

**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 )  
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Case No. 39576 )  
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**ORDERS RE:**

- 1. RELATIONSHIP OF SUBCASES, I.E., MOTION TO DESIGNATE "TEST CASES"**
- 2. MOTION TO DESIGNATE BASIN-WIDE ISSUES OR IN THE ALTERNATIVE, MOTION TO PARTICIPATE**

**I.  
BRIEF PROCEDURAL BACKGROUND**

1. On October 19, 1999, Cranney Bros., Doug Grant and Kevin Michaelson (hereinafter collectively "Cranney Bros."), by and through their attorneys Givens Pursley, LLP, submitted a *Notice of Relationship of Subcases and Motion for Expedited Hearing*. The contention being that there were several legal issues shared by numerous subcases now pending in various procedural stages before the Court. Those legal issues were identified as follows:

**IDWR Sprinkler/Flood Policy.** The propriety of the Department's newly adopted policy to recommend (or concur in an SF5) a quantity element based on a rate reasonably necessary for gravity irrigation where the right originally was decreed for use under a gravity method but currently is delivered using a more efficient irrigation method such as sprinklers.

**Partial Forfeiture.** Whether the portion of a previously decreed or licensed water right that has not been, and cannot be, diverted to beneficial use for five or more years because of conversion to more efficient irrigation methods has been partially forfeited.

**Conveyance Loss.** Whether each water user on a common ditch may be decreed a quantity element for his or her right that includes the full conveyance loss necessary to deliver that individual right down the ditch independent of the other rights delivered in the ditch, or only an amount that reflects the individual right's pro rata share of conveyance loss.

**Idaho Code § 42-1427.** Whether Idaho Code § 42-1427 may be applied to resolve ambiguities concerning previously decreed water right elements, or only to provide the Department a mechanism for recommending elements that were omitted from a prior decree.

Whether the purpose of use element for water rights decreed in the New International Mortgage decree is an "undefined" element within the meaning of Idaho Code § 42-1427, or simply is poorly defined, requiring the Court to construe the decree according to its terms.

Whether claimants asserting the right to use water under the New International Mortgage decree may use I.C. § 42-1427 to claim additional year-round uses such as wildlife, recreation, aesthetics, hydropower, fish propagation, and/or pipeline maintenance that did not exist when the right was initiated or originally decreed.

Cranney Bros. requested, *inter alia*, that this Court schedule a hearing to discuss the procedural status of various subcases in the SRBA and the best way to resolve the "key issues" (the issues identified immediately above).

2. On November 3, 1999, Pioneer Irrigation District, Settlers Irrigation District and Thompson Creek Mining Company (hereinafter collectively "Pioneer Irrigation District"), by and through their attorney of record, Elam & Burke, P.A., and in accordance with *AOI § 16*, moved the Court to designate the following as basin-wide issues:

Whether a water right's quantity may be decreed as the historical diversion rate if the current irrigation method is more efficient (i.e., sprinklers)?

Whether an existing water right may be partially forfeited if a portion is unused for five years or more due to conversion to a more efficient irrigation method?

Whether a claimant on a common ditch may be decreed a quantity which includes the full conveyance loss necessary to deliver that water right down the ditch?

Whether I.C. section 42-1427 can be used to resolve ambiguities concerning previously decreed water right elements?

Whether I.C. section 42-1427 may be used to claim additional uses which did not exist when the right was originally decreed?

In the alternative, Pioneer Irrigation District sought relief that if the Court does not grant the motion to designate the above issues as basin-wide issues, these movants be allowed to participate under *AOI* § 10(k) as permissive intervention (as opposed to intervention as a matter of right).

3. On November 3, 1999, the North Snake Ground Water District ("NSGWD"), on behalf of its members, by and through its counsel of record Beeman & Hofstetter, P.C., filed a *Notice of Relationship of Subcases* seeking a designation of relationship of two issues identified as:

**IDWR Sprinkler/Flood Policy.** The propriety of the Department's newly adopted policy to recommend (or concur in an SF5) a quantity element based on a rate reasonably necessary for gravity irrigation where the right originally was decreed for use under a gravity method but currently is delivered using a more efficient irrigation method such as sprinklers.

