

Party's Name: Cranney Bros.

Attorneys' Names and Address

Jeffrey C. Fereday
Michael C. Creamer
GIVENS PURSLEY & HUNTLEY LLP
277 North 6th Street, Suite 200
P.O. Box 2720
Boise, Idaho 83701-2720
(208) 388-1200
(208) 388-1201 (facsimile)
4431\1\PLEADING\REVIEW.BRF

RECEIVED

MAR 26 1996

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. 36-04260B, 36-
00048A, 36-00049, 36-02169, 36-
00039D

**CRANNEY BROS.'
MEMORANDUM
SUPPORTING THE SPECIAL
MASTER'S FINDINGS AND
RECOMMENDATION OF
DENIAL OF PERMISSIVE
REVIEW**

DESCRIPTIVE SUMMARY

This document is Cranney Bros.' Memorandum Supporting the Special Master's Findings and Recommendation of Denial of Permissive Review in the above-captioned subcases.

MEMORANDUM

Cranney Bros. ("Cranney"), through its attorneys Givens Pursley & Huntley, hereby submits its Memorandum Supporting the Special Master's Findings and Recommendation of Denial of Permissive Review. Cranney argues herein that the

Special Master has correctly determined to allow Cranney to participate in these subcases, that the Special Master's decision was based upon both the law and appropriately considered information, that the Claimants' Motion for Permissive Review does not seek review of controlling issues of law, and serves only to delay these subcases, and that if reviewed by the Court, the Special Master's Order allowing Cranney's Response in these subcases should be affirmed.

1. Background Information.

This matter is before the Court following an extended period of motion practice during which the Claimants have directed substantial and sustained efforts towards barring Cranney and three other movants (collectively "Movants") from participating as respondents in subcases involving Hagerman claims. Having essentially exhausted all opportunities to challenge the Movants' grounds for participation, the Claimants now take aim at the Special Master.

Cranney's involvement in these subcases followed this Court's July 28, 1995 Order, which allowed parties until August 18, 1995 to file late objections or responses to the Director's Reports for Basins 57, 34 and 36. In that Order the Court held that

Because the Director was previously a party to the SRBA and to all Subcases, some parties assumed that IDWR would participate and litigate in defense of the Director's Report. Based on the pleadings and party status of IDWR prior to the 1994 amendments to the SRBA statutes, some parties decided not to participate in certain Subcases, choosing instead to rely on the Director's Report and IDWR's defense of its pleadings.

The Director's Report no longer is a pleading, and IDWR and the Director are no longer a party. Those parties who opted to rely on IDWR to litigate and advocate in favor of the Director's Report are now unable to do so. *Therefore, it is necessary to provide a mechanism for parties to participate in Subcases where participation is required due to*

the removal of the Director and IDWR as a party and the change in status of the Director's Report as a pleading. . .

Decisions on *Motions to File Late Objections* and *Motions to File Late Responses* shall be decided by the Special Master to whom the Subcase has been referred. The Special Master shall require good cause and meritorious position when reviewing these *Motions*. Parties must allege facts, which if true, would constitute a meritorious position.

Order at 1-2 (emphasis added).

On August 17, 1995, Cranney filed five separate late Responses, together with its Motion to File Late Responses and its Supporting Memorandum. Cranney's pleadings alleged, among other things, that

1. Cranney holds claims to ground water rights filed in the SRBA;
2. Cranney has an interest in assuring that other water rights claimed in the SRBA be decreed consistent with basic principles of water law, including the beneficial use requirement;
3. Cranney relied upon the Director's presence as a party in the Subcases to defend the Director's Report, and therefore, had not filed objections or responses earlier;
4. Cranney did not intend to raise additional issues beyond those already presented by the Director's Report and by the Claimants' Objections thereto.

Cranney's proposed Responses asserted that the Director's Report for the subject claims was correct, and alleged the same grounds supporting the recommendations of the claims as were alleged in the Department's own Responses. The Claimants have steadfastly opposed Cranney's participation.

Prior to the Special Master's Hearing on the Movants' Motions to File late Responses, Cranney submitted its Pre-Hearing Memorandum, which argued that Cranney's reliance on the Department's role as a party defending its

Recommendations satisfied the "good cause" requirement for filing a late response. Cranney also argued that Cranney had met the second requirement for filing a late response, which is to allege facts, which if true, would constitute a meritorious position.

