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Department of Water Resources
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36-3A

Movant: State of Idaho

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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 No. See Exhibit "A"

STATE OF IDAHO'S
MOTION TO PARTICIPATE

DESCRIPTIVE SUMMARY

The State of Idaho¹ ("State"), by and through the Office of the Attorney General, submits its *Motion to Participate* in the subcases listed on Exhibit "A."

¹ The State of Idaho is appearing in its proprietary capacity on behalf of those agencies that filed claims in the Snake River Basin Adjudication: Idaho Department of Transportation, Idaho Department of Fish and Game,

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INTRODUCTION

On May 31, 1996, twenty-four water right claimants in the Hagerman Valley filed motions for summary judgment in their individual subcases. For purposes of simplification, the State of Idaho ("State") will refer to these water right claimants collectively as the Hagerman Water Right Owners, Inc. ("HWRO"). Along with the motions, HWRO filed a *Brief in Support of Summary Judgment*. The legal argument and analysis contained in that brief appears to be common to all twenty-four claims. In addition, HWRO submitted a number of affidavits and attachments containing factual material supporting the motions for summary judgment.

The State has reviewed these documents and has determined that it is necessary for the State to participate in the litigation of these motions in order to protect its sovereign and proprietary interests.

DISCUSSION

A. Standards For Participation In The Subcases Established By Administrative Order 1.

Section 6(f) of Administrative Order 1 states that "any party to the adjudication who does not file an objection or response waives the right to be a party to the subcase and to receive notice of further proceedings in the subcase."² This rule was adopted to implement the Court's case management plan. The Court recognized that it could not adjudicate all claims at one time. The SRBA district court needed a means to address the problems inherent in notifying every claimant and determining who wanted to participate in a subcase. Thus, it

Idaho Department of Parks and Recreation, Idaho Department of Lands, Idaho Department of Health and Welfare, Idaho Board of Education, Idaho Water Resource Board, and Idaho Division of Military.

² Idaho Code § 42-1401C makes the State a party to the Snake River Basin Adjudication (SRBA). Individual State agencies that have filed claims are also parties to the SRBA.

created subcases. Section 6(f) places on claimants the duty to affirmatively express an intent to participate in a subcase by filing an objection or response. Otherwise, the Court would deem the claimant to have waived the right to receive notice of future litigation in the subcase.

Section 6(g) of Administrative Order 1 recognizes, however, that a claimant who failed to file an objection or response may need to become involved in an ongoing subcase because of subsequent events. It allows SRBA claimants to renew their active participation by seeking “leave to participate in a subcase.” Section 6(g) instructs the special masters to treat motions to participate as if they were motions to intervene pursuant to I.R.C.P. 24.

Typically, I.R.C.P. 24(a) allows persons not already party to an action to intervene in an action, as a matter of right, in two situations. The first is where “a statute of the state of Idaho confers an unconditional right to intervene.” I.R.C.P. 24(a)(1). An SRBA claimant will always satisfy this standard because Idaho Code § 42-1409(4) required all water right claimants in the basin to file their claims within the SRBA.³

The second situation where intervention as a matter of right is contemplated by I.R.C.P. 24(a) is when:

. . . the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede applicant’s ability to protect that interest, unless the applicant’s interest is adequately represented by existing parties.

I.R.C.P. 24(a)(2). The language of this subsection can be broken into three essential components. To successfully intervene as a matter of right, the applicant must: 1) have an

³ Idaho Code § 42-1401(c) specifically provides that “the Attorney General may appear in any adjudication and shall represent the position of the state of Idaho.” Thus, the State is already a party in a sovereign and proprietary capacity.

“interest” at stake in the action; 2) be prejudiced in some way if intervention is not permitted; and 3) not be adequately represented by existing parties. A fourth requirement recognized in both Idaho case law and Administrative Order 1 is that intervention must be “timely.”

As a practical matter, there will never be a situation where an SRBA claimant is not able to demonstrate that he has an interest at stake in a given subcase. To be considered a “claimant,” a person must be “asserting ownership of rights to use the water within the state of Idaho” or be a person “on whose behalf ownership of rights to the use of water is asserted.” Idaho Code § 42-1401A(1). The Idaho Supreme Court has already recognized that, as claimants to the rights to use an interconnected resource, every party to the SRBA is affected by decisions touching other rights:

. . . by reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all such rights. Accordingly, all water users on a stream, in practically every case, *are interested and necessary parties to any court proceeding.*

In Re Snake River Basin Water System, 115 Idaho 1, 7, 764 P.2d 78 (1988) (emphasis added).

