

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

	)	
	)	<b>CONSOLIDATED SUBCASE: 91-63</b>
<b>In Re SRBA</b>	)	
	)	<b>ORDER GRANTING PARTICIPATION TO</b>
	)	<b>GENE E. BRAY, <i>ET AL.</i>; CITY OF BOISE; AND</b>
	)	<b>STATE OF IDAHO; AND</b>
	)	
<b>Case No. 39576</b>	)	<b>ORDER DENYING MOTION TO CONDUCT</b>
	)	<b>LIMITED DISCOVERY; AND</b>
	)	
	)	<b>ORDER MODIFYING JULY 25, 2003,</b>
	)	<b>SCHEDULING ORDER</b>

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**I.  
PROCEDURAL BACKGROUND**

1. The United States Bureau of Reclamation (BOR) filed water right claims for irrigation storage, irrigation from storage, and other storage rights for Arrowrock Dam and Reservoir, Lucky Peak Dam and Reservoir, and Anderson Dam and Reservoir. The various irrigation entities, which have contracts with the BOR for the delivery of the water, also filed claims to the same water consistent with their respective uses. The Idaho Department of Water Resources (IDWR) recommended the water rights in the name of the BOR, substantially as claimed by the BOR. The corresponding claims filed by the irrigation entities were recommended as disallowed. The irrigation entities individually filed objections to the recommendations, all alleging, *inter alia*, that the water rights should be decreed in the name of the entity or alternatively, that the irrigation entities should be decreed beneficial ownership of the water right. In support of their respective positions, all objections cite to operation of Idaho

law, interpretations of the Reclamation Act of 1902, 43 U.S.C. § 372 and the U.S. Supreme Court case of *Ickes v. Fox*, 300 U.S. 82 (1937). The irrigation entities also objected to some of the other elements such as place of use, quantity, and point of diversion asserting that these elements should reflect the rights as used by the irrigation district. Other objections were also filed to the purpose of use relating to power and industrial storage and to the absence of a remark regarding any subsequent changes to an element of the right.

2. The breakdown of the rights comprising this consolidated subcase is as follows:

a. Water right 63-00303 was filed by the BOR and pertains to the Arrowrock Dam and Reservoir. The right was recommended in the name of BOR. The basis of the claim is a former decreed right. The individual corresponding rights filed by the irrigation entities recommended as disallowed include 63-05262A (Pioneer Irrigation District), 63-05262B (Settlers Irrigation District), 63-05262C (Nampa Meridian Irrigation District), and 63-00303A (Farmers Cooperative Ditch Co.). The BOR also filed 63-05262 which was recommended as disallowed but also recommended under the 63-00303 right.

b. Water right 63-03613 was filed by the BOR and also pertains to the Arrowrock Dam and Reservoir. The right was recommended in the name of the BOR. The basis of the claim is a licensed right. Farmers Union Ditch Co. filed the corresponding right of 63-03613A, which was recommended as disallowed.

c. Water right 63-03614 was filed by the BOR and pertains to Anderson Ranch Dam and Reservoir. The right was recommended in the name of the BOR. The basis of the claim is a licensed right. The individual corresponding rights filed by the irrigation entities include 63-03614A (Pioneer Irrigation District), 63-03614B (Settlers Irrigation District), 63-03614C (Farmers Union Ditch Co.), 63-03614D (New Dry Creek Ditch Co.), 63-03614E (Boise Valley Irrigation District), and 63-03614F (Nampa Meridian Irrigation District).

d. Water right 63-03618, pertaining to rights for Lucky Peak Dam and Reservoir was filed by and recommended in the name of the BOR. The basis for the claim and recommendation is a licensed right. The corresponding rights filed by the irrigation entities include 63-03618A (Pioneer Irrigation District), 63-03618B (Settlers Irrigation District), 63-03618C (Canyon County Water Co.), 63-03618D (Farmers Union Ditch Co.), 63-03618E (Middleton Irrigation Association), 63-03618F (Middleton Mill Ditch Co.), 63-03618G (New Dry Creek Ditch Co.), 63-03618H (Boise Valley Irrigation Ditch Co.), 63-03618J (Nampa

Meridian Irrigation District), 63-03618K (South Boise Water Co.), 63-03618L (Eureka Water Co.), 63-03618M (Thurman Mill Ditch Co.), 63-036518N (Eagle Island) and 63-03618P (Ballantyne Ditch Co.). The BOR also filed 63-05263 which was recommended as disallowed and recommended under the 63-03618 right.