**Partial Forfeiture.** Whether the portion of a previously decreed or licensed water right that has not been, and cannot be, diverted to beneficial use for five or more years because of conversion to more efficient irrigation methods has been partially forfeited.

4. All of the above-stated issues arise out of pending subcases (which are at various procedural stages) in the Hagerman Valley area (Basin 36).

5. The above motion/notices of relationship questions were heard in open court on November 10, 1999. At the hearing, numerous counsel and *pro se* litigants participated. Very summarily stated, three approaches were suggested by the different "factions." They were:

Designate the issues as basin-wide issues. *AOI* § 16.

Not designate the issues as basin-wide issues; rather designate some subcases as "test cases" that address all of these issues, then allow all interested parties to fully develop a factual and legal record before a Special Master and then get them before the presiding judge.

Allow each individual subcase to proceed on its own and follow the standard procedural guidelines for each. (i.e., do not designate as basin-wide issues and do not designate as "test cases." Just let each individual case proceed on its own course just like any other subcase.)

6. At the conclusion of the hearing on November 10, 1999, the Court granted all interested parties until December 3, 1999, to identify/designate any proposed "test cases" and to state why the party thought the respective subcase should be considered as a test case.

7. By letter dated November 17, 1999, the Court received a letter from Mr. Dan McFaddan, *pro se*, of Hagerman, Idaho. The essence of the letter was two-fold. One was concern over the costs to litigate the proposed "test cases" and who was going to pay. The other was whether the issues were more appropriately administrative rather than judicial. Mr. McFaddan also expressed concerns with IDWR's proposed conjunctive management provisions.

8. On December 3, 1999, Cranney Bros., through its attorneys Givens Pursley, LLP, filed a listing of subcases presenting issues appropriate for review by the Presiding Judge as proposed test cases. This filing listed subcases 36-00039D, 36-00068 and 36-00069.

9. On December 3, 1999, NSGWD, by and through its counsel of record, Beeman & Hoffstetter, filed its *Test Case Proposal for Related Subcases*. This filing listed subcases 36-00068, 36-00069 and 36-07071.

10. On December 20, 1999, Pioneer Irrigation District, by and through its attorneys of record Elam & Burke, P.A., filed a response to the test case proposals. This filing suggested as test cases 36-00068, 36-00069 and 36-07071. This filing also specifically recommended against designating 36-00039D as a test case for the reasons stated in the filing.

## II.

### **MATTER DEEMED FULLY SUBMITTED FOR DECISION**

The last filing having occurred in this case on December 20, 1999, the Court deems this matter fully submitted for decision on the next business day, or December 21, 1999.

### III. DISCUSSION

Preliminarily, this Court recognizes that some of the issues identified by the parties may affect multiple subcases throughout the state in one or more of the various basins and may raise important policy concerns for the entire Snake River Basin Adjudication. However, there are countervailing concerns as well.

As noted earlier, there are essentially three proposals before the Court. Pioneer Irrigation District proposed that the issues be resolved by the long-standing basin-wide issue procedure established in *AOI* § 16. NSGWD and Cranney Bros. proposed that "test cases" be identified and pursued. Others suggest just letting the individual subcases proceed in due course. The Court has reviewed a transcript of the proceedings held in open court on November 10, 1999, and has considered all three proposals, including the comments of *pro se* litigants such as Dan McFaddan, which suggest that both the basin-wide issue procedure and the test case procedure would place undue burden on claimants in the test basins to litigate these issues. The Court also analyzed the request to designate test cases and to designate basin-wide issues while considering the factors enumerated in *AOI* § 16. Although IDWR's policies on changes from flood to sprinkler, its method of calculating conveyance loss on multiple rights from the same source, and its interpretation of I.C. § 42-1427 are broadly significant and should be resolved quickly, other factors hereinafter discussed must be considered as well.

