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DISTRICT COURT - SRBA
TWIN FALLS CO., IDAHO

FILED

**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 and
) 36-00135B

)
) **ORDER GRANTING MOTION TO
PARTICIPATE CONDITIONALLY**

BACKGROUND

On May 1, 1995, Petitioner William Taylor filed a *Motion to Participate (Motion)* seeking permission to intervene in subcase nos. 36-00134A and 36-00135B, pursuant to *SRBA Administrative Order 1 (A.O.1)* and I.R.C.P. Rule 24. Affidavits of William Taylor and his attorney, Michael Creamer, were filed with the *Motion* along with a *Memorandum in Support of Motion to Participate*. Mr. Creamer's affidavit was later withdrawn and the *Motion* was set for hearing before Special Master Terrence Dolan on June 5, 1995.

The water right claimants in the two subcases, Walter and Margaret Candy, served a *Notice of Intent to Cross-Examine* Mr. Taylor at the hearing. In response, Mr. Taylor filed his *Objection to Notice of Intent to Cross-Examine and Motion for Protective Order*.

The hearing on the *Motion* was held as scheduled. The Candys were represented by Patrick Brown. The State of Idaho, IDWR, was represented by Nicholas Spencer. Mr. Creamer represented Mr. Taylor and the United States participated by telephone through Daria Zane.

The Special Master denied Mr. Taylor's *Motion for Protective Order* and allowed limited cross-examination. After Mr. Brown's cross-examination of Mr. Taylor and further testimony elicited by Mr. Creamer, counsel presented arguments. The Candys opposed Mr. Taylor's

Motion to Participate while the State supported the *Motion*. The United States took no position. The matter was taken under advisement.

The two consolidated subcases are set for trial before the Special Master on August 28, 1995. Mr. Taylor's counsel has participated in most of the discovery to date. All the parties suggested that key issues will likely be submitted before the trial date on *Motions for Summary Judgment* or similar dispositive pleadings.

On a housekeeping matter, it was learned during the hearing that Mr. Taylor has not individually filed a claim for a water right in the SRBA. Rather, he is the president of Howard Taylor & Sons, Inc., the actual claimant of a groundwater right in Bonneville County in eastern Idaho (Reporting Area 5, Basin 35). The day after the hearing on Mr. Taylor's *Motion*, Mr. Creamer filed an *Amended Motion to Participate* asking to substitute Howard Taylor & Sons, Inc., as the movant.

FINDINGS OF FACT

Mr. Taylor sought participation in subcase nos. 36-00134A and 36-00135B "because issues of law may be established in the proceeding that could affect my ground water rights." *Affidavit of William Taylor (Affidavit)* ¶ 7. After the Idaho Supreme Court's decision in *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994), Mr. Taylor concluded that a delivery call by the Candys in the Hagerman area might affect his ground water rights in the Eastern Snake Plain Aquifer near Idaho Falls. One of Mr. Taylor's ground water right claims (35-29528/35-02648) has a priority date of 1961. The Candys claim a priority date of 1884 for 36-00134A and 1908 for 36-00135 B. Mr. Taylor said:

As a junior water right owner, I have a strong interest in ensuring that those persons who hold senior water rights and who may be eligible to implement a delivery call against my rights are not adjudicated diversion or use entitlements in excess of the amount that actually is, or can be, placed to beneficial use according to law. I would suffer harm if forced to curtail my diversion to satisfy unreasonable rates or volumes of diversion or periods of use by a senior water right holder.

Affidavit ¶ 3.

Another reason given by Mr. Taylor to seek participation on the two subcases was IDWR's promulgation of conjunctive management rules designating the entire Eastern Snake

Plain Aquifer to be an area of common water supply. *Affidavit* ¶ 5. Beginning in the Fall of 1993, Mr. Taylor served on a conjunctive management committee established to advise IDWR about new rules for conjunctive management of the aquifer.

Mr. Taylor knew of the Candys' objections when he filed the *Motion to Participate*. *Affidavit* ¶ 7. He also knew that the Candys sought to bring their subcases forward as "test cases" on such issues as season of use, consumptive use and the effect of a prior decree.

Mr. Taylor knew of the Director's Report concerning the Candys' claims, but had no way of knowing its accuracy. So far as he knew, the recommendations on all the elements were correct. Mr. Taylor agreed that the Candys' claims are small, but if they were awarded more water than they can beneficially use, he might be "called out." Mr. Taylor did not file an objection or a response with the *Motion to Participate*.