3. After the objection and response period ran and while the issue was still before the Special Master, counsel for several of the irrigation entities jointly moved to consolidate the issue of ownership as between the BOR and the irrigation entities, recognizing there were other issues that varied among the water rights for the three facilities and also recognizing the delivery contracts varied between the various entities.

4. Thereafter, the Presiding Judge Roger S. Burdick issued an ***Order Separating and Consolidating Common Issue From Subcases; Order Rescinding Order of Reference to Special Master as to Consolidated Issue; Order Designating Issue as Consolidated Subcase 91-63; Notice of Scheduling and Status Conference on Consolidated Issue (June 23, 2003, Order)***. That ***Order*** provided:

**Notices of Intent to Participate:** Any party to the adjudication not already a party to one of the enumerated subcases in Exhibit A, seeking to participate in the consolidated subcase may do so by filing and serving a response setting forth their position on the issue. The response must be served on the parties to the consolidated subcase (listed in the attached certificate of mailing) prior to the date set for the hearing.

Pursuant the ***Order***, the State of Idaho, the City of Boise and Gene E. Bray, Thomas R. Stuart III, Thomas J. Cade and Amy Williams timely filed *Notices of Intent to Participate*.

5. Objections to participation by the City of Boise and Gene Bray, *et al.*, were filed by Farmers Union Ditch Co., Canyon County Water Company, Middleton Irrigation Association, and Middleton Mill Ditch Company represented by Stoppello & Kiser; Ballentyne Ditch Co., Boise Valley Irrigation Ditch Co., Eagle Island Water Users Association, Eureka Water Co., Farmers Cooperative Ditch Co., Nampa & Meridian Irrigation District, New Dry Creek Ditch Company, South Boise Water Company, and Thurman Mill Ditch Co. represented by Ringert Clark Chartered. Other parties voiced opposition at the hearing held on the matter on October 21, 2003. The BOR did not take a position on participation by any party. No party objected to participation by the State of Idaho.

6. The *June 23, 2003, Order* also required the parties to the consolidated subcase and those seeking to participate to file a statement of issues for purposes of determining whether the issue of ownership could be decided as a matter of law. All parties characterized the issue of ownership as either a matter of law or a mixed question of fact and law.

## II. INTENT OF THE *JUNE 23, 2003, ORDER AND ORDER GRANTING PARTICIPATION*

It is readily apparent from the intent of the *June 23, 2003, Order* that Judge Burdick contemplated opening the consolidated subcase to allow for participation by parties to the adjudication not already parties to the consolidated subcase. This Court concurs for several reasons.

The *June 23, 2003, Order* states the Court views the issue of ownership as primarily involving a question of law which could be decided on summary judgment. The statements of issue filed by the parties primarily characterized the issue of ownership as involving issues of law, albeit some characterized the issue as involving mixed questions of law and fact. However, no party asserted the issues pertaining to ownership could not be decided on summary judgment. Furthermore all objections filed by the irrigation entities were directed towards interpretations of Idaho law, the Reclamation Act of 1902 and the U.S. Supreme Court case of *Ickes v. Fox*, 300 U.S. 82 (1937) and related case law, as opposed to specific contract language or factual circumstances specifically defining ownership. Finally, interpretation of a contract is a question of law, absent a finding of ambiguity. Therefore, the Court views determination of the overriding issue of ownership as turning on resolution of issues of law.