First, some of these issues have already been addressed in large part by the Idaho Supreme Court or by this Court. The Idaho Supreme Court has decided that portions of a water right may be lost by partial forfeiture, abandonment or adverse possession. *State v. Hagerman Water Right Owners*, 130 Idaho 727, 947 P.2d 400; *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 947 P.2d 409 (1997). Also, the extent of beneficial use for periods of less than five years has been decided. *Id.* at 743. This Court has recently decided that the five-year period of forfeiture is tolled upon the filing of a claim in the SRBA. ***Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue*** (Dec. 29, 1999). One Special Master has issued decisions on IDWR's calculation of conveyance loss. ***Order on the Motion of Cranney Bros. To Alter or Amend the Special Master's Recommendation*** (Subcase 36-00039D) (Dec. 15, 1999). This Court has also decided some issues involving I.C. § 42-1427.

***Memorandum Decision and Order on Challenge*** (Subcases 36-00003A, 36-00003B, 36-0003C,

36-000003F, 36-00003K, 36-00003L and 36-00003M) (Nov. 23, 1999). *See also Order on Motion for Reconsideration* on these same subcases (Jan. 11, 2000). Other issues regarding the application of I.C. § 42-1427 will have to be decided as they come before the Court in individual subcases.

To single out individual subcases for test case status or to designate these as basin-wide issues seems inefficient given the procedural status of the various subcases and considering the extent of case law already established. More specifically, this Court firmly believes that by either designating one or more of the issues as basin-wide issues and/or designating certain subcases as "test cases" will delay the overall adjudication in a significant way. Parties will be seeking stays of various subcases until the results of the designations have gone to the highest appellate review possible. Concerning the decisions of the Idaho Supreme Court, there will be significant disagreement over what was decided and factual distinctions will be asserted, as has occurred regarding partial forfeiture and beneficial use. In short, there is more than enough established appellate case law and law of this case to proceed with the identified subcases in due course and allow this Court to handle the factual uniqueness of individual cases on a case-by-case basis.

In addition, this Court is mindful of the burden a basin-wide issue or "test case" procedure would place on claimants in the test basins who have already faced the difficult and expensive task of litigating many basin-wide issues in the SRBA.

#### IV. ORDER

Therefore, the Court **denies** Pioneer Irrigation District's *Motion to Designate Basin-Wide Issues* and **denies** the procedure suggested in NSGWD's *Test Case Proposal for Related Subcases*.

The individual subcases will proceed in due course and if the NSGWD, Cranney Bros., Pioneer Irrigation District, or others wish to get involved in the subcase, then they must follow the procedures set forth in *AOI*.

With respect to Pioneer Irrigation District's motion to participate as permissive intervention and in light of the above ruling, the Court requires counsel for these movants to specify by separate motion the specific subcases in which they now request to participate and the

Court will consider the motion after notice and an opportunity to be heard is provided to the claimants and all parties in the designated subcases.

IT IS SO ORDERED.

Dated January 11, 2000

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BARRY WOOD  
Administrative District Judge and  
Presiding Judge of the  
Snake River Basin Adjudication

#### CERTIFICATE OF MAILING

I certify that on January 11, 2000, a true and correct copy of the **Order Regarding Relationship of Subcases, i.e., Motion to Designate "Test Cases" and Motion to Designate Basin-Wide Issues or in the Alternative, Motion to Participate** were served by first-class mail, postage paid to the following:

Chief, Natural Resources Division  
Office of the Attorney General  
PO Box 4449  
Boise, ID 83711-4449

IDWR Document Depository  
PO Box 83720  
Boise, ID 83720-0098

US Department of Justice  
Environment & Nat'l Resources Division  
550 W Fort Street, Box 033  
Boise, ID 83724

Court Certificate of Mailing for Expedited Hearings

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Deputy Clerk