

Party's Name: Cranney Bros.

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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

Case No. 39576

Subcase Nos. A36-04260B, A36-
00048A, A36-00049, A36-02169,
A36-00039D

CRANNEY BROS.' RESPONSE
TO MOTION TO STRIKE

This is Cranney Bros.'s ("Cranney") Response to the Motion to Strike ("Motion") which was filed by Dan H. and Erma R. McFadden and Fred and Susan Walmsley and Robert Brailsford ("Claimants") on November 21, 1995, in which Claimants assert that the Affidavit of Michael C. Creamer and its attached Exhibits ("Creamer Affidavit"), filed in support of Cranney's Pre-hearing Memorandum, violated I.R.C.P. 6(d) because it was not "served with" Cranney's Motion to File Late Response. Motion at 2.¹

BRIEF HISTORY OF THE CASE

¹ Claimants' Motion to Strike was received by Cranney's counsel after office hours on November 21, 1995, and was first viewed by Cranney's counsel the morning of the hearing, November 22, 1995.

On August 18, 1995, Cranney filed a Motion for Leave to File Late Response. On November 3, 1995, Claimants took Michael Cranney's deposition as part of the discovery authorized by the Special Master. The Claimants' purported purpose for the deposition was to obtain information relevant to Cranney's Motion to File Late Responses, and the existence of good cause and a meritorious position for Cranney's motion. On November 21, 1995, in contemplation of the scheduled November 22, 1995 hearing, and for the Court's benefit in deciding these issues, Cranney filed its Pre-Hearing Memorandum. The Creamer Affidavit was filed simultaneously with the Pre-Hearing Memorandum and in support thereof. The Creamer Affidavit appended 28 pages from the transcript of the deposition of Michael Cranney.

ARGUMENT

The Court should deny Claimants' Motion to Strike. Claimants' argument that the Creamer Affidavit should be stricken because it was not filed simultaneously with Cranney's Motion for Leave to File Late Responses contravenes the purpose of Rule 6(d). The basic purpose of Rule 6(d) is to provide general guidelines and reasonable flexibility. Wright & Miller, Federal Practice and Procedure, Civil 2d § 1161 (1987). Rule 6(d) provides that:

A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than five (5) days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. . . . When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), opposing affidavits may be served not later than one (1) day before the hearing, unless the court permits them to be served at some other time.

I.R.C.P. 6(d) (1995).

It is apparent that how Rule 6(d) is to be applied in various circumstances is within the discretion of the trial judge. Indeed, the several references to the court's ability to establish different time periods for filing and serving motions and affidavits, "breaths discretion at every pore". Thus, Idaho courts have properly denied requests for a wooden application of Rule 6(d), especially where as here, no party is unduly prejudiced. For example, in *Kugler v. Drown*, the parties' request for strict compliance with Rule 6(d) was denied, where a party received only one day's notice instead of the five day minimum:

[Kugler] states that he received only one day's notice instead of the 5-day minimum notice required for hearings under Motions in I.R.C.P. 6(d). Though Rule 6(d) does require five days' notice before a hearing on a motion, we find the lack of notice in this case imposed no additional burden on Kugler and therefore the error was harmless. . . We consider the [trial] court's timing to be fair and not prejudicial.

119 Idaho 687 (Ct. App. 1991).

Rule 6(d) has been interpreted to give the trial court latitude in its application. For example, the language "unless a different period is fixed by these rules or by order of the court" allows the courts great flexibility in fixing a time when notice must be served. *Markham v. Anderton*, 118 Idaho 856, 862 (Ct. App. 1990).

Furthermore, striking the Creamer Affidavit and the appended deposition testimony is a harsh a result where the Claimants have not alleged, and cannot show they are unduly prejudiced thereby. Motions to Strike are governed by I.R.C.P. 12(f), which provides that a "court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Use of even this rule is a drastic remedy and is viewed with disfavor whether applied to

affidavits or pleadings. *Id.* at §§ 1380, 1382. Wright & Miller, Federal Practice and Procedure, Civil 2d § 1380 (1990).

The Idaho courts' reluctance to woodenly apply I.R.C.P 6(d) is illustrated in *Ellis v. Twin Falls Canal Co.*:

Although [the plaintiff] noted [at a hearing on defendant's motion to dismiss] that he had not received the five day notice of the hearing, *he made no assertion of being prejudiced thereby* and did not move for a continuance of the hearing.

