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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     | ) | BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION  |
|                | ) | AND ALTERNATIVE MOTION FOR PERMISSIVE APPEAL OF |
|                | ) | ORDER DENYING MOTION TO DISMISS KIM BODILY AND  |
|                | ) | MOTION TO ALTER OR AMEND JUDGMENT GRANTING      |
|                | ) | MOTION TO DISMISS OBJECTIONS OF FORT HALL       |
|                | ) | WATER USERS ASSOCIATION                         |
| Case No. 39576 | ) | SUBCASE Nos. 01-10223, 01-10248, 25-02160       |
|                | ) | 25-13615, 27-02007, 27-11560, 27-11561.         |
|                | ) |                                                 |
|                | ) |                                                 |

DESCRIPTIVE SUMMARY

Kim Bodily and the Fort Hall Water Users Association submit this brief in support of the following motions:

- 1) Kim Bodily's Motion for Reconsideration and Alternative Motion for Permissive Appeal of Order Denying Motion to Dismiss Kim Bodily pursuant to I.R.C.P. 11(a)(2)(B) and I.A.R. 12(b), and;
- 2) The Fort Hall Water Users Association's Motion to Alter or Amend Judgment pursuant to I.R.C.P 59(e).

## STATEMENT OF FACTS

The Fort Hall Indian Reservation was reserved from the public domain in part by Executive Order of June 14, 1867. Because the United States failed to address the issue of water rights explicitly, the Shoshone-Bannock Tribes may be entitled to a federal reserved water right, i.e., an implied right to sufficient water to satisfy the purposes for which the lands were reserved. Winters v. United States, 207 U.S. 564 (1908).

In 1985, the Idaho legislature directed the Idaho Department of Water Resources to seek a general adjudication of the interrelated claims to the use of the waters of the Snake River Basin. The legislature also adopted a resolution directing that the Governor and the Attorney General attempt to settle the Indian water rights claims through negotiation as opposed to litigation. Negotiations subsequently undertaken by the United States, the State of Idaho, the Shoshone-Bannock Tribes, and the Committee of Nine resulted in the 1990 Fort Hall Indian Water Rights Agreement.

While the 1990 Agreement resolves the Tribes' unadjudicated federal law claims, the United States, the State of Idaho, and the Tribes also agreed to change the nature and extent of previously adjudicated water rights perfected under Idaho state law for the Fort Hall Irrigation Project.

The Fort Hall Irrigation Project was initially authorized by the Act of August 5, 1894, 28 Stat. 305. It is not a reclamation

project. The Project is a creature of statute designed to irrigate lands on the Fort Hall Indian Reservation and adjacent ceded lands or lands sold to non-Indians. The Project's Enabling Act provided that the water rights would be appurtenant to the lands irrigated and that the rights appurtenant to the ceded lands would be sold to the non-Indian users for payment of construction costs. Act of March 1, 1907, 34 Stat. 1015. Title to the physical works and the management and operation of the Project were to remain in the United States until otherwise provided by Congress. The Act makes no mention of "water delivery contracts."

In the 1990 Agreement, the United States, the State of Idaho, and the Tribes agreed to subordinate the water right priority of the ceded lands or lands sold to the non-Indians, to reduce the non-Indian acreage while leaving the Indian acreage intact, and to reduce the storage right with respect to the non-Indian lands from 125,440 acre feet to 25,500 acre feet.

#### **STATEMENT OF THE CASE**

On February 23, 1995, the United States of America, the State of Idaho, and the Shoshone-Bannock Tribes (the "joint movants") filed separate motions to dismiss the objections to the terms of the 1990 Fort Hall Indian Water Rights Agreement filed by Mr. Kim Bodily, an individual water user in the Fort Hall Irrigation Project, and Mr. Floyd Johnson, acting in his capacity as Chairman

of the Fort Hall Water Users Association ("FHWUA").<sup>1</sup>

The motions to dismiss the FHWUA's objections were based on three grounds:

1. The FHWUA is not a claimant in the SRBA nor has it been served and joined as a party, and therefore the FHWUA may not file objections in the SRBA.
2. The objection filed by the FHWUA raises issues that are not within the scope of the SRBA Court.
3. This motion is further supported by the Memorandum in Support of Motion to Dismiss and the Affidavit of David Shaw filed herewith and the record and files in this case.

