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Department of Water Resources

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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	)	Subcases: 34-00074 and 34-02464
	)	
Case No. 39576	)	ORDER DENYING MOTION IN
	)	LIMINE
_____	)	

The claimant, Charles Burgess, filed a *Motion in Limine* (*Motion*) on February 6, 1996, and a *Brief in Support of Motion in Limine* on February 28, 1996. Oral argument was heard March 25, 1996. The *Motion* seeks a ruling of this court that "informal rotation" is inherent in all water rights with irrigation as a purpose of use. *Brief in Support of Motion in Limine*, at 1. Burgess defines "informal rotation" as a schedule for using water by agreement where individual users may, for a period of time, divert the total quantity of water owned by the parties to the agreement. *Brief in Support of Motion in Limine* at 2. Burgess contends that "informal rotation" cannot be used to increase the total quantity of water to which parties to the agreement are entitled. Burgess argues a ruling defining "informal rotation" is justiciable because such a ruling essentially helps to define elements of his water right such as quantity.

Burgess argues he needs a decision on the issue of rotation because he is concerned the Department will not allow him to proceed with "informal rotation" of water. However, at hearing the Department agreed to recognize "informal rotation" as proposed by Burgess.

Specifically, the Department conceded that "informal rotation" is a legitimate part of irrigation rights where two or more water users agree to rotate water. The Department agreed that where two farmers have water rights with the same point of diversion and each is entitled to a water right for 1 cfs, the farmers may agree to a rotation where Farmer A uses 2 cfs for one

week during which Farmer B uses 0 cfs. During the second week, Farmer B may properly use 2 cfs while farmer A uses 0 cfs. The Department recognized this "informal rotation" as a legitimate practice.

SINGLE PARTY CASES

This *Motion in Limine* is unlike most because it does not involve two parties. There is a single party in this subcase, the claimant of the water right. There is no party opposing the *Motion*. IDWR cannot be treated by the court as the nonmoving party in this *Motion* because IDWR was removed as a party. I.C. § 42-1401B(3) (1994); *In re SRBA Case No. 39576*, ___ Idaho ___, 912 P.2d 614, 624-25 (1995). Nevertheless, this court is charged with determining water rights in subcases where only one party remains. Motions in limine must be decided accordingly.

JUSTICIABILITY

Subcases 34-00074 and 34-02464 involve only one party, Charles Burgess. Nevertheless, issues of justiciability may arise in single party cases where a claimant must rebut the *prima facie* weight given Director's Report. Subcases 34-00074 and 34-02464 do not involve instances where the claimant is rebutting the Director's Report. Thus, these subcases do not appear to raise any justiciable issues. The Idaho Supreme Court has held that:

Justiciability is generally divided into subcategories--advisory opinions, feigned and collusive cases, standing, ripeness, mootness, political questions, and administrative questions.

Miles v. Idaho Power Co., 116 Idaho 635, 639, 778 P.2d 757 (1989)

The Idaho Supreme Court set forth the critical elements of a justiciable controversy in *Harris v. Cassia County*, 106 Idaho 513, 681 P.2d 988 (1984):

A 'controversy' in this sense must be one that is appropriate for judicial determination. . . . A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. . . . The controversy must be definite and concrete, touching the legal relations of the parties having adverse legal interests. . . . It must be a

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real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

Harris, 106 Idaho at 516, quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41, 57 S.Ct. 461, 464, (1937).

The instant case is not justiciable because there is no concrete dispute. The lack of justiciability, however, does not derive from the claimant's position as the sole party. If subcases which lack more than a single party were nonjusticiable on that basis alone, this court would be unable to determine water rights in the majority of disputes brought which involve disagreements with the Idaho Department of Water Resources.

The instant subcase is non-justiciable for other reasons. The alleged "dispute" with the Department fails to meet the criteria of a "controversy" that is appropriate for judicial determination. The controversy is not "definite and concrete." It is not a "real and substantial controversy admitting of specific relief through a decree of a conclusive character. . . ." *Id.* The issue of recognizing "informal rotation" is nonjusticiable because IDWR agrees to recognize "informal rotation" in the same manner which claimant seeks.

Since the Department agreed at hearing to allow the very rotation practices sought by Mr. Burgess, it will hereafter be bound by that representation. Thus, no justiciable controversy exists.

Therefore, IT IS ORDERED that the *Motion in Limine* is **DENIED** on the grounds the court was not presented with a justiciable controversy.

DATED May 2, 1996.


BRIGETTE BILYEU
Special Master, Reporting Area 1
Snake River Basin Adjudication

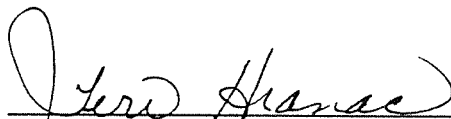
CERTIFICATE OF MAILING

I certify that a true and correct copy of the **ORDER DENYING MOTION IN LIMINE** was mailed on May 2, 1996, with sufficient first-class postage to the following:

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