If all the water users on a stream can be considered “interested and necessary parties to any court proceeding,” then they always satisfy the “interest” element contained in I.R.C.P. 24.

By the same token, the existing parties to a subcase will never adequately represent the interests of other parties to the SRBA. Every SRBA claimant is competing against every other claimant for the right to use an “interlocking” resource. Indeed, a primary purpose of the subcases is to resolve disputes between the parties. Therefore, the “adequacy of representation” element of I.R.C.P. 24 will always favor the party seeking to participate in a given subcase.

Thus, although the SRBA district court refers to I.R.C.P. 24 to evaluate motions to participate in subcases, the only relevant inquiry is: 1) whether a given motion for participation is timely; and 2) whether participation by the moving party will prejudice other parties to the subcase. Timeliness does *not* refer to the close of the response period in a given subcase because that would render section 6(g) of A.O. 1 a mere repetition of section 6(f). Instead, the SRBA district court should balance the timeliness of a motion to participate against the possible prejudice to both the moving and non-moving party. The SRBA district court will have to compare the consequences of not participating in the subcase to the moving party against the consequences to the non-moving party if participation is allowed. In some cases, the motion to participate may be so untimely as to represent a waiver of the moving parties' right to participate in the subcase. On the other hand, the subcase's impact on the moving party's rights may be so significant that some prejudice to the non-moving party may be necessary.⁴ The SRBA district court should consider these issues on a case-by-case basis.

B. The State's Motion To Participate Is Timely.

HWRO's motions for summary judgment are, in large part, based on the argument that the Director's Report for Basin 36 incorrectly reduces members' claimed rights by virtue of the doctrine of partial forfeiture. *See* HWRO Brief in Support at 2 ("the reason IDWR recommended the reduction of decreed rights was based on partial forfeiture, which is not the law"). The basis for HWRO's statement that partial forfeiture is not the law in Idaho is the

⁴ The prejudice referred to by the State in this section refers to the SRBA district court's case management authority, as well as the right of existing parties to adhere to original briefing and hearing schedules. It will be nearly impossible for existing parties to a subcase to demonstrate that participation of another party will prejudice the resolution of their substantive rights. That is because any SRBA claimant can challenge the result of a subcase, whether that claimant actively participated or not. *See* A.O. 1, section 12.

SRBA district court's recent decision in Basin-Wide Issue 10. HWRO did not take any action in these subcases before the decision in Basin-Wide Issue 10.

The SRBA district court's *Memorandum Decision on Basin-Wide Issue 10* was issued on April 26, 1996. The Court announced at an oral hearing on May 21, 1996, that it would not reconsider the decision in Basin-Wide Issue 10. The Court also granted permission to appeal the decision on that date. This Court entered an *Order Denying Motion for Reconsideration and Granting Motion for Permission to Appeal*, which confirmed its oral rulings, on June 3, 1996.

Given the date of HWRO's motions, and the dates of this Court's rulings on Basin-Wide Issue 10, the State's *Motion to Participate* is timely.⁵

C. The State's Interests Will Be Significantly Prejudiced Unless Its *Motion To Participate* Is Granted.

HWRO's motions for summary judgment raise a number of issues that affect the sovereign and proprietary rights of the State. It would be manifestly unfair to rule on issues affecting the State without allowing the State to respond to HWRO's arguments.

The State has two overriding interests that it intends to protect throughout the litigation of the SRBA. The first is that the State, as the representative of the people of Idaho, has a sovereign and proprietary interest in ensuring both the accuracy and administrability of the final decree. Second, the State has a sovereign and proprietary interest in ensuring that the

⁵ The State's *Motion to Participate* is also timely under the standards for intervention as a matter of right. The Idaho Supreme Court has ruled that the "test of timeliness" turns on the "extent of prejudice which any delay resulting from the application [for intervention] will cause the existing parties." *Duff v. Draper*, 96 Idaho 299, 302, 527 P.2d 1257 (1974). The SRBA district court has informed the State that the hearing on HWRO's motions is set for July 9, 1996. Pursuant to I.R.C.P. 56(c), the State will file its response to HWRO's motions fourteen days before the hearing date. The State is not seeking an extension of time or any delay in the litigation of these subcases. Therefore, this Court will not be prejudicing HWRO by granting the State's *Motion*.

legislation governing the SRBA is interpreted properly. HWRO raises issues in its motions that have the potential to affect both of these interests.

