amount may be applied in certain circumstances.

HWRO Claimants' Position:

Denied.

*(13) Maximum Diversion Rate

Director's Report:

The Director recites the maximum annual diversion volume of water reasonably required for irrigation (generally 3.5 to 4.0 AFY per acre, with exceptions permitted).

HWRO Claimants' Position:

Denied.

*(14) Maximum Consumptive Use Rate

Director's Report:

The Director recites the maximum annual consumptive use volume of

water reasonably required for irrigation (generally 2.5 to 3.0 AFY per acre, with exceptions permitted).

HWRO Claimants' Position:

Denied.

*(15) Size Limitations on Overlapping Rights

Director's Report:

The Director states that where more than one water right is used to irrigate the same ground, the total may not exceed: (1) 0.02 cfs per acre, (2) the maximum annual diversion volume, or (3) the maximum annual consumptive use volume.

HWRO Claimants' Position:

Denied.

*(16) Inch Per Acre Rule

Director's Report:

The Director recites and explains the inch per acre rule: Rule is generally 0.02 cfs per acre, but departures are permitted. However, 0.03 cfs per acre is allowed for acreages of 5 acres or less.

HWRO Claimants' Position:

Denied.

(17) Report Instructions

Director's Report:

Following the sixteen points listed above, the Director's report contains a set of "instructions" (beginning on page A-i) in which the Director outlines and explains the various components of the water right report (point of diversion, place of use, etc.).

HWRO Claimants' Position:

Claimant denies the accuracy of this description.

(18) Report on Each Water Right

Director's Report:

The bulk of the Director's Report is the analysis of individual rights.

HWRO Claimants' Position:

General denial.

IGWA wishes to underscore that the summary provided above is simply a

shorthand synopsis which necessarily omits some of the detail and nuance contained in the full version of the Director's Report and the Question 14 Statements which respond to the Director's Report. Its purpose is solely to assist the Court by highlighting some of the key issues raised.

IGWA has placed asterisks by twelve of the eighteen issues raised by the HWRO Claimants indicating those which IGWA considers to be particularly significant issues. Obviously, other parties might identify a somewhat different mix as being the key issues. In any event, it is clear that a number of significant issues have been raised. (Although IGWA might suggest that some of the issues raised by HWRO Claimants are frivolous, they have been raised nonetheless and must be resolved.)

In some cases, however, it is not clear precisely what issue has been raised. For instance, it is not clear what the HWRO Claimants were getting at in paragraph 3 of Part VI of their Question 14 Statements (see item 3 above, entitled "Conjunctive Administration"). The term conjunctive administration can be used to refer simply to the principle that ground and surface water can be administered jointly when hydrologically connected. I.e., ground water rights are not, per se, legally immune from calls by surface users, and vice versa. Others use the term conjunctive administration (or, more often, conjunctive management) to refer to a broader range of legal questions regarding how ground and surface rights will be administered together. E.g., This raises questions such as futile calls, reasonable pumping levels, reasonable means of diversion, and so on. Many of these

questions were raised by parties in *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994). These were never resolved by the Court, however. Consequently, the HWRO Claimants' denial of the Director's authority for conjunctive administration potentially opens up a significant set of issues.

Now that the Court has lifted the stay it placed on these proceedings, IGWA anticipates the need to file late objections to water rights filed by the HWRO claimants. However, it is difficult to do so—particularly for a large number of water rights—without some resolution of the key issues identified above. Without such resolution, potential objectors cannot know whether they have a legal basis for objection or whether it is appropriate to raise an issue at this time. By way of example, the HWRO Claimants deny that the inch-per-acre rule is applicable in Idaho. It is important to know whether and under what circumstances that rule applies before evaluating whether each of the thousands of water rights claimed in the SRBA violate the rule. Otherwise, costly technical evaluations could proceed on the basis of an improper premise.

