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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF TWIN FALLS

IN RE: SRBA	)	JOINT OPPOSITION TO FHWUA
	)	MOTION TO ALTER OR AMEND JUDGMENT
CASE NO. 39576	)	AND TO KIM BODILY'S MOTION FOR
	)	RECONSIDERATION AND ALTERNATIVE
	)	MOTION FOR PERMISSIVE APPEAL
	)	
	)	1990 FORT HALL INDIAN WATER RIGHTS
	)	AGREEMENT AND SUBCASE Nos: 01-10223,
	)	01-10248, 25-02160, 25-13615,
	)	27-02007, 27-11560, 27-11561.

DESCRIPTIVE SUMMARY

This is the joint memorandum of the United States, Shoshone-Bannock Tribes, and the State of Idaho in opposition to the following motions: (1) Motion to Alter or Amend Judgment Granting Motion to Dismiss Objections of Fort Hall Water Users Association; (2) Motion for Reconsideration and Alternative

JOINT MEMO IN OPP. TO FHWUA &
KIM BODILY MOTION TO RECONSIDER, ETC. -- 1

Motion for Permissive Appeal of Order Denying Motion to Dismiss
Kim Bodily.

INTRODUCTION

By Order entered on May 11, 1995, this Court dismissed the objections of the Fort Hall Water Users Association ("the Association") on the grounds (1) that the Association is not a claimant of a water right and therefore is not a party with standing to object to water right claims by the United States and others; and (2) that the objections fail to state a claim for relief which may be granted. The Court observed that the Association neither objected to the United States' claim of ownership nor filed a competing claim for ownership of the subject water rights. It is thereby undisputed that the Association is not the legal owner of the water rights at issue in this case. It is also undisputed that the Association has filed no water right claims in the SRBA. See e.g., Affidavit of David Shaw, dated February 23, 1995. Thus, based on these undisputed facts, the Court held that the Association lacked standing and granted the motions to dismiss. The Court also granted the motion on the separate ground that the objections failed to state a claim upon which relief may be granted which was within the subject matter jurisdiction of the SRBA court.

As to the two objections filed by Mr. Kim Bodily, however, the Court denied the joint motions to dismiss on the basis that Mr. Bodily did in fact object to ownership and thereby claimed ownership pursuant to some sort of water right. It is undisputed

that Mr. Bodily also claims a de minimis domestic water right for a well but has no claim for the surface water that is the subject of his objections. On these undisputed facts, the Court found that the pleadings did evidence a claim as to ownership of a water right sufficient to confer standing upon Mr. Bodily and denied the motions to dismiss.

The Association now moves this Court to reconsider its ruling dismissing the Association's objections. The basis for the motion, alleged to be I.R.Civ.P. 59(e), is not clear, although it appears to re-argue many of the points concerning standing and subject matter jurisdiction made previously in briefing and argument prior to the court's ruling. Mr. Kim Bodily also separately moves the Court for reconsideration or, alternatively, for permissive appeal of the Court's Order denying the motion to dismiss, for reasons which are also less than clear since Mr. Bodily prevailed on that motion. In the following section, we shall address each of these motions.

ARGUMENT

- A. There is No Factual or Legal Basis Upon Which to Alter or Amend the Judgment Granting the Motions to Dismiss the Objections of the Fort Hall Water Users Association.

In support of its Motion to Alter or Amend the Order dismissing its objections, the Fort Hall Water Users assert as a basis Idaho Rule of Civil Procedure 59(e), which provides that,

A motion to alter or amend the judgment shall be served not later than fourteen (14) days after entry of the judgment.

The grounds for such a motion are listed in I.R.Civ.P. 59(a) and include such things as irregularity of the proceedings of the court, accident or surprise, newly discovered evidence, insufficiency of the evidence, or error in law, occurring at trial. Id. Rule 59(a) requires that any motion to alter or amend the judgment which asserts insufficiency of the evidence to justify the verdict or error in law occurring at trial "must set forth the factual grounds therefore with particularity." I.R.Civ.P. 59(a)(7).