The only affidavit filed in support of the motions was that of Mr. David B. Shaw, the Chief of the Adjudication Bureau of the Idaho Department of Water Resources. Mr. Shaw's affidavit attests only to the fact that "the Fort Hall Water Users Association has not filed any notices of claims in the Snake River Basin Adjudication." The "records and files in the case" include the Director's Report and the objections. The Director's Report in turn contains the 1990 Fort Hall Indian Water Rights Agreement, the proposed decree, and the United States' notices of claim. No other supporting affidavits were filed, and no other pleadings in which facts are asserted or from which factual inferences could be drawn are in the record.

The joint motions to dismiss Kim Bodily's objections were based on two grounds:

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<sup>1</sup> Individual motions to dismiss the objections of Kim Bodily were filed in Water Right Nos. 01-10248 and 27-11560. Individual motions to dismiss the objections of the FHWUA were filed in Water Right Nos. 01-10223, 01-10248, 25-02160, 25-13615, 27-02007, 27-11560, and 27-11561.

1. The objection filed by Mr. Bodily raises issues that are not within the scope of the SRBA Court.
2. This motion is further supported by the Memorandum in Support of Motion to Dismiss and the Affidavit of David Shaw filed herewith and the records and files in this case.<sup>2</sup>

No other affidavits were filed in support of the motions to dismiss Mr. Bodily's objections. The records and files in the case which relate to the motions consist of the Director's Report and Mr. Bodily's objections.

The motions to dismiss were heard on April 18, 1995. On May 11, 1995, the court entered its order granting the motions to dismiss the objections of the FHWUA and denying the motions to dismiss Mr. Bodily's objections. The orders are addressed separately in this brief, though the legal principles overlap.

#### THE MOTIONS TO DISMISS THE FHWUA'S OBJECTIONS

The motions to dismiss raised two issues for summary judgment with respect to the FHWUA, viz., the standing of the FHWUA to file objections and whether the SRBA has subject matter jurisdiction over the issues raised by the objections. The motions sought to have the standing issue treated first, raising the jurisdictional issue only if the court were to determine that the FHWUA has

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<sup>2</sup> Unless Mr. Shaw's affidavit was intended to mean that individual water users within the FHWUA have "not filed any notices of claims," as opposed to the literal reading of the affidavit "that the Fort Hall Water Users Association has not filed any notices of claims," the affidavit could not support the motions to dismiss Mr. Bodily's claims. If this was Mr. Shaw's intent, he was wrong; Mr. Bodily has filed a notice of claim for a non-Project domestic well, as did Mr. Floyd Johnson.

standing to file the objections. With respect to the related burden of proof, the initial burden of establishing the absence of a genuine issue of material fact rests with the joint movants. Tingley v. Harrison, 125 Idaho 86, 89, 867 P.2d 960, 963 (1994). The companion proposition is "[i]f a party moving for summary judgment raises issues in his motion but then fails to provide any evidence showing a lack of any genuine issue of material fact with respect to those issues, the non-moving party has no burden to respond with supporting evidence." Thomson v. Idaho Insurance Agency, Inc., \_\_\_ Idaho \_\_\_, 887 P.2d 1034, 1038 (1994). The evidence presented by the joint movants went solely to the issue of standing. The joint movants provided no evidence with respect to the jurisdictional question of whether the issues raised by the objections are within the scope of the SRBA.<sup>3</sup>

### Standing

The sole legal basis of the joint movants' standing argument was that a "claimant" can only be a person who has filed a water

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<sup>3</sup> The court noted that water rights disputes are non-jury matters and "in considering a motion to dismiss . . . , 'the court sits as a trier of fact and is not required to construe all evidence and inferences to be drawn therefrom in the light most favorable' to the non-moving party." Citing Keenan v. Brooks, 100 Idaho 823, 825, 606 P.2d 473 (1980). This proposition relates to evidence that would have been presented to a jury. Sitting as a trier of fact, the court is required to view conflicting evidentiary facts in favor of the nonmoving party. The court is not necessarily required to draw inferences from uncontroverted facts, but can draw the inferences it deems most probable. Argyle v. R.W. Slemaker, 107 Idaho 668, 670, 691 P.2d 1283 (1984).

right claim in the SRBA. Mr. Shaw's affidavit formed the only factual basis of the legal argument. In response to the motions, the FHWUA explained that the statute involved, i.e., § 42-1401A, creates two classes of claimants, viz., "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." (Emphasis added). Because the FHWUA did not claim standing on the basis of the first class of claimants, i.e., as a person asserting ownership of rights, Mr. Shaw's affidavit was inapposite.