Some of these issues—those which raise pure questions of law—may best be suited for designation as basin-wide issues. For other issues, it may make more sense to postpone their resolution until they are framed squarely by specific factual controversies. In these cases, it would be helpful for the parties to identify specific examples of water rights which raise such issues, and use these as test cases. A third possibility is that the Court might determine that it is premature to determine some of these issues at all at the water right determination stage.

For example, the Court might find that it is unnecessary and inappropriate to declare at the time of water right adjudication what is a reasonable means of diversion for a particular ground or surface water right. Thus, the Court might find that such issues should be raised later, when and if they arise in the context of administration of particular water rights.

It has been IGWA's understanding that certain of these issues (such as duty of water) are properly and necessarily raised at the time of adjudication of a water right, while others (such as reasonable means of diversion) should not be decided at the adjudication stage, but may properly be raised when water rights are administered. However, there does not appear to be clear precedent in Idaho governing when and how to raise such issues. Now that other parties are beginning to raise them, however, IGWA wishes to preserve its right to contest any issue properly before the Court.

Because of the complexity of the questions raised, IGWA has not chosen, at this time, to force the issue by filing motions for designation of basin-wide issues or for summary judgment. Rather, IGWA asks the Court for guidance and assistance in establishing a framework for the orderly resolution of these questions through a combination of the following:

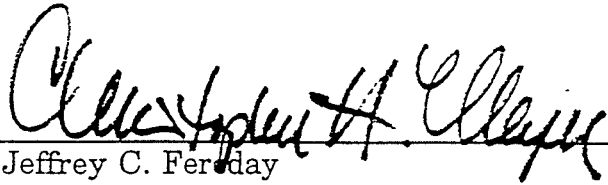
1. Designation of basin-wide issues
2. Selection of test cases
3. Declaration that an issue need not be resolved at this stage.

However the Court chooses to proceed, IGWA respectfully requests a full

opportunity for discovery and briefing on any such issue before it is decided.

Respectfully submitted this 15th day of December, 1994.

GIVENS PURSLEY & HUNTLEY

By 
Jeffrey C. Feraday
Christopher H. Meyer

Attorneys for
Idaho Ground Water Appropriators, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on December 15, 1994 I caused to be served a true and correct copy of the foregoing:

1. IGWA's MOTION AND SUPPORTING MEMORANDUM FOR THE ESTABLISHMENT OF A FRAMEWORK FOR THE ORDERLY RESOLUTION OF ISSUES RAISED BY OBJECTIONS TO THE DIRECTOR'S REPORT IN BASIN 36
2. IGWA's MOTION FOR EXPEDITED HEARING
3. ORDER GRANTING EXPEDITED HEARING

to each of the persons named below by the method indicated below each of their names.

Chief
Natural Resources Division
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, ID 83711-4449

☒ U.S. Mail ☐ Fax ☐ By hand ☐ Overnight

United States Department of Justice
Environment and Natural Resources
Division
550 West Fort Street, Box 33
Boise, ID 83724

☒ U.S. Mail ☐ Fax ☐ By hand ☐ Overnight

James Annest, Esq.
Law Offices of James Annest
1742 Overland Avenue
Burley, ID 83318

☒ U.S. Mail ☐ Fax ☐ By hand ☐ Overnight

Josephine P. Beeman, Esq.
Moffat, Thomas, Barrett, Rock & Fields
First Security Bank Building
P.O. Box 829
Boise, ID 83701

☒ U.S. Mail ☐ Fax ☐ By hand ☐ Overnight

Cliff S. Bentz, Esq.
Yturri, Rose, Burnham, Bentz & Helfrich
P.O. Box 450
Fruitland, ID 83619

☒ U.S. Mail ☐ Fax ☐ By hand ☐ Overnight

Patrick D. Brown, Esq.
John C. Hepworth, Esq.
Hepworth, Lezamiz & Hornhorst, Chartered
133 Shoshone Street North
P. O. Box 389
Twin Falls, ID 83303-0389