109 Idaho 910, 911 (1985) (emphasis added). Thus, a party seeking any "protection" afforded by Rule 6(d) must at least show that it was prejudiced by the alleged noncompliance with the rule. Claimants have made no assertion that they are somehow prejudiced by the submission of the Cranney deposition testimony.

Additionally, *Ellis* implies that the proper remedy is to move for a continuance of hearing on a motion, not to strike. This remedy allows a party to properly review the information, rather than simply to strike it. Of course, in this case, the information appended to the Creamer Affidavit already should have been in the Claimants' possession for three weeks - it was the Claimants who elicited the testimony at the deposition they themselves conducted.² There could be no unfair surprise to the Claimants' by the presentation of the Cranney testimony, and the Claimants have not be prejudiced thereby.

Cranney Bros.' Pre-Trial Memorandum was prepared, and the Creamer Affidavit submitted, to inform the Court as to how Cranney's deposition testimony squared with the allegations by the Claimants that Cranney did not have good cause

²Although the Affidavit of Patrick D. Brown states that he "received a true and correct copy of the transcript of the deposition on November 3, 1995", this does not seem probable given that the deposition lasted until after 5:00 pm that day. In any event, Cranney presumes that the Claimants in fact have had access to the deposition transcript at least as long as Cranney has.

or a meritorious position to support Cranney's Motion, and to support the Cranney's allegations contained in its pleadings. It was the Claimants who asserted that objective facts would show the absence of good cause and a meritorious position to support the Cranney Motion. However, the deposition transcript excerpts provide additional confirmation of the good cause and meritorious position stated in Cranney's pleadings. The Court should be able to review them.

Despite consistent court precedent, and the ruling of Judge Hurlbutt, that the Special Master could determine the merits of Cranney's Motion upon the allegations contained in Cranney's pleadings, the Claimants were permitted discovery to inquire into specific facts. Cranney understood that the Claimants' intent was then to lay any such facts that it deemed relevant to the Court's decision on the Cranney Motion before the Court, and indeed that is what the Claimants have done. It would be the height of irony and prejudice if the Claimants were permitted to engage in such discovery, present only select portions of the Cranney deposition testimony to the Court, and then be permitted to invoke Rule 6(d) to prevent a balanced presentation of that testimony.³

The Special Master should recall that he has been allocated broad leeway by Judge Hurlbutt to do equity in the case of Motions to File Late Objections and Responses, and has been directed to liberally allow an opportunity to participate in the subcases if a party has "got something to say." At the hearing on the Motions for Amendment of Administrative Order 1, Judge Hurlbutt held that the

³Cranney's argument that the Motion to Strike should be denied does not rely on the fact that the Claimants have themselves submitted Cranney deposition excerpts with the Court. However, this fact serves to illustrate the need for the Court to exercise its discretion in favor of an equitable and liberal review of the circumstances and facts and towards granting Cranney's Motion to File Late Responses.

determination of good cause and meritorious position will be up the Special Master.

The Judge stated that

I think this way I intend to see that there be some liberality in parties having an opportunity to get in these cases, at the same time giving the parties to the subcases a fair opportunity to resist what upon examination, might be a meritless attempt to get into the case. In other words, if you[ve] got something to say, I suspect you'll be in. If you don't, we're not going to waste anybody's time.

Reporters Transcript at 25, 27, July 18, 1995 Hearing Held before Judge Hurlbutt, attached hereto as Exhibit A. The Judge also stated that

As a general matter, I would say that [removal of the director as a party] does establish good cause; but I can conceive of a number of situations where there may be objective criteria in a subcase which would require a different result.

So when I say I want to view this process liberally, it is that as a general proposition, absent clear factors to the contrary, removal of the director is tantamount to good cause.

Id.

Rule 6(d) does not run counter to these directives. However, granting the Claimant's Motion to Strike defeats the principles outlined by Judge Hurlbutt. Allowing the Creamer Affidavit to be admitted is consistent with Judge Hurlbutt's ruling allowing motions to file late objections and responses, and with the flexibility and discretion given to the Special Master under Rule 6(d). On their face, Cranney's pleadings demonstrate that Cranney has "something to say" in these subcases. There

has been no showing that the Claimants are prejudiced by the filing of the Creamer Affidavit and appended materials. The Claimants' Motion to Strike should be denied.