Prior to the hearing on Cranney's Motion to File Late Responses, the Claimants deposed one of Cranney's principals, Michael Cranney, ostensibly to obtain discovery on the factual grounds for the allegations in Cranney's pleadings. Mr. Cranney's deposition testimony again highlighted the appropriateness and importance of Cranney's participation in the subcases. Accordingly, Cranney submitted counsel's affidavit ("Affidavit"), to which was attached excerpts from the Cranney Deposition. The statements contained in these deposition excerpts alleged nothing not already alleged by Cranney's pleadings regarding good cause and meritorious position—the Affidavit's attachments merely provided Mr. Cranney's deposition statements to counterbalance those deposition statements that Cranney anticipated the Claimants would proffer to the Court. The Claimants moved to strike the Affidavit solely because it was not filed contemporaneously with Cranney's Motion to File Late Responses.¹

The Special Master's December 21, 1995 *Order Denying Motions to Strike Affidavits and Order Granting Motions to File Late Responses* ("December 21, 1995 Order") makes it clear that the Special Master did not deem the statements contained

¹The Claimants asserted they were prejudiced by the Cranney deposition excerpts because their counsel did not receive them until shortly before the hearing on Cranney's Motion to File Late Responses. However, the excerpts were from a deposition *their counsel* conducted previously, and it is difficult to conceive how they were surprised by the contents of the transcript.

in the Cranney Deposition, or the affidavits submitted by other Movants, as conclusive evidence of the merits of their Responses. In reference to the Claimants' Motion to Strike, the Special Master observed that

Even though the affidavits complained of by the Claimants are flawed in certain respects [i.e., the time of their filing], 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.

December 21, 1995 Order at 3.

The Claimants then sought permissive review of the December 21, 1995 Order, arguing that a controlling issue of law was raised; namely whether the Idaho Rules of Evidence and Rules of Civil Procedure were applicable to the Special Masters review of the Motions to File Late Responses. Permissive review was denied.² The Claimants now challenge the Special Master's Recommendation and Order denying permissive review of the December 21, 1995 Order.

2. Argument

A. There is no dispute that the Idaho Rules of Evidence and Procedure apply in these subcases.

As demonstrated by the briefs of the parties, responding to the Claimants' Motion for Permissive Review and their subsequent challenge of the Special Master's

²These issues already have been briefed to the Special Master by Cranney and the other parties.

Recommendation, there is no dispute that the Idaho Rules of Evidence and Procedure apply to these cases. However, there also should be no dispute that the I.R.E. and the I.R.C.P. are to be implemented to produce judicial efficiency and economy and substantial justice, and that the rules vest the Court with discretion to accept under a "notice pleading" standard, pleadings showing the basis for one's participation and alleging the requisite interest in the case. *See Bunn v. Bunn*, 99 Idaho 710, 587 P.2d 1245 (1978) (liberal construction of rules, while it cannot alter compliance which is mandatory or jurisdictional, will ordinarily preclude dismissal for mere technical noncompliance, especially where no prejudice is shown); I.R.E. 102 (rules of evidence to be construed to secure fairness, elimination of unjustifiable expense and delay, and the end that truth may be ascertained and proceedings justly determined). This is particularly true with rules such as I.R.C.P. 6(d) dealing with the timing of filing affidavits and other pleadings, and which has been construed to lend discretion to the Court in its application. *See e.g., Kugler v. Drown*, 119 Idaho 687, 809 P.2d 1166 (Ct. App. 1991) (denying party's request for strict application of time limitations in I.R.C.P. 6(d)); *Markham v. Anderton*, 118 Idaho 856, 862 (Ct. App. 1990). Cranney submits that the I.R.E., the I.R.C.P. and SRBA Administrative Order 1, subject to the Court's inherent discretion concerning the matters before it, govern in the SRBA and these subcases.

Furthermore, this Court already has announced that it is looking to the Special Master to determine whether a proposed intervention alleges good cause and meritorious position ("decisions on *Motions to File Late Objections* and *Motions to File Late Responses* shall be decided by the Special Master"). July 28, 1995 Order at 1-2.

All concerned, including the Claimants, have had a full opportunity to present their positions on what essentially is a simple question of intervention, and the Special Master has ruled. The Special Master's ruling is consistent with Idaho's rules of procedure and evidence, and with the Court's directive that motions to file late objections and responses were to be viewed liberally by the Special Masters so that "absent clear factors to the contrary, removal of the director is tantamount to good cause." *In Re: SRBA*, Reporter's Transcript (July 18, 1995) at 27. No such factors have been suggested here. The ruling should not be disturbed.

B. Cranney should be permitted to proceed as a party in these subcases immediately.

The speedy resolution of whether Cranney will be permitted to be a party to these subcases is extremely important to Cranney, the Court, and to all other parties in the SRBA. As the Special Master observed in his December 21, 1995 Order, the fact that Cranney chose these particular subcases to intervene in is no accident. These cases are representative of over 160 other Hagerman claims which uniformly allege, among other things, that the basis of their water rights are actual beneficial use or their previously decreed amount, *whichever is greater*, that they must be decreed a season of use for irrigation of January 1 through December 31, and that their water rights must be decreed to include new uses developed subsequent to the original decree, or even uses yet to be developed. Many, if not all of these Hagerman claims (including all five involved in the Cranney Responses) assert the right to be decreed diversion rates that far exceed the amounts recommended by the Director's Report, and the statutory duty of water under Idaho Code § 42-220. It is critically

important that if Cranney's rights could be held accountable for satisfying senior rights placing a call on the Snake Plain Aquifer, then those senior rights must not be overstated by the Claimants, or ultimately, the Court's decree. The same reasoning is applicable to all other SRBA claimants as well.