☒ U.S. Mail ☐ Fax ☐ By hand ☐ Overnight

Randall C. Budge, Esq.
Racine, Olson, Nye, Cooper
& Budge, Chtd.
201 East Center, Suite A2
P.O. Box 1391
Pocatello, ID 83204-0391

☒ U.S. Mail ☐ Fax ☐ By hand ☐ Overnight

Rebecca Craven, Esq.
Robert T. Anderson, Esq.
Nez Perce Tribal Executive Committee
Office of Legal Counsel
P.O. Box 305
Lapwai, ID 83540-0305

☒ U.S. Mail ☐ Fax ☐ By hand ☐ Overnight

Douglas A. Donohue, Esq.
Donohue Law Office
812 E. 12th Avenue South
Nampa, ID 83651

☒ U.S. Mail ☐ Fax ☐ By hand ☐ Overnight

Brad A. Flinders, Esq.
Stunz, Fonda, Nichols, Kiyuna, Okai,
Horton & Flinders
P.O. Box 1565
Nyssa, OR 97913

☒ U.S. Mail ☐ Fax ☐ By hand ☐ Overnight

Randall C. Fredricks, Esq.
Strand Building, Suite 270
815 Park Boulevard
Boise, ID 83712-7739

☒ U.S. Mail ☐ Fax ☐ By hand ☐ Overnight

Scott L. Campbell, Esq.
David B. Lincoln, Esq.
Bobbie K. Dominick, Esq.
Eiam & Burke, P.A.
702 W. Idaho Street
P.O. Box 1539
Boise, ID 83701

☒ U.S. Mail ☐ Fax ☐ By hand ☐ Overnight

Richard A. Cummings, Esq.
Meuleman, Miller, Strother & Cummings
960 Broadway, Suite 400
P.O. Box 955
Boise, ID 83701

☒ U.S. Mail ☐ Fax ☐ By hand ☐ Overnight

W. Kent Fletcher, Esq.
Parsons, Smith, Stone & Fletcher
137 West 13th Street
P.O. Box 910
Burley, ID 83318

☒ U.S. Mail ☐ Fax ☐ By hand ☐ Overnight

Kent W. Foster, Esq.
Holden Kidwell Hahn & Crapo
330 Shoup Avenue
P.O. Box 50130
Idaho Falls, ID 83405

☒ U.S. Mail ☐ Fax ☐ By hand ☐ Overnight

Blair J. Grover, Esq.
Grover Law Office, Chartered
102 North Clark
P.O. Box 36
Rigby, ID 83442-0036

☒ U.S. Mail ☐ Fax ☐ By hand ☐ Overnight

John D. Hansen, Esq.
C. Timothy Hopkins, Esq.
Teresa L. Sturm, Esq.
Hopkins, French, Crockett, Springer &
Hoopes
428 Park Avenue
P.O. Box 51219
Idaho Falls, ID 83405-1219

☒ U.S. Mail ☐ Fax ☐ By hand ☐ Overnight

Dana L. Hofstetter, Esq.
Holland & Hart
P.O. Box 2527
Suite 1400, West One Plaza
Boise, ID 83701-2527

☒ U.S. Mail ☐ Fax ☐ By hand ☐ Overnight

Roger D. Ling, Esq.
Ling, Nielson & Robinson
615 H Street
P.O. Box 396
Rupert, ID 83350

☒ U.S. Mail ☐ Fax ☐ By hand ☐ Overnight

Don A. Olowinski, Esq.
Albert P. Barker, Esq.
Richard B. Burleigh, Esq.
Hawley Troxell Ennis & Hawley
877 West Main Street
P.O. Box 1617
Boise, ID 83701

☒ U.S. Mail ☐ Fax ☐ By hand ☐ Overnight

Ray W. Rigby, Esq.
Jerry R. Rigby, Esq.
Rigby Thatcher Andrus Rigby, Kam &
Moeller, Chartered
25 North Second East
P.O. Box 250
Rexburg, ID 83440-0250