DATED this 30th day of November, 1995.

GIVENS PURSLEY & HUNTLEY LLP

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

Jeffrey C. Fereday
Michael C. Creamer
Attorneys for Cranney Bros.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of November, 1995, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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

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

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

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



1 position. If a party seeks to file a late
2 objection or response and fails to state a
3 meritorious position, it does not serve any
4 utility to clutter the proceedings in that
5 fashion.

6 The master will make the determination on
7 cause. The master will make the determination on
8 merit. And the master may grant the filing of
9 the late objection or response with such
10 limitations as are just and appropriate. Those
11 could include limitations on discovery,
12 scheduling, whatever may be necessary.

13 I think this way I intend to see that there
14 be some liberality in parties having the
15 opportunity to get in these cases, at the same
16 time giving the parties to the subcases a fair
17 opportunity to resist what, upon examination,
18 might be a meritless attempt to get into the
19 case. In other words, if you got something to
20 say, I suspect you'll be in. If you don't, we're
21 not going to waste anybody's time.

22 This will allow, too, with the filing of a
23 pleading, an objection or response, the special
24 master to very quickly align parties. If you're
25 aligned with another party, the special master

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1 certainly may appoint lead counsel. So simply
2 filing an objection, having it granted and being
3 in doesn't necessarily mean that you're going to
4 be saying very much other than through lead
5 counsel. So I will leave it to the masters to
6 manage the case.

7 Mr. Ling, any questions?

8 MR. LING: Just one, Your Honor. In
9 the objections that one may want to file, or
10 response, I assume that you are not allowing
11 anybody to open up new issues that are not
12 already raised. My concern is you didn't mention
13 that; and if you just allow objections to a
14 subcase, then parties may want to raise issues
15 that have never been raised before. And I assume
16 that is not your intent.

17 THE COURT: That is not my intent.
18 That was not the intent of the motion as I took
19 it.

20 MR. LING: Right.

21 THE COURT: So your objection and
22 response will be limited to the issues already
23 before the special master in the subcase.

24 But you will have to take a position under
25 rule 11. And you have 21 days in which to do it

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1 from the issuance of the order. That may be a
2 couple days, but -- and that includes all parties
3 to the adjudication as that term is defined in
4 the new statute. And so I take that to mean all
5 state agencies or the State of Idaho.

6 Mr. Brown, any questions?

7 MR. BROWN: No, Your Honor, other than
8 the obvious one which I think will come up
9 immediately after this hearing; and that is
10 whether the court could give us some indication
11 whether good cause is established by removal of
12 the director alone.

13 THE COURT: As a general matter, I
14 would say that does establish good cause; but I
15 can conceive of a number of situations where
16 there may be objective criteria in a subcase
17 which would require a different result.

18 So when I say I want to view this process
19 liberally, it is that as a general proposition,
20 absent clear factors to the contrary, removal of
21 the director is tantamount to good cause. You
22 may have taken actions in a subcase previously
23 that would not allow you to get in under this
24 rule.

25 Mr. Monson?

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1 MR. MONSON: I have nothing.

2 THE COURT: Okay. Counsel, I'd like
3 to move to the next matter on the agenda. There
4 has been a motion to admit John Paul Kennedy as
5 counsel pro hac vice.

6 Mr. Hollifield, did you want to proceed
7 with that matter?

8 MR. HOLLIFIELD: Yes, Your Honor.

9 THE COURT: Mr. Hollifield.

10 MR. HOLLIFIELD: Thank you, Your Honor.
11 Your Honor, I have not received any objections to
12 the motion.

13 I would like to tell you a little bit about
14 John Paul Kennedy. He graduated from Harvard
15 University. He attended the Stanford University,
16 and he received his JD from that law school.

17 He's admitted to practice before the
18 Supreme Court of the United States and is
19 currently a member of the Utah Bar Association.
20 And he has been in private practice for 28
21 years.

22 And at this time, Your Honor, I would like
23 to introduce John Paul Kennedy to the court.

24 THE COURT: Mr. Kennedy, good
25 afternoon.

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