Mr. Taylor testified that when the general stay was lifted in December, 1994, that was the earliest opportunity he had to intervene in the Candys' subcases. He filed his *Motion to Participate* more than three weeks before the Scheduling Conference during which the trial date was set.

CONCLUSIONS OF LAW

1. Party to the Adjudication

To determine when a party to the SRBA who is not a party to a subcase may participate in that subcase, one must consider *SRBA Administrative Order 1, Rules of Procedure*:

Any party to the adjudication who is not a party to a subcase may, by timely motion, seek leave to participate in a subcase. The motion shall be titled "Motion to Participate." A *Motion to Participate* shall be treated like a *Motion to Intervene* (I.R.C.P. 24) and shall be decided by the Presiding Judge or the assigned special master.

A.O.1 § 6g.

[A] motion to participate may be filed by any party to the adjudication even if that party has filed a water right claim which is not yet at issue.

A.O.1 § 9, Note.

By definition, "any party to the adjudication granted leave to participate in a subcase" is a *party to a subcase*. *A.O.1* § 2o.

The first criteria, that one seeking participation in a subcase must be a *party to the adjudication*, has been satisfied. Mr. Taylor filed the *Motion*, but his testimony established that Howard Taylor & Sons, Inc., is the claimant of Water Right No. 35-29528 and hence, a party to the SRBA. The substitution of Howard Taylor & Sons, Inc., in place of Howard Taylor in the *Amended Motion to Participate* also ensures that the real party in interest is before the Court.

2. Timeliness

The second criteria, timeliness, has also been met. The *Motion to Participate* was filed well in advance of the Scheduling Conference, before the trial date was set. There was evidence that Mr. Taylor generally knew of the issues now presented in the Candys' subcases as early as September, 1993. But it was the *Musser* decision in February, 1994, that brought the issue of conjunctive management to the front burner. Of course, by then, the time to file objections or responses had run. As a member of the conjunctive management committee, Mr. Taylor considered rules which could impact his company's water right claims. However, a general stay was in effect until December, 1994. It was only after that date when it was reasonable to expect Mr. Taylor to seek participation in the Candys' subcases.

It was also reasonable for Mr. Taylor to wait until May, 1995, to file the *Motion to Participate* because he knew that in December, 1994, the Idaho Ground Water Appropriators, Inc., filed its *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*. Mr. Taylor is a member of IGWA and supported its *Motion*. But the *Motion* was stricken on December 20, 1994, because IGWA was not a party to a subcase in Reporting Area 3 (Basin 36). The fact that Mr. Taylor waited another four months to retain counsel and file his own motion is not unreasonable.

3. Participation

SRBA Administrative Order 1 requires that a motion to participate be treated *like* a motion to intervene. That is to be expected since all claimants are already *parties* to the SRBA and a literal application of Rule 24 would be meaningless.

The idea of treating each contested water right as a separate subcase likely grew out of an attempt to gain control of the massive number of claims. It would be impossible to deal with 150,000+ potential parties to each water right claim. On the other hand, there had to be some way for parties to intervene in subcases where they have some interest. Otherwise, the parties would have to file "blanket" objections to all claims. Hence, *A.O. 1* allows participation in a subcase by a motion treated *like* a motion to intervene.

I.R.C.P. Rule 24 contemplates intervention of right or permissive intervention. A person seeking intervention must state the grounds and attach "a pleading setting forth the claim or defense for which intervention is sought." I.R.C.P. Rule 24 (c). Mr. Taylor filed no pleading stating a claim or defense for which he sought intervention, unless one considers his *Notices of Claim to a Water Right Acquired Under State Law* filed with IDWR as such. He filed no objection or response. Hence, the Candys do not know Mr. Taylor's position on any element of their water rights. Mr. Taylor raised no factual issues. His concerns are solely legal issues.

It makes sense that a party to the adjudication seeking participation in a subcase need not attach a pleading setting forth a claim or defense for which intervention is sought. If there were such a requirement, it would be superfluous because claims and defenses are virtually the same as objections and responses. If one is allowed to file an objection or response in a subcase, by definition they become a party to that subcase. *A.O. 1* § 2o. Therefore, there would be no need to move to participate. One would simply file the objection or response.

It seems clear that *A.O. 1* contemplates participation in a subcase much like that granted permissive intervenors where "the applicant's claim or defense and the main action have a question of law or fact in common." I.R.C.P. Rule 24 (b). In the context of the SRBA, that means participation should be allowed where the applicant's water right claim or defense and a claim or defense in a particular subcase have some common question of law or fact. But once participation is granted, the intervenor's role may be limited. In other words, while the intervenor may be designated a *party*, he or she may not have the same role as a party who filed a claim, objection or response.

