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Claimants:

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

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

) **BRIEF IN SUPPORT OF**
) **PERMISSIVE REVIEW OF**
) **MASTER'S ORDERS**
)

DESCRIPTIVE SUMMARY

This brief supports the claimant's Consolidated Motion for Permissive Review of Master's Orders. It argues for review of the orders on the grounds that proceedings before masters

will be expedited and more efficient if this Court now determines whether masters must follow the Idaho Rules of Procedure and Idaho Rules of Evidence. It also argues those goals are achieved by now determining whether this Court's Order Granting in Part, and Denying in Part, Joint Motions for Amendment of Administrative order.

BACKGROUND

On December 12, 1995, Master Dolan entered an order that makes two principal rulings. First, it denies claimants' motions to strike four (4) affidavits that were submitted in support of filing late responses by Sand Springs Ranches, Faulkner Land and Livestock, May Farms, and Cranney Bros. The first three (3) entities respectively sought to establish grounds for leave to file their responses by submitting affidavits of Tom Ambrose, Mike Faulkner and Ralph May. Claimants sought to strike each because each was incompetent on its face as not based on personal knowledge, as replete with hearsay lacking foundation, as conclusory and as containing several other evidentiary defects. Claimants also sought to strike the affidavits because, during depositions, each affiant admitted to a lack of personal knowledge or expertise. The master denied the motions because, "[w]hile 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 same ruling was applied to the motion to strike the affidavit of Michael Creamer, counsel for Cranney Bros. and attachments which were selected portions of a deposition of Michael Cranney. The affidavit was objected to not only for evidentiary defects (the attachments were all

hearsay) but also because the affidavit was untimely under I.R.C.P. 6 (d). Cranney Bros. Had submitted no affidavit or other form of evidence in August 1995 with the motion for leave to file a late response. Creamer's affidavit was filed received by opposing counsel on the afternoon of November 21, less than 24 hours before the November 22, 1995 hearing on the motions to file late pleadings.

In sum, the master erroneously granted leave to file late pleadings based on the affidavits by finding good cause for untimeliness apparently because "it was reasonable for them to rely upon the Director to investigate all SRBA water claims..." The basis for the finding had to have been based on the conclusory assertion in the affidavits or other assertion that were not evidence, since each affiant admitted in his deposition that he had no knowledge of the claimants rights or use of water and had not even read the Director's Report pertaining to the claimants' rights, if at all, until August of 1995. Each also admitted to having no knowledge about whether the claimant's use of water affected the affiant's use, or vice versa, but became concerned that it *might* as a result of Musser v. Higginson, 125 Idaho 392 (1994). In short, each affiant (who was the 30(b)(6) deponent for the respective entity) admitted that the entity's concerns arose only after the objection and response period ended in 1993. Also, when asked what factual basis there was for seeking to participate other than a wholesale but unverified acceptance of the Director's recommendation, each affiant claimed there was none he knew of except that which went undisclosed under claims of attorney client or work product privilege. Over the claimants' objections, including to standing, Master Dolan ruled that, "it [made] no difference that none of the Movant knew details in the Director's Report or specific facts about the Claimants' water uses."

Based on those events, the claimants seek permissive review for two reasons. In what manner and how expeditiously litigation will proceed in these subcases and in the SRBA generally depends largely on knowing whether the Idaho Court Rules as well as A.O.1 and other orders of this court will be applied by Masters. Then, if those rules apply to motion practice before the masters, it is equally essential to now know this Court's order setting forth the criteria under which late pleadings will be allowed has been properly construed and applied, as well as whether standing is required from a constitutional or prudential perspective at the subcase level, given this Court's order that subcases proceed as if each is a discreet and separate lawsuit.

THE STANDARD FOR PERMISSIVE REVIEW

Under A.O.1.11.d., permissive review of a masters interlocutory determination may occur where the determination "... involves a controlling question of law as to which there are substantial grounds for difference of opinion and in which immediate consideration of the determination may advance the orderly resolution of the litigation."

This standard is derived from I.A.R. 12, which has been construed to turn upon the weighing of several factors:

In accepting or rejecting an appeal by certification under I.A.R. 12, this court considers a number of factors in addition to the threshold questions of whether there is a controlling question of law, and whether an immediate appeal would advance the orderly resolution of the litigation. It was the intent of I.A.R. 12 to provide an intermediate appeal from an

interlocutory order if substantial legal issues of great public interest or legal questions of first impressions are involved. The court also considers such factors as: 1) the impact of an immediate appeal upon the parties; 2) the effect of the delay of the proceedings in the district court pending the appeal; 3) the likelihood or possibility of a second appeal after judgment is finally entered by the district court; and 4) the case work load of the appellate courts. No single factor is controlling the court's decision of acceptance or rejection of an appeal by certification, but the court intends by Rule 12 to create an appeal in the exceptional case and does not intend by the rule to broaden the appeals which may be taken as a matter of right under I.A.R. 11. For these reasons, the court has, over the six year experience of the use of Rule 12, accepted only a limited number of applications for appeal by certification.