Because the Court removed the consolidated issue from the *Order of Reference* to the Special Master, the Court, in effect, procedurally precluded parties to the adjudication from entering the individual subcases on a motion to alter or amend the Special Master's Report and Recommendation as concerns issues of law. *SRBA Administrative Order 1 (AO1)* 13.a. provides:

Any **party to the adjudication** including parties to the subcase, may file a Motion to Alter or Amend . . . . Failure of any party in the adjudication to pursue or participate in a Motion to Alter or Amend the Special Master's Recommendation shall constitute a waiver of the right to challenge or defend it before the Presiding Judge. (Emphasis added.)

*AOI* 2.g. defines **party to the adjudication** as any **claimant** as defined in I.C. §§ 42-1401(A)(1) and (6). I.C. § 42-1401A(1) defines “**claimant**” as “any person asserting ownership of rights to the use of water within the state of Idaho or on whose behalf the ownership of rights to the use of water is asserted.” I.C. § 42-1401A(6) defines “party” as “any person who is a claimant or any person who is served or joined.” Summarily stated, any party to the adjudication has standing to enter a subcase by filing a Motion to Alter or Amend. All parties now seeking participation in the consolidated subcase meet the criteria for a “party to the adjudication.” Therefore, had the Court not rescinded the *Order of Reference*, all parties would have been able to participate via a Motion to Alter or Amend.

This Court acknowledges there are limitations as to what issues can be raised on a motion to alter or amend, namely only questions of law and challenges to the sufficiency of evidence can be raised and a motion to alter or amend is not a substitute for an objection, as the record is already developed and cannot be altered with new or conflicting evidence. *See North Snake Ground Water District v. Gisler*, 136 Idaho 747, 750, 40 P.3d 105, 108 (2002). However, in this case, because the paramount issue to be decided is primarily, if not entirely, an issue of law, this Court has difficulty distinguishing a problem with allowing participation at this stage when the parties would have been able to participate before the Special Master.

Alternatively, *AOI* allows for participation by parties to the objections not already parties to a subcase through a motion to participate. *AOI* § 10(k) provides (with emphasis):

Any **party to the adjudication** who is not a party to a subcase may seek leave to participate in a subcase by filing a timely *Motion to Participate*. A *Motion to Participate* shall be treated like a motion to intervene under I.R.C.P. 24 and shall be decided by the Presiding Judge or the assigned Special Master. A party to the adjudication who does not file an objection, a response or a timely *Motion to Participate* waives the right to be a party to the subcase and to receive notice of further proceedings before the Special Master, except for *Motions to Alter or Amend*.

a. **Intervention of Right.**

I.R.C.P. 24(a) sets forth the standard for intervention as a matter of right.

Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the state of Idaho confers an unconditional right to intervene; or (2) 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).

Again, had the Court not rescinded the *Order of Reference* from the Special Master, the parties could have participated as a matter of right as to legal issues through a motion to alter or amend.

**b. Permissive intervention.**

The Idaho Supreme Court in *In re SRBA Case No. 39576, Minidoka Nat'l Wildlife Refuge, SRBA Subcase No. 36-15462*, 134 Idaho 106, 996 P.2d 806 (2000), addressed the standard for permissive intervention in the context of the SRBA. "I.R.C.P. 24(b) allows permissive intervention by a person '[u]pon timely application' and 'when an applicant's claim . . . and the main action have a question of law or fact in common.'" *Id.* at 110, 996 P.2d at 810. The decision of whether to grant the motion to intervene is discretionary with the trial court. *Id.* at 110, 996 P.2d at 810.

The Court, in its discretion, for the reasons already listed, would also allow permissive intervention under I.R.C.P. 24(b). Furthermore, the SRBA Court has acknowledged the opportunity to participate when a party's interest is only of a generalized nature. In the quantification proceedings for the Wild & Scenic River claims, the Court denied a motion for permissive intervention where the parties seeking intervention had only a generalized interest, but only because their generalized interest was already being adequately represented by parties to the subcase asserting the same position. *See Order on Motion to Participate/Intervene, AO1 10k, I.R.C.P. 24(a) & (b), Motion to Dismiss Objections to Amended Claims, I.R.C.P. 12(b)(6), Consolidated Subcase No. 75-13316 Wild & Scenic Rivers Claims (July 29, 2002)*. Lastly, any intervention at this very early stage of the proceedings results in little or no prejudice to existing parties to the subcase.