The subject motions do not set forth the factual grounds for the alleged errors with particularity, and a close examination of the Court's decision does not reveal any errors, either of fact or of law. The FHWUA asserts in its motion that the Court's order "is contrary to requirements of I.C. 42-1401A and Idaho summary judgment law," but the memorandum in support fails to demonstrate that assertion. The Association asserts as error the Court's rulings as to standing and lack of subject matter jurisdiction. This Memorandum will address each asserted error in turn.

1. The Court Correctly Held that the Association Lacks Standing. The Court held that the FHWUA "does not have standing to object and their objections fail to state a claim upon which relief can be granted." In reaching that conclusion, the Court relied on the definition of "party" found in I.C. 42-1401A(7) (1986) which defines "party" to include "any person who is a claimant or any person who is served or joined." "Claimant" is

further defined in I.C. 42-1401A(1) as, "any person asserting ownership of rights to the use of water within the state of Idaho or on whose behalf ownership of rights to the use of water is asserted." Id. The Court went on to observe 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. I.C. § 42-1401A(7). It is 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. Fort Hall Water Users Association now claims an ownership interest in some of these same water rights notwithstanding their failure to file a claim or to object to the ownership element in the *Agreement*.

Because it is not a claimant, the Fort Hall Water Users Association is not a statutory party to the SRBA. Therefore it lacks standing to object to the *Agreement*.

May 11, 1995 Order at 3-4.

The Court's logic is unassailable. The Association lacks standing because it has failed to properly plead the necessary facts. The Association nonetheless complains that the Court did not address the "second prong" of the definition which includes as a "claimant" a person "on whose behalf ownership of rights to the use of water is asserted," Id., but again there are no assertions in the pleadings that the Project water rights claimed by the United States are claimed "on behalf of" the Association. Thus, even if the "second prong" in the definition of claimant was relevant here, the Association cannot meet it.

The applicable water right claims for the use of the Fort Hall Irrigation Project as filed by the United States reveal

instead that they are claimed by the "United States of America" only, and not "on behalf of" the Association or any of its members.¹ As the Court observed, there was no objection filed by the Association to that element of the water right claims at issue here, and therefore no dispute exists as to the ownership of the water rights or the status of the Association. Because the Association failed to object to the United States' ownership of the subject right, and failed to file a competing claim for such rights, there was no need for the Court to address this "second prong" of the definition as the Association would have this Court do, and the interpretation this Court gave to I.C. 42-1401A is completely correct and the Association's assertions are unfounded. See Association Brief, at 8-9.²

2. Subject Matter Jurisdiction. The Association next

¹ See Notice of Claim to a Water Right Acquired Under State Law, dated March 19, 1993 (Included in Section 3, Director's Report for the 1990 Fort Hall Indian Water Rights Agreement (Reporting Area 25)). The proposed consent decree included in the Director's Report describes the Project water rights as, "Water Rights Held by the United States for Use on Non-Indian owned lands on the Fort Hall Irrigation Project and for the Bureau of Indian Affairs, Fort Hall Agency." Nowhere is there any mention of the claims being filed "on behalf of" the Association or any of its members.

² The Association further argues that the United States somehow misled the water users into believing that it would file claims on their behalf, relying on an internal agency memorandum and a letter from the Fort Hall Agency Superintendent to Floyd Johnson, written in 1989, over three years prior to the United States filing claims in the adjudication. The letter to Mr. Johnson specifically noted that, "[f]or those users who wish to file on their own, they may do so," and invited Mr. Johnson and other water users to meet with the state and federal negotiators to "answer any questions you may have." In any event, such a letter cannot confer standing where none is evident on the face of the pleadings since, as in any litigation, it is the pleadings filed by the parties which control. I.C. § 42-1412(4). Nowhere in the pleadings -- the United States' claims or the Association's objections -- is there any assertion that the claims filed by the United States "for use on non-Indian owned lands" within the Project are filed "on behalf of" members of the Association.