☒ U.S. Mail ☐ Fax ☐ By hand ☐ Overnight

Cecil D. Hobdey, Esq.
Hobdey & Hobdey
Attorneys at Law
125 Fifth Avenue West
P.O. Box 176
Gooding, ID 83330

☒ U.S. Mail ☐ Fax ☐ By hand ☐ Overnight

William R. Hollifield, Esq.
Hollifield and Tolman
249 Third Avenue East
P.O. Box 66
Twin Falls, ID 83303-0066

☒ U.S. Mail ☐ Fax ☐ By hand ☐ Overnight

Laurence J. Lucas, Esq.
Senior Staff Attorney
LAW Fund of the Rockies
P.O. Box 1612
408 West Idaho Street
Boise, ID 83701

☒ U.S. Mail ☐ Fax ☐ By hand ☐ Overnight

Bert L. Osborn, Esq.
26 South Ninth Street
P.O. Box 158
Payette, ID 83661

☒ U.S. Mail ☐ Fax ☐ By hand ☐ Overnight

William F. Ringert, Esq.
Daniel V. Steenson, Esq.
Andrew M. Harrington, Esq.
Ringert Clark, Chartered
455 S. Third Street
P.O. Box 2773
Boise, ID 83701-2773

☒ U.S. Mail ☐ Fax ☐ By hand ☐ Overnight

Richard Simms, Esq.
Margaret J. King, Esq.
Simms & Stein
P.O. Box 3329
Hailey, ID 83340

☒ U.S. Mail ☐ Fax ☐ By hand ☐ Overnight

James P. Speck, Esq.
Hogue, Speck & Aanestad, P.A.
120 East Avenue
P.O. Box 987
Ketchum, ID 83340

☒ U.S. Mail ☐ Fax ☐ By hand ☐ Overnight

James C. Tucker, Esq.
John A. Rosholt, Esq.
John K. Simpson, Esq.
Rosholt Robertson & Tucker, Chartered
142 Third Avenue North
P.O. Box 1906
Twin Falls, ID 83303-1906

☒ U.S. Mail ☐ Fax ☐ By hand ☐ Overnight

Lary C. Walker, Esq.
P.O. Box 828
Weiser, ID 83672

☒ U.S. Mail ☐ Fax ☐ By hand ☐ Overnight

Jeanette Wolfley, Esq.
Candy L. Jackson, Esq.
Shoshone-Bannock Tribes
P.O. Box 306
Fort Hall, ID 83203

☒ U.S. Mail ☐ Fax ☐ By hand ☐ Overnight

Bruce M. Smith, Esq.
Rosholt Robertson & Tucker, Chartered
1221 West Idaho, Sixth Floor
P.O. Box 2139
Boise, ID 83701-2139

☒ U.S. Mail ☐ Fax ☐ By hand ☐ Overnight

Larry Sullivan, Esq.
Schroeder, Hutchens & Sullivan
P.O. Box 220
Vale, OR 97918

☒ U.S. Mail ☐ Fax ☐ By hand ☐ Overnight

Terry T. Uhling, Esq.
ShawnDel Ysursa, Esq.
Assistant General Counsel
Environmental & Regulatory Affairs
J.R. Simplot Company
P.O. Box 27
Boise, ID 83707

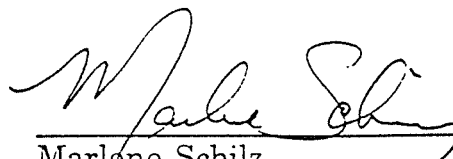
☒ U.S. Mail ☐ Fax ☐ By hand ☐ Overnight

Douglas R. Whipple, Esq.
Whipple's Law Office, Chartered
111 West 15th Street
P.O. Box 249
Burley, ID 83318

☒ U.S. Mail ☐ Fax ☐ By hand ☐ Overnight

Craig R. Zaiss, Esq.
Attorney at Law
305 Grover Street
P.O. Box 628
Parma, ID 83707

☒ U.S. Mail ☐ Fax ☐ By hand ☐ Overnight


Marlene Schilz