

COPIES

12-26

RECEIVED

JAN 02 1996

Department of Water Resources
Adjudication Bureau

Claimants:

Dan H. and Irma R. McFaddan
Fred and Susan Walmsley
Robert Brailsford
Hagerman Water Users Association
Walten E. Mildren
Harry R. Gisler
Ya-Ta-Hay Investments, Inc.

RECEIVED
DEC 29 1995
OFFICE OF THE
ATTORNEY GENERAL

Attorney Name and Address:

HEPWORTH, LEZAMIZ & HOHNHORST,
CHARTERED
133 Shoshone St. North
P.O. Box 389
Twin Falls, ID 83303-0389
Telephone: (208)734-7510

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

) Subcase Nos. 36-00048A, 36-00049,
) 36-02169, 36-00039D, 36-04260B,
) 36-15168, 36-00051A, 36-00021 &
) 36-10283A

Case No. 39576

) CLAIMANTS' CONSOLIDATED
) MOTION FOR PERMISSIVE REVIEW
) OF MASTER'S ORDERS
)

COME NOW the claimants in the above enumerated subcases, through their
counsel of record, and move the court to grant permissive review of the special master's
determination in the interlocutory ORDER DENYING MOTIONS TO STRIKE AFFIDAVITS

HLH
Chartered
Hepworth,
Lezamiz &
Hohnhorst

CLAIMANTS' CONSOLIDATED MOTION FOR
PERMISSIVE REVIEW OF MASTER'S ORDERS - 1

1 AND ORDER GRANTING MOTIONS AND AMENDED MOTIONS TO FILE LATE
2 RESPONSES, dated December 12, 1995. Copies of the orders are attached as Exhibit A.
3 Permissive review is sought upon the grounds that the ruling as contained in the orders
4 involve controlling questions of law as to which there are substantial grounds for difference
5 of opinion and in which an immediate appeal from the orders may materially advance the
6 orderly resolution of litigation in the subcases.

7 The questions are whether the Master erred by not applying the Idaho Rules
8 of Civil Procedure and the Idaho Rules of Evidence to the proceedings, and whether the
9 Master erred by improperly construing and applying to the proceedings the July 28, 1995
10 Order Granting in Part, and Denying in Part, Joint Motions for Amendment of Administrative
11 Order 1.

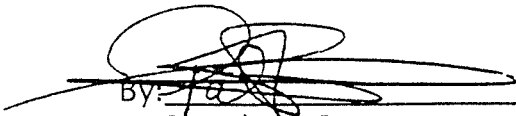
12 Under A.O. 1, 11.d., this motion is being filed before Special Master Terrence
13 Dolan for his review and recommendation, with findings, and is being submitted pursuant
14 to the *General Docket Sheet Procedure*.

15 This motion is based upon the facts and law set forth in the affidavit of counsel
16 and the brief of the movants submitted contemporaneously with this motion.

17 By this motion, movants respectfully request an order be entered granting
18 permissive appeal on the ORDER DENYING MOTIONS TO STRIKE AFFIDAVITS AND
19 ORDER GRANTING MOTIONS AND AMENDED MOTIONS TO FILE LATE RESPONSES.
20
21
22
23

1 Dated this 26th day of December, 1995.

2 HEPWORTH, LEZAMIZ & HOHNHORST,
3 CHARTERED

4 By: 

5 Patrick D. Brown
6 Attorneys for Claimants

7 CERTIFICATE OF SERVICE

8 The undersigned, a resident attorney of the State of Idaho, with offices at 133
9 Shoshone St. North, P.O. Box 389, Twin Falls, Idaho 83303, and one of the attorneys for
10 the claimants in this matter, certifies that on the 26th day of December, 1995, he served
11 a true and correct copy of the foregoing document by the method indicated below, and
12 addressed to the following:

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

☒ U.S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Telecopy (Fax)

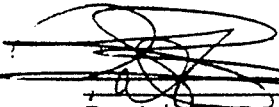
16 United States Dept. of Justice
17 Environment & Natural Resources
18 550 West Fort Street, MSC 033
19 Boise, ID 83724

☒ U.S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Telecopy (Fax)

19 Jeffrey C. Fereday
20 Givens, Pursley & Huntley
21 P. O. Box 2720
22 Boise, ID 83701-2720

☒ U.S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Telecopy (Fax)

Josephine P. Beeman X U.S. Mail
Dillion, Bosch, Daw & Bock, Chtd. Hand Delivered
Fidelity Building Overnight Mail
242 N. 8th Street, Suite 200 Telecopy (Fax)
Boise, ID 83702


