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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) Subcase No. 36-02080
)
Case No. 39576) SPECIAL MASTER'S FINDINGS AND
) RECOMMENDATION OF DENYING
) MOTION FOR PERMISSIVE REVIEW
)
_____)

FINDINGS

On December 22, 1994, the Magic Valley Underground Pumpers' Association, Inc., and each of its individual members (Association)¹ filed their *Motion for Leave to File Late Objection* in Subcase No. 36-02080.² The Association sought leave to file a late objection to the recommended priority date of September 9, 1948.

After a full hearing, on August 21, 1995, the Special Master entered an *Order Denying Motion for Leave to File Late Objection (Order)*. The bases for denial were: (1) the Association failed to show good cause to file a late objection; and (2) there was no justiciable controversy because the Association's claimed defense is barred by the doctrine of *res judicata*.

On September 5, 1995, the Association filed alternative pleadings to seek review of the

¹ The Magic Valley Underground Pumpers' Association, Inc., did not file a claim in the SRBA and is not a party to the SRBA. In its pleadings, it describes itself as a non-profit association with a membership of over 130 individual water right holders who pump ground water from the Eastern Snake Plain Aquifer for irrigation purposes. Attached to the *Motion* was a list of 96 Association members who together filed 457 water right claims in the SRBA, 427 of which are in Reporting Area 3 (Basin 36).

² Subcase No. 36-02080 is a license-based claim filed by the United States of America, Bureau of Reclamation, for 1,100 cfs of ground water from 177 wells for domestic use and to irrigate 62,159.2 acres in Minidoka and Jerome Counties (A&B Irrigation District, North Side Pumping Division, Minidoka Project).

Order. To clarify the status of the pleadings, on December 14, 1995, the Special Master entered an *Order Deeming Notice of Appeal and Objections as a Motion for Permissive Review*.

MEMORANDA

The Association lodged their *Brief in Support of Motion for Permissive Review* on January 16, 1996. The Association argued that the *Order* presents two controlling questions of law: (1) What is the correct standard for reviewing a motion to file a late objection? and (2) Are parties and the Court barred from reviewing all the elements of a decreed or licensed water right in the SRBA? They suggested that immediate consideration of those issues will advance the orderly resolution of the SRBA.

The United States lodged its *Response to Magic Valley Underground Pumpers' Brief in Support of Motion for Permissive Review* on February 7, 1996. The United States argued that the *Motion* be should be denied because interlocutory appeals should be granted sparingly and only in exceptional cases. Review of a discretionary ruling, such as the *Order*, does not present a controlling question of law. Also, there is no substantial difference of opinion on the standard to be applied for granting motions to file late objections.

A&B Irrigation District³ lodged its *Brief in Opposition to Motion for Permissive Review* on February 7, 1996. It, too, argued that the Association has not met the requirements of *SRBA Administrative Order 1 (A.O.1)*, Section 11(d), including the fact that the organization is not a party to the subcase. Only a Special Master or a party to a subcase may seek permissive review of a Special Master's interlocutory determination.

The Association lodged its *Reply Brief in Support of Motion for Permissive Review* on February 28, 1996. It alleged that whether the decision in question was within the discretion of the court does not preclude interlocutory review. The Association argued two further points concerning the *Order*. First, the *Order* misapplied the diligence standard to events that occurred thirty years ago rather than when the Association learned about the "defective" priority date in

³ A&B Irrigation District became a party to the subcase on April 27, 1993, when it filed an objection stating that there should be a confirmation of the contractual interest of A&B with the United States "in regard to the water right held for the benefit of the lands of landowners in the District."

1994. Second, the *Order* misapplied the doctrine of *res judicata* to bar the Association from alleging a meritorious defense because the thirty year old court order was not an adjudication on the merits.

DISCUSSION

A&B correctly pointed out that the Association is not a party to this or any other subcase. Neither is it a party to the adjudication. Rather, the Association represents at least 96 of its members who pump ground water for irrigation and who filed claims in the SRBA. Since there are other organizations in the SRBA who represent their members, the precedence is established to recognize "groups." Technically, though, those groups can be recognized only as speaking on behalf of its individual members who are parties to the adjudication and not on its own behalf. For purposes of this recommendation, the word "Association" is used collectively to mean the members of the Association who are parties to the adjudication.

SRBA A.O.I, Section 11(d), states that a Special Master or a "party to a subcase" may seek permissive review of an interlocutory determination. That wording raises the question of whether a party to any subcase may seek permissive review in any other subcase or whether permissive review is limited to parties in their own subcases. Some of the Association's members are parties to their own subcases, but none of them are parties to Subcase No. 36-02080. May they seek permissive review in this subcase?

Logic would indicate that *SRBA A.O.I* was meant to limit permissive review to parties in their own subcases. Otherwise, every party to the adjudication would effectively become a party to every other subcase, at least for purposes of interlocutory determinations. That would defeat a major premise allowing intervention in subcases by non-parties only by a timely motion to participate. *SRBA A.O.I*, Section 6(g).

Another indication that the Court intended to restrict permissive review to parties in their own subcases is the following language from *SRBA A.O.I*, Section 11 (d):

Any party to the adjudication may file a response to the *Motion for Permissive Review*. The response must be filed within 30 days after publication of the filing of the motion in the docket sheet.

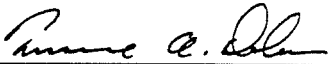
The Court clearly intended to distinguish between “party to a subcase” and “party to the adjudication.” That means the Court will allow parties to a subcase to seek review of interlocutory determinations in their own subcases by filing a motion for permissive review and following the docket sheet procedure. Only then may parties to the adjudication (parties outside the subcase) join in the subcase by filing a response. That language suggests that parties to the adjudication, who are not parties to a particular subcase, may not join in the interlocutory review process until after a party to that subcase has filed such a motion.

If no party in a particular subcase files a motion for permissive review of an interlocutory determination, the only remedies available to parties to the adjudication (parties outside the subcase) are to file a *notice of challenge* or *response to a notice of challenge* to a Special Master’s report. *SRBA A.O.I*, Sections 12(a) and(b). The Presiding Judge would then have the options of adopting, modifying or rejecting, in whole or part, the report. The Presiding Judge could also receive further evidence or recommit the report with instructions. *SRBA A.O.I*, Section 12(c).

It is apparent that denying the Association permissive review may result in re-visiting the subcase sometime in the future. However, the alternative of allowing non-parties to control the conduct of proceedings at the subcase level would be even more disruptive and burdensome to the parties. For that reason, there is no alternative but to deny the Association’s *Motion for Permissive Review*.

THEREFORE, IT IS RECOMMENDED that the Association’s *Motion for Permissive Review* be **denied**.

DATED March 7, 1996.



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 SPECIAL MASTER'S FINDINGS AND RECOMMENDATION OF DENYING MOTION FOR PERMISSIVE REVIEW was mailed on March 7, 1996, with sufficient first-class postage to the following:

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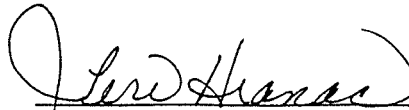
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