As pointed out in our brief in response to the motions, the FHWUA asserted standing under the second class of claimants created by I.C. § 42-1401A. During the hearing on April 18, 1995, and in its order granting the joint movants' motions to dismiss, the court paid no attention to the statutory basis on which the FHWUA asserted standing. In its order, the court held that:

It is undisputed that the Fort Hall Water Users Association did not file a Notice of Claim to these or any rights in the Snake River Basin Adjudication. It is, therefore, not a statutory party to the SRBA.

The court's conclusion, however, does not follow.

Subsection (7) of § 42-1401A, upon which the court relies, defines a "[p]arty . . . [as] the director, any person who is a claimant, or any person who is served or joined." A "claimant" is defined in subsection (1) of § 42-1401A, the subsection of the statute upon which the FHWUA relied. A "claimant" is "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." (Emphasis added). To conclude that the FHWUA does not have standing, the court would have to posit the fact that the FHWUA did not file a claim, as attested to by Mr. Shaw, and the fact that the members of the FHWUA are not persons on whose behalf ownership of rights to the use of water has been asserted. It is not enough to conclude that the FHWUA did not file a claim.<sup>4</sup>

Unlike the court, the joint movants did pay attention to the basis upon which the FHWUA asserted standing. However, the joint movants provided no evidence that the members of the FHWUA are not claimants under the second class of claimants created by the statute. Instead, the joint movants simply argued in their reply brief that the statute does not mean what it says, i.e., that a person on whose behalf ownership of rights to the use of water is asserted cannot be a claimant. In this regard, Idaho law holds "that where a statute or constitutional provision is plain, clear, and unambiguous, it 'speaks for itself and must be given the interpretation the language clearly implies.'" Moon v. Investment Board, 97 Idaho 595, 548 P.2d 861 (1976). In other words, according to the Idaho Supreme Court, a district court is not at liberty to read an unambiguous statute differently. In this case, the United States, the State of Idaho, and the Tribes did not and

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<sup>4</sup> The motions to dismiss did not assert that the FHWUA did not have standing under the part of the statute upon which the FHWUA relies. That part of the statute is not mentioned in the motions.

could not assert an alternative meaning for the statute, just as they could not assert that it is ambiguous. I.C. § 42-1401A means what it says. Accordingly, members of the Association are by statutory definition "claimants" in the SRBA. The court's conclusion to the contrary lacks a basis in reason. Likewise, the court's refusal to assess or discuss the applicable part of the statute is inexplicable.<sup>5</sup>

In ruling as it did on the issue of standing, the court sua sponte found it "significant that the objections filed by the Fort Hall Water Users Association to the rights at issue in the Agreement did not contest the 'ownership' element of those water rights.'" The court, however, completely misses the significance of the fact that the FHWUA did not contest ownership. The FHWUA did not contest the United States' ownership because doing so would have eliminated the Association's standing under the second class of claimants in § 42-1401A(1). If the United States did not have legal title to the water rights in question, it would have had no basis upon which to file a claim on behalf of the members of the

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<sup>5</sup> In the United States' Notice of Claim for the non-Indian portion of the Fort Hall Irrigation Project, which is part of the record from which the court should draw the inference it deems most probable, the United States posits that it does not own the land (13,221.24 acres) on which the water is applied. Pursuant to the Project's Enabling Act, the water rights are appurtenant to the land. In the Remarks section of the United States' Notice of Claim, it is stated that "[t]he water rights are claimed by the United States for use on land owned by non-Indian individuals which (sic) are served by the Fort Hall Irrigation Project. Accordingly, the non-Indian owners of land in the Project are necessarily persons on whose behalf the United States asserted the rights.

FHWUA.

The court also stated that the "Fort Hall Water Users Association now claims an ownership interest in some of these same rights notwithstanding their failure to file a claim or object to the ownership element in the Agreement." The FHWUA did not and has not claimed absolute ownership of the water rights for the purpose of standing. Nor was such an issue raised by the motions to dismiss. On the contrary, because the FHWUA could not have asserted that each of its members had filed a claim in the SRBA, to have made an untimely argument that it was an owner of the water rights would have stripped the Association of standing.<sup>6</sup> Again, the court persisted in ignoring the subsection of § 42-1401A upon which the FHWUA relied and continued to jump ahead of itself and to focus instead on the "contract" aspect of the issue of subject matter jurisdiction. The FHWUA, however, never asserted or discussed ownership of the water rights in the context of the issue of standing.