The overall theory of HWRO's motions is that the requirement of reasonable beneficial use only applies to the "establishment" of a water right, not the "exercise" of a water right. The State asserts that this argument is not supported by Idaho law. If the requirement of beneficial use is irrelevant once a water right is established, then the only purpose of the SRBA is to quantify beneficial use claims. Under HWRO's theory, previously licensed and decreed rights can not be reviewed by the SRBA district court to ascertain the extent of current beneficial use. This position directly conflicts with both the traditional role of a court in an adjudication and the obligations given to IDWR by the legislature. The State should be allowed to participate in the subcases to present its position on this issue.

HWRO argues that IDWR's recommendations are "irrelevant and immaterial because they do not relate to the establishment of the right." HWRO's Brief in Support at 2. Again, this argument fails to recognize that beneficial use is the measure and the limit of the water right, both at the time of establishment and during subsequent exercise. Also, HWRO's argument discounts the *prima facie* standard given to IDWR's recommendations by Idaho Code § 42-1411(5). The State should be allowed to participate in the subcases to present its position on this issue.

HWRO argues that Idaho Code § 42-1427 prevents IDWR from independently investigating the elements of a claimed water right that are included in a previous decree. HWRO's Brief in Support at 21. This is a misinterpretation of section 42-1427 that would

nullify other portions of the 1994 SRBA amendments. The State should be allowed to participate in the subcases to present its position on this issue.

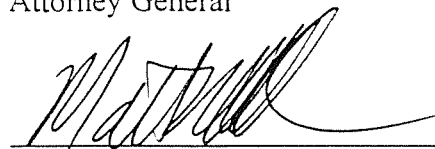
HWRO argues that the State is bound to the New International Mortgage Bank decree by principles of *res judicata*. HWRO's Brief in Support at 17-18. This argument is based on the allegation that the Idaho Department of Fish and Game (IDFG) is a successor in interest to an original party to the New International decree. According to HWRO, since IDFG is an agent of the State, it can bind the entire State, and presumably other State agency claimants, to the terms of the New International. Once again, the State asserts that this is an incorrect statement of the law. The State should be allowed to participate in the subcases to present its position on the *res judicata* effect of the New International on the State and its various proprietary agencies.

CONCLUSION

The State must be permitted to participate in the litigation of these subcases to avoid substantial prejudice to its interests. By contrast, participation in these subcases will not prejudice the ability of HWRO to present its case. For all of the foregoing reasons, the State's *Motion to Participate* should be granted.

DATED this 5th day of June, 1996.

ALAN G. LANCE
Attorney General

A handwritten signature in black ink, appearing to read 'Matthew J. McKeown', written over a horizontal line.

MATTHEW J. McKEOWN
Deputy Attorney General
Natural Resources Division

CERTIFICATE OF SERVICE

I certify that on this 5th day of June, 1996, I served a true and correct copy of the foregoing STATE OF IDAHO'S MOTION TO PARTICIPATE by placing the same in the United States mail, postage prepaid or in the Statehouse Mail, addressed as follows:

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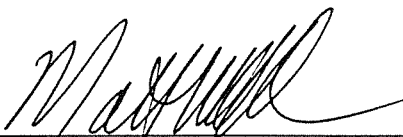
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EXHIBIT "A"

List of Subcases

Lynn J. Babington and Karen L. Babington	36-00003C
Walter J. Bonning, II and Judy L. Bonning	36-00108B
Dale E. Boyer and Elaine Boyer	36-00079
William E. Norris, David L. and Linda C. Cropper, Blaine Richard and Vivian Cropper, Dave and Nancy Anderson	
Mildred Culbertson	36-00047
Frank C. Erwin and Peggy Erwin	36-10409
Michael J. Fleming	36-00092
Keith L. Fuell and Jolene Fuell	36-00064B
Frank L. Glauner and Jean Glauner	36-00086C
Mattie P. Grigg	36-00039E
George J. Korbis and Nellie W. Korbis	36-10283B
Marilyn J. Miller	36-00039N
Howard L. Morris and Rhonda K. Morris	36-00085A
Howard L. Morris and Rhonda K. Morris	36-00061
Howard L. Morris and Rhonda K. Morris	36-00062
Mark Potter and Susan Potter	36-00063
Edna M. Rea	36-00039J
Roger Shaffer	36-00003A
Doyt H. Simcoe and Roxie Simcoe	36-00034B
Richard D. Simon	36-00003F
Dick J. Veenendaal and Sigrid E. Veenendaal	36-00035J
Edith L. Vernon	36-00039C
Paul E. Watkins and Inez S. Watkins	36-00003E
Basil Lester Zink and Myrle Hyde Zink	36-00106
	36-00103F