4. *Amicus Curiae*

Having found that participation in a subcase should be allowed where an applicant merely pleads a common question of law or fact, that leaves the matter of the degree of participation.

If a party files a motion to participate and attaches pleadings contesting elements of a water right, that party should be granted the customary party status. But there may be some reason why a party to the SRBA would choose not to file an objection or response. In that case, if the party simply alleges some common question of law or fact, that party should be granted the status of *amicus curiae*.

No party in the Candys' subcases represents the ground water appropriator's view, other than maybe the State. While Mr. Taylor could not point to any discrepancy in the Director's Report of the Candys' claims, he felt that the State's interests are not the same as his. The process and procedures are so new that he felt only he could adequately protect his own interests.

The Candys argue that the issues in their subcases concern elements of water rights and not distribution of water. To add any issues beyond those elements will add complexity, lengthen the process of adjudicating their water rights and cost more money. Their points are well taken. Before granting permissive intervention, a court must consider "whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." I.R.C.P. Rule 24 (b).

Traditionally, an *amicus* served as an impartial advisor to the court and not as a party. But that role has evolved through the years. Many courts now permit and even encourage an *amicus* to participate as a representative of third-party interests which may be affected by ongoing litigation. Some use the term, "litigating *amicus curiae*."¹ An *amicus* can: 1) provide information to the court; 2) raise jurisdictional and other important issues overlooked by the parties; 3) assure the presentation of a complete factual scenario; and 4) suggest potential implications of the court's decision.

While sometimes inviting *amicus* participation, courts usually place significant limitations on their role. For instance, an *amicus* may not independently conduct discovery, engage in motion practice or reject proposed settlement. In short, an *amicus* can not control the course of litigation.

¹ Michael K. Lowman, *The Litigating Amicus Curiae: When Does the Party Begin After the Friends Leave?*, 41 Am. U. L. Rev. 1243 (Summer, 1992).

To avoid undue delay or prejudice to the original parties, an intervenor generally takes the case as he or she finds it at the time intervention is sought. The factual issues in the Candys' subcases have been framed, most of the discovery has been completed and it is expected that only legal issues remain.

Water rights claimed by William Taylor & Sons, Inc., have yet to be reported by IDWR, so they are not now before the court. By granting it participation, the court will not avoid a multiplicity of actions -- one compelling reason often cited for granting intervention. Neither will the corporation's water rights be directly impaired. On the other hand, there is the question of what impact a senior surface water appropriator may have on a junior ground water appropriator. Once the State completes its rules for conjunctive management of the Eastern Snake Plain Aquifer, everyone will have some answers to that question. But for now, the parties are left guessing.

In these particular subcases, being among the first to proceed to hearings on the merits of the claims, it is appropriate for the Special Master to allow more open participation by interested parties to the SRBA. Some procedural and substantive precedents will be set during these early hearings. A good example is this very issue of participation in subcases. At the same time, it is incumbent upon the court to limit such participation in certain circumstances, especially where the party seeking participation is interested "because issues of law may be established in the proceeding that could affect my ground water rights." *Affidavit* ¶ 7.

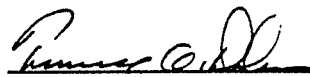
ORDER

IT IS ORDERED:

1. Granting Howard Taylor's motion to amend his *Motion to Participate*. Howard Taylor & Sons, Inc., shall be substituted as the real party in interest in place of Howard Taylor; and
2. Granting the *Amended Motion to Participate* to the extent that Howard Taylor & Sons, Inc., may participate as an *amicus curiae*. As an *amicus*, the corporation may:
 - A. Receive all pleadings for purposes of scheduling hearings and depositions;

- B. Engage in discovery conducted by the other parties;
- C. Be present at all depositions;
- D. Serve as co-counsel with another party;
- E. Participate in trial, including presentation of witnesses and other evidence;
- F. Participate in oral argument; and
- G. Submit briefs in support of or opposition to motions.

DATED June 26, 1995.



TERRENCE A. DOLAN
Special Master, Reporting Area 3
Snake River Basin Adjudication

CERTIFICATE OF MAILING

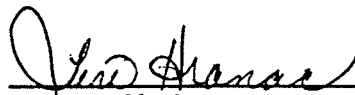
I certify that a true and correct copy of the **ORDER GRANTING MOTION TO PARTICIPATE CONDITIONALLY** was mailed on June 26, 1995, with sufficient first-class postage to the following:

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