#### A Court Should Decide Only Dispositive Issues

With regard to the issue of standing, the court held that the FHWUA is not a claimant, accordingly is not a party to the SRBA, and therefore lacks standing. Pursuant to the established principle that the court will not render advisory opinions [Harris

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<sup>6</sup> Some of the individual members of the FHWUA have filed non-Project claims for domestic wells in the SRBA, including Mr. Floyd Johnson.

v. Cassia County, 106 Idaho 513 (1984)], and pursuant to prior decisions in this case [E.g., ORDER DENYING MOTIONS FOR RECONSIDERATION, Subcase No. 91-00004], the FHWUA's objections to the 1990 Agreement should have been dismissed on the basis of the court's dispositive holding that the FHWUA lacks standing. Instead, the court gratuitously decided the issue of subject matter jurisdiction. A resolution of the issue was not necessary to the court's decision to dismiss the FHWUA's objections.

### **Subject Matter Jurisdiction**

With respect to the second issue that was before the court, i.e., the issue of subject matter jurisdiction, the same principles of summary judgment law apply. The joint movants had the initial burden of establishing the absence of a genuine issue of material fact and that they are entitled to prevail as a matter of law. The joint movants asserted no factual basis upon which to conclude that there is no genuine issue of material fact. They based the second half of their motion to dismiss on the bare legal assertion that "[t]he pleadings filed by the FHWUA fail to allege matters relating to the elements of water rights at issue in the SRBA." According to the joint movants, the Association's "interests in the use of water are limited to "contracts with the U.S. . . ."

To assess the matter, the court should look to the proposed decree and the Association's objections. With respect to water right No. 01-10248, for example, the proposed decree sets forth the

source, annual diversion volume, diversion rate, annual volume of consumptive use, priority date, point of diversion, purpose and period of use, place of use, and basis of the proposed Snake River right. The Association's "Standard Form 1 Objection" sets forth objections to the quantity of the proposed right, the place of use, and the amount of consumptive use. The "pleadings," in other words, set forth a number of disputes over three basic elements of the water rights held on behalf of the members of the FHWUA as they have been proposed to be adjudicated in the 1990 Agreement. These "elements" of the water right are set forth in I.C. § 42-1409 as the elements that the SRBA is statutorily obliged to adjudicate.

The joint movants did not assert that the pleadings do not expressly raise "matters relating to the elements of water rights at issue in the SRBA." They argued instead that the relationship between the United States and the Fort Hall water users somehow rises above the substantive dispute and renders the dispute "outside the scope of the SRBA." The argument is premised on the assertion that "water delivery contracts" between the United States and the water users form the sole basis of the Fort Hall water users' rights to the use of water. Without providing the court with any factual support for the existence of such contracts, the joint movants simply stated to the court that the water users are prematurely complaining of a failure to physically deliver water pursuant to water delivery contracts.

The FHWUA is not complaining of a failure to deliver water

pursuant to non-existent water delivery contracts. As the owners of equitable title to the water rights appurtenant to the ceded or sold lands in the Fort Hall Irrigation Project, the FHWUA is objecting to the fact that the United States, the State of Idaho, and the Tribes have attempted to change the nature and extent of its state-created water rights in the guise of settling the federal reserved water rights of the Tribes.<sup>7</sup>

The motions to dismiss raise the issue -- in the form of a bare statement -- that alleged water delivery contracts between the members of the FHWUA and the United States, as a matter of fact, define the basis upon which the membership is entitled to water. The FHWUA asserted in response that the issues framed by the pleadings involve substantive disputes over the elements of the state-created water right for the Fort Hall Irrigation Project. The FHWUA also asserted that the Project's Enabling Act makes no mention of contracts for delivery of water, but refers only to contracts for sale of the water rights appurtenant to the ceded lands or lands sold to the non-Indians. The joint movants elected not to support their assertion that the nature of the contractual relationship between the United States and the Fort Hall water users is the same as the relationship between a municipality and a

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<sup>7</sup> The motions to dismiss do not assert that the FHWUA does not have standing as the beneficial owner of the rights appurtenant to the ceded lands. Such an assertion would fly in the face of federal law. See Act of March 1, 1907, 34 Stat. 1015.

homeowner.<sup>8</sup> They did not dispute the fact that the Fort Hall Irrigation Project legislation refers only to contracts which would sell and convey the water rights appurtenant to the non-Indian lands.