For the foregoing reasons, participation is **granted** to Gene E. Bray, Thomas R. Stuart III, Thomas J. Cade and Amy Williams and the City of Boise. Because no party opposed participation by the State of Idaho, and also for the same reasons stated, participation is also **granted** to the State of Idaho.

### **III. SCOPE OF ISSUE TO BE DECIDED**

As already discussed the primary issue raised by all of the objections filed in the individual subcases concerns the ownership of water rights, developed pursuant to the Reclamation Act of 1902, as between the BOR and the irrigation entities that contracted with the BOR for delivery of the water. All objections were directed towards interpretations of application of Idaho law, the Reclamation Act of 1902 and the U.S. Supreme Court case of *Ickes v. Fox*, 300 U.S. 82 (1937). As such this is the intended scope of the proceedings.

The objections filed to other elements of the rights such as quantity, place of use and point of diversion, which assert that said elements should be consistent with the use of the particular irrigation entity, are integrally related but secondary to the issue of ownership and at least at this stage only involve issues of law. Resolution of the ownership issue will affect and shape the resolution of these issues.

The remaining objections regarding the recommended purposes of use for stream flow maintenance, the absence of a remark concerning transfers, and issues pertaining to uncontracted storage space are beyond the scope of the consolidated subcase and not before the Court at this time.

### **IV. ORDER DENYING MOTION TO CONDUCT LIMITED DISCOVERY**

The Court ruled from the bench on the *Motion to Conduct Limited Discovery*, for the reasons stated in open court, namely that the purpose of the discovery motion was to determine what standing, if any, was had by the parties seeking to intervene. The intended purpose of the ***June 23, 2003, Order*** in allowing discovery upon leave of court was for conducting limited discovery germane to the resolution of the issue before the Court.

### **V. MODIFIED SCHEDULING ORDER**

Because of the participation of new parties and the representation to the Court that the parties were scheduled to begin negotiations, the following modifies the ***July 25, 2003, Order*** regarding scheduling:

1. **Negotiation Period:** the parties shall have until **February 27, 2004**, within which to negotiate a settlement concerning the ownership of the subject water rights as between the irrigation entities and the BOR.

2. **Order Concerning Discovery:** The *July 25, 2003, Order* concerning discovery shall remain in effect.

3. **Motion/Briefing Schedule:**

a. **Motions/Cross Motions for Summary Judgment, Opening Briefs and Affidavits:** Motions/cross motions for summary judgment, opening briefs and affidavits shall be filed with the Court and served on the parties **no later than 5 p.m., Friday, April 30, 2004**.

b. **Responsive Briefs and Affidavits:** Responsive briefs and affidavits shall be filed with the Court and served on the parties **no later than 5 p.m., Wednesday, May 26, 2004**.

c. **Reply Briefs:** Reply briefs and affidavits shall be filed with the Court and served on the parties **no later than 5 p.m., Friday, June 11, 2004**.

A hearing will be set at a later date by separate notice.

IT IS SO ORDERED.

Dated November \_\_\_\_\_, 2003.

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JOHN M. MELANSON  
Presiding Judge  
Snake River Basin Adjudication



## CERTIFICATE OF MAILING

I certify that a true and correct copy of the **ORDER GRANTING PARTICIPATION TO GENE E. BRAY, ET AL.; CITY OF BOISE; AND STATE OF IDAHO; AND ORDER DENYING MOTION TO CONDUCT LIMITED DISCOVERY; AND ORDER MODIFYING SCHEDULING ORDER** was mailed on October \_\_\_\_, 2003, with sufficient first-class postage to the following:

IDWR Document Depository  
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Deputy Clerk