Patrick D. Brown

(WATER\9SUBMOT.D21)\lm

25

SEP 12 11:53
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	)	Subcase Nos.: 36-00021B (36-00021)
	)	36-00039D, 36-00048A, 36-00049,
	)	36-00051A, 36-02169, 36-04260B,
Case No. 39576	)	36-10283A and 36-15168
	)	
	)	ORDER DENYING MOTIONS TO
	)	STRIKE AFFIDAVITS and ORDER
	)	GRANTING MOTIONS AND
	)	AMENDED MOTIONS TO FILE LATE
	)	RESPONSES

On August 18, 1995, Cranney Bros. filed its *Motion to File Late Responses* (Cranney Motion) in five of the above subcases: 36-00039D, 36-00048A, 36-00049, 36-02169 and 36-04260B.¹ Attached to the Cranney Motion was its *Brief in Support of Motion to File Late Responses*. The same date, Cranney Bros. lodged responses to objections in each of the five subcases.

On August 18, 1995, May Farms, Ltd. (May Farms) and Sand Springs Ranch Partnership (Sand Springs) filed *their Motions to File Late Responses*² (May Farms and Sand Springs Motions)

¹ The claimants/objectors in these five subcases are: Fred and Susan Walmsley (36-00039D); Dan and Irma McFadden (36-00048A, 36-00049 and 36-02169); and Robert H. Brailsford (36-04260B).

² Amended May Farms Motions in Subcase Nos. 36-00021B and 36-10283A were filed on September 12, 1995.

in four of the above subcases: 36-00021B, 36-00051A, 36-10283A and 36-15168.³ Attached to the May Farms and Sand Springs *Motions* were four separate but similar *Memoranda in Support of Motions to File Late Responses*.⁴ The same date, May Farms and Sand Springs lodged responses to objections in each of the four subcases.

Cranney Bros., May Farms and Sand Springs will sometimes be referred to collectively as Movants.

On November 21, 1995, the claimants in all nine of the above subcases (Claimants) filed their *Consolidated Memorandum Opposing Intervention*. The Claimants also filed their *Motion to Strike* the affidavit of attorney Michael C. Creamer and the attached portion of Mike Cranney's deposition (Subcase Nos. 36-00039D, 36-00048A, 36-00049, 36-02169 and 36-04260B). Finally, the Claimants filed six *Objections and Motions to Strike Affidavits* of Ralph L. May (36-00021B and 36-10283A), Mike Faulkner (36-00048A and 36-00049) and Tom Ambrose (36-00051A and 36-15168). Attached was the Claimants' *Memorandum in Support of Objection and Motion to Strike Affidavits and Preclude Intervention*.

On November 21, 1995, Cranney Bros. lodged its *Pre-Hearing Memorandum*.

A hearing was held on November 22, 1995, at the SRBA Courthouse in Twin Falls, Idaho. Jeffrey C. Fereday appeared for Cranney Bros., Dana L. Hofstetter and Josephine P. Beeman for May Farms and Sand Springs, Patrick D. Brown for the Claimants and Brent R. King for IDWR. The Cranney *Motion* was set for hearing just before the May Farms and Sand Springs *Motions*. However, because of similarities of the *Motions* and the Claimants' consolidated opposition, the hearings were combined. All counsel were present and participated throughout the hearing.

After the hearing, on December 1, 1995, Cranney Bros. filed its *Response to Motion to Strike*. The same day, the Claimants wrote to the Special Master asking that the pleading be

³ The claimants/objectors in these four subcases are: Harry R. Gisler (36-00021B); Walten and Marjorie Mildren (36-00051A); Ya-Ta-Hay Investments, Inc. (36-10283A); and Hagerman Water Users Association (36-15168).

⁴ An amended Sand Springs *Memorandum* in Subcase No. 36-00051A was filed on September 12, 1995.

disregarded and Cranney Bros.' counsel be admonished for submitting post-hearing briefs and evidence.

Motions to Strike

The Claimants moved to strike certain affidavits because they were not served with the *Motions* or they contain hearsay testimony, lack foundation and the affiants are not qualified as experts. While these criticisms are well taken for purposes of summary judgment or trial, they are less compelling in the context of these motions to file late pleadings-- particularly in these subcases. The Claimants and Movants have followed a particularly contentious motion practice and the court has been required to fashion its responses accordingly. On top of that, these are "test" subcases where fundamental and unique issues are being explored. Sweeping legislative changes in the midst of ongoing litigation only added to the challenges. The result has been a certain "flexible" application of SRBA Administrative Order 1 and the Idaho Rules of Civil Procedure to accomplish the ends of justice.

Judge Daniel C. Hurlbutt's July 28, 1995 Order⁵ concerning late filings clearly intended to provide "special consideration" to some parties to the adjudication. The Order was made because of legislative changes in the party status of IDWR and its Director. Even now, over a year after the amendments to the SRBA statutes went into effect, the court and the parties continue to discover new implications.