Federal law, on the one hand, defines the contracts as contracts of sale, with the United States retaining legal title. The joint movants characterize the contracts as water delivery contracts. As a matter of fact, they are one or the other. Idaho law is clear in this regard. It holds "that if a party moving for summary judgment raises issues in his motion but then fails to provide any evidence showing a lack of any genuine issue of material fact with respect to those issues, the nonmoving party has no burden to respond with supporting evidence." Thomson v. Idaho Insurance Agency, supra at 1038 (1994). Accordingly, the FHWUA had no obligation to respond with supporting evidence. We simply stated that the joint movants' characterization of the contracts does not comport with the law.<sup>9</sup>

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<sup>8</sup> The joint movants characterized the respondent's objections as an "assertion that the United States has breached its contractual obligations to deliver water to the non-Indian water users within the Fort Hall Irrigation Project . . . ." Joint Memorandum at 6.

<sup>9</sup> The only reason that the FHWUA attempted to introduce two examples of the Project contracts of sale at the hearing was because the court maintained that the Association had a duty to provide the contracts to establish ownership notwithstanding that the Association did not object to ownership. While urging that the nonmovants had an obligation to produce the contracts to prove absolute ownership in order to establish standing, the court tacitly took the position that the movants had no burden to produce the contracts to support their unfounded statement that there is no

What happened in this case is that the joint movants filed a motion to dismiss based solely on the factual assertion that the FHWUA is not a claimant and thus not a party. This is the motion that the FHWUA responded to. The joint movants did not base their motion on the ground that the members of the Association are not persons on whose behalf the United States filed its Notice of Claim for the non-Indian portion of the Fort Hall Irrigation Project.<sup>10</sup>

In the reply to the FHWUA's response to the motion to dismiss that was actually filed, the FHWUA explained that it did not purport to be a claimant as a party who had filed claims. In their reply brief, the joint movants stated for the first time that the United States did not file its Notice of Claim on behalf of the non-Indians. The law in Idaho is clear on this critical point. The Supreme Court has held that a district court errs in construing summary judgment standards "to mean that when a party moves for

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fiduciary relationship between the members of the Association and the United States or to show that the nature of the contracts places the objections outside the scope of the SRBA. Without supporting evidence, the court apparently simply believed the United States, but would require the FHWUA to support its contrary assertion with fact. The burden in this regard should rest with the movants. No case in Idaho stands for the proposition that a party must come to court with all of the documents necessary to make a threshold showing of its standing under § 42-1401A(1), just as a party who files a notice of claim is not required to produce its chain of title.

<sup>10</sup> Based on the exchanges that took place during the settlement negotiations, the United States could not have done so. See Attachment A and B. Moreover, when Mr. Bodily attempted to file a claim on his Fort Hall water right he was told that he could not do so because the United States had already filed a claim on his behalf.

summary judgment on one issue, then the non-moving party must respond as to all issues and submit factual materials on all issues, even though those 'issues' have not been asserted, because the nonmoving party . . . will have the ultimate burden of proving every element of their case at trial." Thomson v. Idaho Insurance Agency, supra at 887 P.2d 1038. The proper view is that "if the movant does not challenge an aspect of the nonmovant's case in that party's motion, the nonmovant is not required to address it at the summary judgment stage of the proceedings." Id. In this case, the joint movants did not challenge in their motion that aspect of § 42-1401A(1) that underlies the FHWUA's alleged failure to provide evidence that the United States filed its Notice of Claim on the non-Indians' behalf. The court's decision in this regard grants a motion for summary judgment that was never filed.