complains that, "the court gratuitously decided the issue of subject matter jurisdiction," which the Association asserts is unnecessary, now that the Court has ruled against it. In essence, the Association seeks to relitigate the matters already decided by the Court as to the Court's jurisdiction to entertain the nature of the dispute before it. The focus of the Association's complaint seems to be with the Court's observation that, "[a]ny contractual action Fort Hall Water Users Association has against the United States as a result of the *Agreement*, if decreed, is beyond the scope of the SRBA Court's jurisdiction and would have to be initiated in a proper forum." May 11 Order at 4.

Contrary to the Association's contention, the Court's ruling was necessary to decide the Motion to Dismiss. The Joint Motion to dismiss asserted the defense of "failure to state a claim" which included the contention that the SRBA Court lacks jurisdiction to consider what amounts to a contract dispute: as the Court observed, "the Fort Hall Water Users Association claims that the *Agreement* will not allow the United States to fulfill its contractual obligations to provide storage water." *Id.* Exclusive jurisdiction to hear cases against the United States which sound in contract rests with the federal courts pursuant to applicable federal law, including 28 U.S.C. §§ 1346 and 1491; the jurisdiction of this Court by contrast is limited by the adjudication code to specific matters, including the adjudication of the underlying water rights which are properly claimed in the

adjudication; it does not encompass contract disputes. See Idaho Code § 42-1412(8). Thus, by the specific limitations of both federal and state law, this Court's jurisdiction does not encompass secondary contract disputes between water right claimants and their customers. As we pointed out in our earlier briefing and argument, if the United States is unable to meet its contract obligations to deliver water to members of the Association, they have a completely adequate forum available in the federal courts.

This ruling was also necessary to address the contentions of the Association and Mr. Bodily, that they have no forum available other than the SRBA to seek relief. See Brief at 20, where the Association and Mr. Bodily assert, without any authority, that, "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 [sic] of an action for breach of a non-existent contract." That presupposes, of course, that the water users have "water rights" which they have not claimed, and, in any event, is simply incorrect as a matter of federal law, as this Court has noted. Id. at 4.

Thus, it was necessary for the Court to address both the standing argument and the jurisdictional argument to decide the motions to dismiss before it. Although each is alone a sufficient ground for dismissal, they are also related to some extent since standing is a jurisdictional defense and it was completely appropriate for the Court to address both of them.

B. Mr. Kim Bodily's Motion to Reconsider or to Grant Permissive Appeal is Unfounded and Should be Denied.

The Motion on behalf of Mr. Kim Bodily is perplexing at best. As noted above, the Court ruled in Mr. Bodily's favor in denying the joint motion to dismiss his objections. The net effect of the Court's order is to permit Mr. Bodily to proceed to trial to present evidence to contest the water right elements as pled in his objections, which is precisely where Mr. Bodily was prior to the filing of the motion to dismiss his objections.³

Mr. Bodily apparently asserts that the Court somehow erred in its analysis as to Mr. Bodily's standing by failing to distinguish whether it was the fact that Mr. Bodily has filed a domestic groundwater right in the SRBA or the fact that he objected to the ownership element in his objections. Such

³ Mr. Bodily has filed two objections: (1) to water right No. 01-10248 which describes the United States' right to divert water from the Snake River to serve non-Indian lands within the Project; and (2) to water right No. 27-11560 which describes the United States' water right to divert water from Sand Creek to serve the non-Indian lands within the Project. Neither water right is intended to serve the Indian lands which are the subject of the 1990 Fort Hall Indian Water Rights Agreement.

With respect to each water right, Mr. Bodily has objected to the same four elements: Ownership; quantity; place of use (number of irrigated acres within each forty acre subdivision); and "Other" being "the deletion of 4.06 of my acres for watering." See Mr. Bodily's Objections to water right Nos. 01-10248 and 27-11560. As shown in the map attached to his objections, Mr. Bodily's property totals 7.26 acres, of which 4.06 acres was determined by the Idaho Department of Water Resources and the Project not to have been irrigated during the five years preceding the commencement of this adjudication. The relief requested by Mr. Bodily is to have "my 4.06 acres added back into the total use for the project and returned to my use." Id.