Cranney seeks to become a party in these subcases to establish a precedent for how this large number of similar claims should be resolved by the Court. In terms of judicial economy, and the expenses to all involved, establishing precedent with these limited, representative claims is the most reasonable approach. Once Cranney's Responses have been finally accepted, Cranney is fully prepared to go forward with these cases quickly, economically, and in the utmost good faith. Cranney believes that if responses to its written discovery can be timely received, and its expert has an opportunity to view the Claimants' premises and water delivery systems, Cranney could be ready for trial on one or more of these subcases by as early as the end of May or the first week of June, 1996.

However, the precedential value of these cases, and consequently the benefit to the Court and the parties in terms of speedy *and correct* resolution of the significant legal issues they pose, will be lost if further delays result from the Claimants' pending motions, or others they might file. The Special Master already has set a large number of Hagerman area subcases to which no party has responded for hearings commencing the second week of June. In those cases, there will be no other party than the Claimant to present the legal and factual basis for recommending rights according to their actual beneficial use. Therefore, Cranney believes that the Claimants' pending motions must be resolved quickly, in Cranney's

favor, so that these subcases can be scheduled for trial at the earliest possible time to provide the most precedential benefit to the parties and the court.

For the foregoing reasons, Cranney requests that the Court uphold the Special Masters Findings and Recommendation of Denial of Permissive Review, that the Court concur in the Special Master's decision to permit Cranney's Late Responses in the above-captioned subcases, and that the Court do so at the earliest possible time, to allow their timely resolution.

DATED this 25th day of March, 1996.

GIVENS PURSLEY & HUNTLEY LLP

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

Michael C. Creamer
Attorneys for Cranney Bros.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25th day of March, 1996, 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

Environment & Natural Resources Division
United States Department of Justice
550 West Fort Street, Box 033
Boise, Idaho 83724

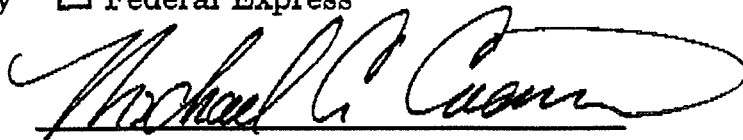
☐ U.S. Mail ☒ Fax ☐ Hand Delivery ☐ Federal Express

Josephine P. Beeman, Esq.
Dillion, Bosch, Daw & Bock, Chartered
Fidelity Building
243 N. 8th Street, Suite 200
Boise, Idaho 83702

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

Court Certificate of Mailing for Expedited Hearings (2/29/96)

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



FAX COVER SHEET

DATE: March 25, 1996

TIME: 3:40

PAGES (INCLUDING COVER): 11

ORIGINAL TO FOLLOW: () Yes (X) No

OUR FILE NUMBER: 4431-1

MATTER: In Re SRBA; Case No. 39576

TO:

Name	Organization	Fax Phone
1. Diana R. Delaney	Clerk - SRBA Court	208-736-2121
2. Chief, Nat. Res. Div.	Attorney General's Office	334-2690
3. Envir. and Nat. Res. Div.	DOJ	334-9375
4. Josephine P. Beeman	Dillion, Bosch, Daw & Bock	344-9140
5. Patrick D. Brown	Hepworth, Lezamiz	208-734-4115

MESSAGE:

Diana—

Attached for filing please find Re: Subcase Nos. 36-04260B, 36-00048A, 36-00049, 36-02169, 36-00039D; CRANNEY BROS.' MEMORANDUM SUPPORTING THE SPECIAL MASTER'S FINDINGS AND RECOMMENDATION OF DENIAL OF PERMISSIVE REVIEW. If you have any questions regarding the attached, please do not hesitate to call. Thank you.

—Mike Creamer

cc: Court Certificate of Mailing for Expedited Hearings (2/29/96) - via U.S. Mail

If transmission is incomplete, call Molly Creswell at (208) 388-1248.

***** CONFIDENTIALITY NOTICE *****

THIS FACSIMILE MAY CONTAIN CONFIDENTIAL INFORMATION THAT IS PROTECTED BY THE ATTORNEY-CLIENT OR WORK PRODUCT PRIVILEGE. IT IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL(S) NAMED ABOVE. IF YOU ARE NOT A NAMED RECIPIENT OR AN EMPLOYEE RESPONSIBLE FOR DELIVERING THE FACSIMILE, YOU ARE INSTRUCTED NOT TO DELIVER, DISTRIBUTE OR COPY THIS FACSIMILE, NOR SHOULD YOU DISCLOSE ITS CONTENTS OR TAKE ANY ACTION IN RELIANCE ON THE INFORMATION IT CONTAINS. IF YOU HAVE RECEIVED THIS FACSIMILE IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY TELEPHONE TO ARRANGE FOR THE RETURN OF THE TRANSMITTED DOCUMENTS TO US. THANK YOU.

[4431\1\MCC-DELA.FG3]