As noted above, § 42-1401A(1) provides the statutory basis of the FHWUA's standing. In this regard, the joint movants did not rely on a contract provision that contradicts or waives the Association's standing under § 42-1401A(1).<sup>11</sup> In a factual

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<sup>11</sup> I.C. § 42-1401A(1) contemplates by its terms some form of relationship between the United States and the members of the Association as persons "on whose behalf ownership of rights to the use of water is asserted." This relationship could be a trust relation between a trustee and a beneficiary or a contractual relationship. The statute does not limit the class of "claimants" it creates to persons in a particular kind of relationship. The mere fact that there are contracts involved does not resolve the issue of jurisdiction. The joint movants must show that the terms of these contracts and the relationship that they create transform the substantive issues to an issue outside the scope of the SRBA. The joint movants neither did so nor attempted to do so.

vacuum, they simply argued that the contracts create a relationship between the United States and the Fort Hall water users that somehow negates their right to object or that the contracts effectively transform the substantive issues raised by the pleadings into the kind of contractual provision that the court has concluded are inappropriate for inclusion in a decree.<sup>12</sup>

Instead of coming forward with any evidence to support their contention, the joint movants relied solely on an empty assertion of law. Because the joint movants submitted no evidence, the FHWUA had no burden to respond with contradictory evidence. Thomson, supra. To so hold would not only shift the burden on a motion for summary judgment to the non-moving party, but would simultaneously require the non-moving party to produce evidence to rebut an unsupported assertion.

#### THE MOTIONS TO DISMISS KIM BODILY'S OBJECTIONS

The court held that Kim Bodily is "a claimant in the Snake

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<sup>12</sup> In oral argument the United States urged that it is similar to an irrigation district or municipality. The United States, however, is clearly neither. The assertion that the relationship between the United States and the Fort Hall water users is the same as the relationship between an irrigation district or a municipality and their contracting water users is not supported by any evidence. The relationship between the United States and the non-Indian users of water in the Fort Hall Irrigation Project is unique. Unlike the situation in Idaho where an irrigation district may "own" the right of its water users, the United States sold the water rights appurtenant to the non-Indian lands in the Fort Hall Irrigation Project. Those rights have vested under federal and state law, leaving the United States as the nominal "owner" of the rights.

River Basin Adjudication" who objected to the "'ownership' element of water rights 01-10248 and 27-11560 which are part of the Agreement." The court then concluded that because he is a party to the Snake River Basin Adjudication, he has standing to object to the 1990 Agreement. The court went on to hold that it "has subject matter jurisdiction to hear his objection to the ownership element" of the objected to water rights, concluding that "the pleadings before the court do not support the dismissal of the objections filed by Kim Bodily and the motions as to him are denied."

The holding of the court is internally inconsistent and confusing. The court determined that Mr. Bodily is a "claimant" without setting forth the basis upon which he is a claimant, i.e., whether he is a claimant because he individually filed a claim for a domestic well or whether he is a claimant because a water right was filed on his behalf.<sup>13</sup> The basis upon which the court limited Mr. Bodily's objections solely to the issue of ownership is equally unclear. The court apparently limited the objections to ownership on its belief that it lacked jurisdiction to determine the other issues raised in the objections. The basis for such a decision appears to be the court's conclusion that the other issues "sound in contract" and are therefore outside of the jurisdiction of the SRBA. In order to reach such a conclusion, however, the

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<sup>13</sup> The latter basis would support the proposition that any claimant in the Snake River Basin in the State of Idaho could object to any water right in the system quite aside from whether a case or controversy existed between the claimants.

court would have to have found facts in the record that were sufficient to support such a finding on the joint movants' request for summary judgment. There were no facts or evidence presented to the court to support the proposition that court lacked jurisdiction over the substance of the objections. The joint movants did not provide any basis for the court to conclude that it lacked jurisdiction beyond the mere statement that the water users were complaining of a breach of a contract to deliver water.<sup>14</sup>

The court's conclusion that it has jurisdiction to hear the "ownership" issue actually supports the implication that there were no facts before the court to support a granting of summary judgment to the effect that the court lacked jurisdiction to hear the other issues raised in the objections, such as quantity, place of use, and the amount of irrigated acreage. This is so because if Mr. Bodily were to prevail on the issue of ownership it would appear under the court's reasoning that the court would have jurisdiction to determine the other issues.<sup>15</sup> Thus, the effect of the court's order is that it is summarily deciding an issue now that may well turn out to be wrong once actual evidence is considered on the

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<sup>14</sup> It should be significant that the Enabling Act does not refer to "delivery contracts" and that such contracts do not exist. The "Agreement for Water Right, Fort Hall Project" that the court excluded from evidence referred to the Enabling Act and quoted the language of the statute that contemplated contracts in which Project water rights could only be sold to the non-Indians. It is understandable why the joint movants did not want to support their assertions of "water delivery contracts" with the actual contracts.