Budell v. Todd, 105 Idaho 2, 3-4, 665 P.2d 701 (1983) (emphasis added).

Considering the factors imposed by the rule, and as enumerated by the court in Budell, it is exceedingly clear that claimants frame an appropriate situation for permissive review.

The first criteria imposed by the rule is whether the action presents "a controlling question of law." The Budell court noted that a "controlling question" is one which "terminates" the

case and also noted that the rule creates the same basic procedure, and that its use is subject to the same policy considerations as practiced under a federal statute, 28 U.S.C. Section 1292(b). Under the federal statute, a question may be controlling although it does not "terminate" a case:

... a question need not be dispositive of the case to qualify as a controlling one.

* * *

The critical requirement is that it have the potential for substantially accelerating the disposition of litigation.

It is necessary, however, that the order involve a clear-cut question of law against a background of determined and immutable facts.

9 Moores Federal Practice, Section 110.22[2], pp. 273-277 (2nd ed. 1992).

Whether the rules of procedure and evidence apply are controlling questions both in the sense that they may be dispositive and that they are questions of law overlaying immutable facts which, when resolved, have the potential for substantially accelerating the disposition of litigation. If the rules apply to motion practice before masters, then their application indisputably disposes of litigation between the claimants and Cranney, Sand Springs, Faulkner and May. This is so because the objectionable affidavits are the sole evidentiary basis upon which leave to file pleadings rest, and without the entities the claimants are left to present their cases to the master for recommendation, without the need to try the cases against the four entities which seek to intervene. If the rules do not apply, then the subcases may proceed unencumbered by argument over deadlines and sufficiency and admissibility of evidence and the like, as litigators are want to follow, and must follow in other judicial proceedings in this state. A decision now avoids sorting through and

unwinding the morass of later determining whether the rules should have been applied and whether misapplication or nonapplication resulted in harmless error. A decision now also avoids potentially inconsistent and positively confusing procedures which arise because different masters hold inconsistent views about applicability. A decision now avoids potential due process and equal protection concerns that arise because a party does not know what the procedural rules are and cannot meaningfully participate and because masters are proceeding under different rules in different subcases. In short, permissive review provides the court with the opportunity to head off confusion, inconsistency and potential challenges of constitutional magnitude concerns subcase proceedings. Review allows the court to take early control of the litigation and to obviate expense, delay and prejudice that will result from ill-defined procedure. And since the four entities which lack any knowledge are the sole SRBA parties seeking participation (except as to general provisions), review may entirely dispose of adversarial litigation in the above subcases, eliminate the need for discovery admittedly necessary to educate the entities as to whether each has a concrete dispute with the claimants, and potentially accelerate the disposition of each claim.

Next, the claimants have substantial grounds for their differing opinion given this court's order of reference directs the master to follow the I.R.C.P.; A.O.1 does the same; I.R.E. 101(b) and (d)(3) make the evidence rules applicable; and various other evidence rules such as 602 (personal knowledge required), 701 et. seq. (opinion testimony), and 801 et. seq. (hearsay) render the affidavits inadmissible.

Moreover, the questions are of great public interest and first impression given the number of subcases and other matters to proceed before masters. The delay which may result from

review may be inconsequential, given the Claimants and other members of HWRO have moved to stay subcase proceedings pending designation and resolution of Basin-Wide Issues 10 and 11. The possibility of further review after a final recommendation exists, but would be far more focused if the rules under which the subcases proceed are now clarified. The possibility of further review of these or other subcases on due process or equal protection grounds or for inconsistency among matters is greatly diminished or eliminated by early review. Finally, the district court's appellate workload is likely to be less complicated and less voluminous if a decision is rendered now.

On the second matter, construction and application of the court's order concerning the showing required to file late pleadings on account of the Director's status change, a controlling question is presented. The July 28, 1995 Order states that, given the Director's former party status, some parties decided not to participate in certain subcases and instead chose to rely on the Director. It continues to say that such parties are now unable to litigate because they opted to rely on the Director and that created an unusual scenario which [n]ecessitates special consideration for some parties" Order at p. 1. Consequently, the court held that participation would be allowed if such parties showed good cause for untimeliness and a meritorious position. *Id.*, p.2.