Thus, trial on Mr. Bodily's objections will require proof by Mr. Bodily as to his claim of ownership of the subject water rights as well as the extent to which his property has been irrigated and water put to beneficial use.

clarification is merely academic,⁴ and is not a ground upon which to grant either reconsideration or permissive appeal since any ambiguities may be cleared up prior to, or following, trial.⁵

Mr. Bodily appears to be concerned that the trial upon his objections will somehow be adjudicated "piecemeal," in that his "standing" will be considered in the first trial followed by another trial on the merits of his objections. See Brief in Support of Motion for Reconsideration or Permissive Appeal and Motion to Alter or Amend Judgment (Hereinafter, "Reconsideration Brief"), at 20. We do not read the Court's May 11, 1995, Order that way. Rather, it is our understanding that the trial to be held beginning June 26, 1995, will entertain evidence as to each of Mr. Bodily's objections, including the ownership issue as well as his other objections, to the extent that they may not be resolved by pre-trial motions. The undersigned parties agree with Mr. Bodily insofar as we certainly do not want to have Mr. Bodily's objections heard in a piecemeal fashion.

Mr. Bodily has presented no basis upon which to reconsider

⁴ Given that Mr. Bodily has raised no issue with respect to his groundwater right, we suspect that the real basis for Mr. Bodily's standing is the ownership objection which is itself problematic in that he has failed to file any competing claim to the same surface water irrigation right that is at issue here. See Idaho Code § 42-1408A(1)(c) (effect of failure to file a notice of claim).

⁵ Moreover, by both filing a claim to a domestic groundwater right and by objecting to the ownership of the two Project water rights, Mr. Bodily has asserted a claim to standing to object which was nowhere present in the pleadings of the Association, so clarification of the basis for the denial of the motion to dismiss will not resurrect the objections filed by the Association. See discussion supra.

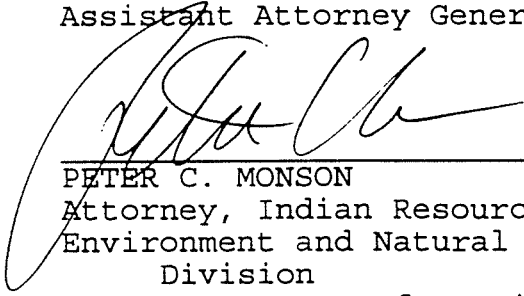
the May 11, 1995 Order nor to permit an appeal of it. On the contrary, Mr. Bodily has simply raised a straw man argument and attempted clumsily to knock it down. Given that the Order could not have been more clear in denying the motion to dismiss and indeed was favorable to Mr. Bodily, his motion is unfounded and should be denied.

CONCLUSION

For the foregoing reasons, as well as those stated in the Court's decision and the arguments previously made by the undersigned movants, the alternative Motions by Kim Bodily should be denied as should the Association's Motion to Alter or Amend Judgment dismissing its objections.

Respectfully submitted this 25th day of May, 1995.

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CERTIFICATE OF SERVICE

I hereby certify that I have this 25th day of May, 1995, served a true copy of the foregoing JOINT OPPOSITION TO FHWUA MOTION TO ALTER OR AMEND JUDGMENT AND TO KIM BODILYU'S MOTION FOR RECONSIDERATION AND ALTERNATIVE MOTION FOR PERMISSIVE APPEAL -- 1990 FORT HALL INDIAN WATER RIGHTS AGREEMENT AND SUBCASE NOS. 01-10223, 01-10248, 25-02160, 25-13615, 27-02007, 27-11560, 27-11561 by depositing same in the U. S. Mails, first class postage prepaid, addressed as follows:

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