<sup>15</sup> The threshold "issue" obviously would no longer be one of contract for delivery of water.

issue.

Had the court required the joint movants to produce evidence to prove that Kim Bodily did not have standing pursuant to I.C. §42-1401A(1) as someone on whose behalf a claim had been filed, Mr. Bodily could have provided evidence to specifically rebut whatever evidence was actually presented, assuming that the joint movants could have produced such evidence. This in turn would have resolved the second issue of subject matter jurisdiction. One apparent purpose of the alternative grounds for standing under I.C. §42-1401A(1) is to recognize a second class of "claimants" who can object to the treatment of the water right by the Director's Report or a stipulated agreement. This is the only forum where the non-Indian water users can have the elements of their water rights addressed. A federal district court has no business doing so in the guise of an action for breach of a non-existent contract.

The court has placed Mr. Bodily in the position of having to undertake a piecemeal adjudication of the objections on his own. If he were to prevail on the issue of "ownership" after the time and expense of a trial on the issue, the court would then hear his other objections. However, if the court were to recognize Mr. Bodily's standing under the appropriate part of I.C. §42-1401A(1), as it should because there has been no motion or proof to the contrary by the joint movants on this aspect of Mr. Bodily's standing, there would be no need to go through the inefficient process of requiring Mr. Bodily to go to trial to prove his

standing to object to the agreement.<sup>16</sup>

#### PERMISSIVE APPEAL

If the court declines to reconsider this issue, Mr. Bodily requests permission to appeal the court's decision for the reasons set forth in the motion and because it involves a "legal question of first impression." Budell v. Todd, 105 Idaho 2, 665 P.2d 701 (1983). Additionally, it involves a "controlling question of law as to which there is substantial grounds for difference of opinion," and an immediate appeal would "materially advance the orderly resolution of the litigation" with respect to the statutory interpretation of I.C. §14-1401(A) as well as the SRBA court's jurisdiction. Kindred v. Amalgamated Sugar Co., 118 Idaho 147, 795 P.2d 309 (1990).

#### CONCLUSION

With respect to the Fort Hall Water Users Association's objections, the court has held in effect that the beneficial owners of the water rights appurtenant to the ceded or sold lands within the Fort Hall Irrigation Project have no recourse against the United States, the State of Idaho, and the Shoshone-Bannock Tribes for attempting to profoundly alter the nature and extent of their

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<sup>16</sup> The argument asserted on the issues of summary judgment and similar issues with respect the issue of standing and subject matter jurisdiction addressed elsewhere in this brief should be applied to Mr. Bodily's situation as well.

state-created water rights. The court has done so by ruling on an issue of summary judgment that was not raised in the motion to dismiss. Contrary to I.C. § 42-1401A(1) and Idaho case law defining the contours of summary judgment, the court has also ruled that the FHWUA had a burden to submit factual materials in relation to an issue that was never presented to the Association. In sum, the court's decision grants a motion for summary judgment that was not filed.

With respect to Kim Bodily's objections, the court's order is internally inconsistent and undermines judicial economy. The court's conclusion that it has jurisdiction to hear the "ownership" issue also rests on the counterproductive implication that there were no facts of record to support the court's view that the remaining issues are outside the scope of the SRBA.

Accordingly, the Fort Hall Water Users Association and Kim Bodily urge the court to alter or amend the judgment dismissing the Association to comport with the adjudication statutes and Idaho law. They also urge that the court reconsider the contradictory and procedurally impossible situation in which the court's decision has placed Mr. Bodily.

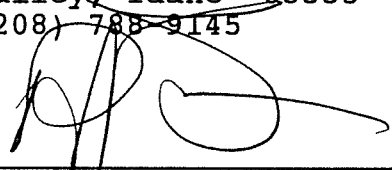
DATED this 17th day of May, 1995.