Whether that showing must be established by evidence is a question of first impression in this court, and, if an evidentiary showing is required, then undisputed and immutable facts, that is the absence of admissible evidence, establish that the burden was not met. The result that follows is dispositive of the adversarial subcase proceeding, as stated above. On the other hand, if an evidentiary showing was not required or if, in order to meet the burden, a party merely has to mouth the words that "he relied on the director," and it makes no difference whether or not

an intervenor knew in 1993 or presently knows the contents of a Director's Report or facts about a claimant's water use or right, then a review is calculated to accelerate the disposition of these and numerous other motions to participate or file late pleadings throughout the SRBA. After all, the court's July 28, 1995 Order does not set up special criteria. It specifically rejects the creation of special criteria and directs that criteria "similar to" those for I.R.C.P. 55© be applied. Accordingly, deciding if a bald assertion of reliance suffices to meet the burden for intervention, then review may accelerate disposition of over 70 subcases where removal of the Director has been asserted as a ground to plead late. There will then be no need or grounds from which to successfully oppose such motions. All parties and the court will avoid needlessly expending resources. It also may accelerate disposition of numerous other subcases where potential participants assert the right to participate, but lack knowledge about whether they dispute claims or recommendations. Given A.O.1. requires subcases to proceed as if they were separate lawsuits, it is prudent for the court to now decide if concrete adversity is required concerning the facts of a subcase. It is especially prudent when one considers that A.O.1. gives all parties to the SRBA the right to have legal issues decided de novo by challenge to a Master's Recommendation. Being a party to the SRBA should not confer a right to jump into any subcase for the purpose of putting a claimant through an expensive discovery process as a prerequisite to deciding whether concrete adversity exists. Allowing that practice has a severe impact on the claimants not only from a financial perspective, but from emotional and temporal perspectives. The fortuity of being in a test basin should not transform a claimant into a veritable guinea pig, subjected to other's fishing expeditions on nothing more than speculation that future calls may or may not impact the others.

Taking into account the above, it is clear that review has the potential to accelerate the disposition of these subcases, as well as other subcases in the SRBA. A second appeal is unlikely considering the immutable facts and the nature of the review is to set forth the framework under which the subcases will proceed to the merits. Delay may be of no consequence given the motion to stay and the need to resolve the legal questions of Basin-Wide Issues 10 and 11. In fact, the delay may allow all to proceed more expeditiously.

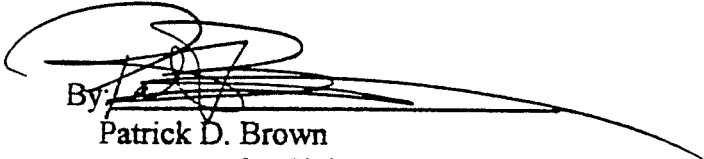
It is equally clear that the public interest and the public coffers are implicated by the ruling. Judicial resources and personal saving should not fund potential disputes which may never exist. Nor should the court allow its order to be misconstrued into a vehicle by which any party to the SRBA may belatedly participate, and any claimant be put to the impossible task of opposing a motion where neither evidence nor controversy are of consequence. The Order was clearly intended to provide relief to only those parties who cognitively decided that there was no need to file pleading in particular subcase, but the master's decision makes the entire motion practice surrounding that question wasteful and meaningless residue. Certainly the court's July 28, 1995 Order provides substantial grounds for differences, as it is unlikely the court intended parties to engage their resources and the court's resources if the singular act of filing of a motion sufficed to allow participation by any party to the SRBA.

Because the questions raised above are controlling questions about which there are substantial grounds for differences of opinion and which require immediate consideration in order for the subcases, and the SRBA, to proceed to orderly resolution. Because knowing the rules and proceeding under them is a prerequisite to orderly resolution, the claimants respectfully request that

the master recommend permissive review and that the court accept review.

Dated this 26 day of December, 1995.

HEPWORTH, LEZAMIZ & HOHNHORST,
CHARTERED

By: 
Patrick D. Brown
Attorneys for Claimants

CERTIFICATE OF SERVICE

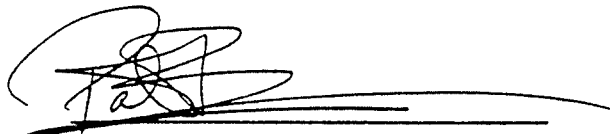
The undersigned, a resident attorney of the State of Idaho, with offices at 133 Shoshone St. North, P.O. Box 389, Twin Falls, Idaho 83303, and one of the attorneys for the claimants in this matter, certifies that on the 26 day of December, 1995, he served a true and correct copy of the foregoing document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

Chief, Natural Resources Div.	☒ U.S. Mail
Office of the Attorney General	☐ Hand Delivered
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Boise, ID 83711-4449	

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550 West Fort Street, MSC 033	☐ Overnight Mail
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Jeffrey C. Fereday	☒ U.S. Mail
Givens, Pursley & Huntley	☐ Hand Delivered
P. O. Box 2720	☐ Overnight Mail
Boise, ID 83701-2720	☐ Telecopy (Fax)

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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

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