Even though the affidavits complained of by the Claimants are flawed in certain respects, the timing of their filing and their contents are sufficient for purposes of these motions to file late pleadings. It must be remembered that the motions were filed by SRBA parties seeking to participate in subcases. The Movants have not had the opportunity to conduct discovery. It may reasonably be expected that their responses will be substantially refined and amended as they gather more information. The suggestion that the Movants will step into the shoes of the Director and defend the whole Director's Report is not reasonable. At this point, their burden is not to *prove* a case but to *plead* sufficient facts to support their motions. The affidavits meet that minimal burden and will not be stricken.

⁵ The full title of the Order is Order Granting in Part, and Denying in Part, Joint Motions for Amendment of Administrative Order 1.

Motions to File Late Responses

The Movants argue that they meet the criteria of Judge Hurlbutt's July 28, 1995 Order: (1) they filed their pending motions in a timely manner and attached completed responses; (2) they have shown good cause for not filing responses in a timely manner; (3) they have demonstrated the existence of a meritorious position; and (4) they do not seek to enlarge or add to existing issues. In support of their allegation of "good cause", all three Movants suggest that they chose not to file responses in a timely manner because they relied upon IDWR to "defend" the Director's Report. Now that the Director's Report is no longer a pleading and IDWR and the Director are no longer parties, they seek to file late responses in all nine subcases.

There is no question that the pending motions were filed in a timely manner and completed responses were attached. It is also clear that the Movants do not seek to enlarge nor add to existing issues. Almost any element they might have chosen to respond to was objected to by the Claimants. So, the issues are whether good cause and a meritorious position have been shown.

The court is satisfied that the Movants shown both good cause for untimeliness and the existence of a meritorious position. It was reasonable for them to rely upon the Director to investigate all SRBA water claims and defend his findings in strict accord with Idaho water laws. When IDWR and its Director were removed as parties by the Legislature, it was also reasonable for the Movants to suspect that some claims might result in excessive rights. After all, at the time the *Motions* were filed, no subcase had proceeded to a full hearing before the Special Master.

The fact that the Movants chose these particular subcases to intervene is no accident. These subcases concern water claims in the Hagerman Valley where the *Musser*⁶ case arose. Right or wrong, the Movants were concerned that future "calls", as happened in that case, *might* impact their farm operations. Given the information generally available to water users, their concern was understandable. It made no difference that none of the Movants knew details in the Director's Report or specific facts about the Claimants' water uses.

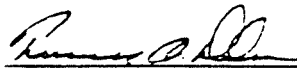
⁶ *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994).

Having said that, the court feels compelled to remind the Movants and Claimants of Rule 11(a)(1), Idaho Rules of Civil Procedure:

The signature of an attorney or party constitutes a certificate that the attorney or party has read the pleading, motion or other paper; that to the best of the signer's knowledge, information, and belief after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation [emphasis added].

Therefore, IT IS ORDERED that the Claimants' *Motions to Strike Affidavits* are denied. It is further ordered that the Cranney *Motion to File Late Responses* and the May Farms and Sand Springs *Motions and Amended Motions to File Late Responses* are granted. However, participation of Cranney Bros., May Farms and Sand Springs shall be limited to litigation of those elements in the Director's Report to which the Claimants have objected and to which IDWR has responded. They may not enlarge or add to existing issues. Responses previously lodged with the court by Cranney Bros., May Farms and Sand Springs are deemed filed the date of this Order.

DATED December 12, 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 DENYING MOTIONS TO STRIKE AFFIDAVITS and ORDER GRANTING MOTIONS AND AMENDED MOTIONS TO FILE LATE RESPONSES** was mailed December 12, 1995, with sufficient first-class postage to the following:

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

Jeffrey C. Fereday
Givens, Purley & Huntley
P.O. Box 2720
Boise, ID 83701

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

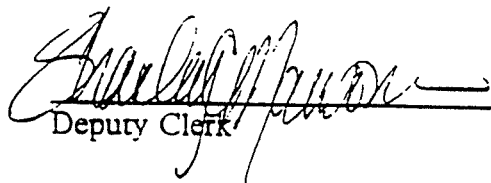
Brent R. King
Idaho Department of Water Resources
P.O. Box 83720
Boise, ID 83720-0098

Courtesy copies to:

Josephine P. Beeman
Dana L. Hofstetter
Dillon, Bosch, Daw & Bock, Chartered
Suite 200
242 North 8th Street
Boise, ID 83720

Daria J. Zane
R. Lee Leininger
William M. Ferry
The United States Department of Justice
Environment & Natural Resources Division
550 West Fort Street, MSC 033
Boise, ID 83724-0663

Cheri C. Jacobus
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, ID 83711-4449


Deputy Clerk