Respectfully Submitted,



---

Margaret J. King  
Simms & Stein, P.A.  
102 Aspen Lakes Drive  
P.O. Box 3329  
Hailey, Idaho 83333  
(208) 788-9145



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Richard A. Simms  
Simms & Stein, P.A.  
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Hailey, Idaho 83333  
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CERTIFICATE OF SERVICE

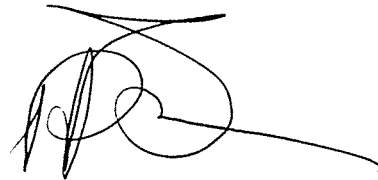
I hereby certify that on this 17th day of May, 1995, I served copies of the foregoing BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION AND ALTERNATIVE MOTION FOR PERMISSIVE APPEAL OF ORDER DENYING MOTION TO DISMISS KIM BODILY AND MOTION TO ALTER OR AMEND JUDGMENT GRANTING MOTION TO DISMISS OBJECTIONS OF FORT HALL WATER USERS ASSOCIATION by placing true and correct copies thereof in the United States mail, first class postage prepaid to each person listed below:

Peter C. Monson  
Indian Resources Section  
Environment and Natural Resources Division  
United States Department of Justice  
999 18th Street, Suite 945 N. Tower  
Denver, CO 80202

Candy L. Jackson  
Tribal Attorney's Office  
Shoshone-Bannock Tribes  
P.O. Box 306  
Fort Hall, ID 83203

Clive Strong  
Office of the Attorney General  
Natural Resource Division  
700 West Jefferson, Room 206  
P.O. Box 44449  
Boise, ID 83711-4449

John A. Rosholt  
Norman M. Semanko  
Rosholt, Robertson & Tucker  
142 3rd Avenue North  
P.O. Box 1906  
Twin Fall, ID 83303-1906



Richard A. Simms

*Copy*

ATTACHMENT A

February 8, 1989

Supervisory Civil Engineer, Fort Hall Irrigation Project  
Water right negotiations

Superintendent, Fort Hall Agency

In reference to the water right negotiations among the Tribe, State, and U.S. Government, a question arises that has a direct impact upon the Project waterusers. This question has either not been effectively addressed or not effectively communicated to the people involved. The question is "who represents the interests of the non-Indian Project waterusers located both on and off reservation" or "How are the non-Indian Project wateruser interests to be handled?"

Presently, the Idaho Department of Water Resources is advising non-Indian Project users that the United States will file their water right claims on their behalf. At one point I was given verbal information that the BIA would file on all Project water rights. Other discussions indicate this may not be the case. The Secretary of the Fort Hall Waterusers Association has apparently been given conflicting information as well. In other discussions, it appeared the Tribe would represent the non-Indian Project users. The Walker Report (pg 123-124) states "evidence of ownership of water rights has not been issued to landowners in the ceded area.... Should the Secretary of the Interior issue evidence of ownership of water rights to non-Indian landowners there would be several requests to transfer water rights from place to place and the administration of the project would become more involved and difficult. It would appear preferable for the Government to continue virtually to hold in trust title to project water right." Confusion also exists regarding the priority dates that the non-Indian waterusers may be entitled to.

Therefore, I am requesting a clarification of the procedures and legal position regarding all of the Project waterusers. If the non-Indian waterusers are to be handled differently from the Indian waterusers, they should be so informed in the very near future so they can plan accordingly.

Your assistance in this matter would be appreciated.

Alan L. Oliver  
Supervisory Civil Engineer

ALOliver:jsm 2/8/89  
cc: Agency Chrony  
Irrig Chrony  
Irrig Subj: 1103-04m.  
Don Jones, PAO



# United States Department of the Interior

BUREAU OF INDIAN AFFAIRS  
FORT HALL AGENCY  
FORT HALL, IDAHO 83203



March 13, 1989

Mr. Floyd Johnson  
13562 W Tyhee Rd  
Pocatello, ID 83202

Dear Floyd:

Re: Water Rights Adjudication

On March 8th and 9th the Shoshone-Bannock Tribes, State of Idaho, and United States met in Boise to continue water right negotiations. One of the topics was "Who represents the non-Indian Project waterusers?". After discussion of the issue, it was determined the United States would file water right claims with the State of Idaho for all Project waterusers. For those users who wish to file on their own, however, they may do so. Some of the people in this category may be those who purchased "Indian" lands and who may be entitled to an earlier priority date than the Project currently has under State law.

In order to update you on the progress being made in the negotiations and to answer any questions you may have, the US and State negotiators have set aside time to meet with the Board members of the Fort Hall Waterusers Association. The meeting has been set at the Pocatello Municipal Airport for Monday, March 20, 1989 at 2:00 P.M. If you have any questions regarding this meeting, please advise. If not, we'll see you at the airport.

Sincerely,

Alan L. Oliver  
Supv. Civil Engineer