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STATE OF IDAHO

DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF THE DISTRIBUTION
OF WATER TO VARIOUS WATER RIGHTS
HELD BY AND FOR THE BENEFIT OF A&B
IRRIGATION DISTRICT, AMERICAN FALLS
RESERVOIR DISTRICT #2, BURLEY
IRRIGATION DISTRICT, MILNER
IRRIGATION DISTRICT, MINIDOKA
IRRIGATION DISTRICT, NORTH SIDE
CANAL COMPANY, AND TWIN FALLS
CANAL COMPANY

IN THE MATTER OF IGWA'S SETTLEMENT
AGREEMENT MITIGATION PLAN

Docket No. CM-DC-2010-001
Docket No. CM-MP-2016-001

**BJGWD's REPLY AND OBJECTION
TO SWC'S OPPOSITION TO
BONNEVILLE-JEFFERSON
GROUND WATER DISTRICT'S
MOTION TO INTERVENE / MOTION
TO STRIKE**

The Bonneville-Jefferson Ground Water District (hereafter "BJGWD") hereby responds and objects to the Surface Water Coalition's (hereafter "SWC") Opposition to Bonneville-Jefferson Ground Water Districts' Motion to Intervene/Motion to Strike (hereafter "SWC Opposition").

OVERVIEW

SWC opposes BJGWD substituting its counsel in this action and BJGWD intervening in the above captioned matter. SWC cannot have it both ways. Either BJGWD is a party to the case

and can substitute its counsel of record or it is not a party to the case and should be permitted to intervene to ensure all legal arguments and defenses are raised at summary judgment and before the Director at the February 8, 2023, hearing.

SWC's arguments focus less on substance and rely on a rigid and unreasonable application of IDAPA Rules. For good reason, the IDAPA grants tremendous discretion to the Director to deviate from Rules when their strict enforcement would be "impracticable, unnecessary or not in the public interest." IDAPA37.01.01.051. Here, there is no question BJDWD is harmed by the outcome of this matter. It has substantially complied with the requirements to substitute its counsel and to intervene. No additional discovery has been sought by BJDWD, nor will any undue delay or prejudice occur by permitting BJDWD to provide, essentially, supplement briefing in support of the Director holding a hearing pursuant to Idaho Code § 42-1701A(3) to challenge the *Final Order Regarding Compliance with Approved Mitigation Plan* entered in this matter on September 8, 2022 ("Compliance Order").

Finally, as a political entity, it is in the public interest to not bar BJDWD from ensuring it protects its legal interests. For the reasons set forth below, the Director should permit BJDWD to substitute its counsel or intervene for the purpose of presenting legal arguments and defenses not raised by IGWA in its summary judgment briefing.

STANDARD OF REVIEW

Decision "on the timeliness of a motion to intervene under an abuse of discretion standard. *State v. United States*, 134 Idaho 106, 109, 996 P.2d 806, 809 (2000) (citing *Cf. NAACP v. New York*, 413 U.S. 345, 365–66, 93 S. Ct. 2591, 2602–03, 37 L.Ed.2d 648, 662–63 (1973) (interpreting identical federal rule governing intervention). Timeliness of intervention is determined from all

the circumstances: the point to which the suit has progressed is not solely dispositive. *Id.* (emphasis added).

ARGUMENT

I. BJGWD's Motion to Intervene is adequate and should be granted.

SWC first argues that BJGWD is “not eligible to be an intervenor because [BJGWD] is currently a party to this contested case and is represented by IGWA.” SWC Opposition pp. 4. SWC has not presented any authority demonstrating that BJGWD is in fact a party. IGWA is the named party to this litigation. However, even if BJGWD is considered an actual party, it should be permitted to raise arguments as a party to this case. *See infra.*

SWC next argues that BJGWD failed “to allege that Bonneville’s interests are not adequately represented by existing parties” and “[e]ven if they had, that position would be untenable” because IGWA has represented BJGWD “in the Coalition delivery call for well over a decade.” SWC Opposition pp. 4. SWC acknowledges the basis for BJGWD’s request to intervene on page 5 of SWC’s Opposition, which is “to preserve and not waive certain legal arguments and defenses not raised in IGWA’s Response brief.” SWC’s argument also fails to analyze issues arising from the fact that it alleged breach of the Settlement Agreement during the 2021 irrigation season against IGWA, which precipitated the Director’s Compliance Order, which IGWA and BJGWD are contesting.

To the extent a breach was alleged, and the Director has found a breach occurred, BJGWD has a duty to its members to adequately represented all legal arguments and defenses to protect its members from damage claims and further curtailment/reductions of their ground water. These issues did not arise prior to SWC seeking summary judgment in December 2022 to prevent IGWA

from having a Idaho Code § 42-1701A(3) hearing before the Director. As such, BJGWD has a direct and substantial interest in the outcome of the February 8, 2023, hearing.

SWC next argues BJGWD's "January 4, 2023, motion is untimely because the prehearing conference in this matter was held nearly two months ago on November 10, 2022." SWC Opposition pp. 5. SWC cites IDAPA 37.01.01.352: "Petitions to intervene must be filed at least fourteen (14) days before the date set for formal hearing, or by the date of the initial prehearing conference, whichever is earlier." Importantly, SWC omits Rule 37.01.01.353.02. from its opposition.

The agency may grant late petitions to intervene for good cause shown or may deny or conditionally grant petitions to intervene that are late for failure to state good cause for the late filing, to prevent disruption, to prevent prejudice to existing parties, to prevent undue broadening of the issues, or for other reasons.

Importantly, the "[t]imeliness of intervention is determined from all the circumstances: the point to which the suit has progressed is not solely dispositive." *State*, 134 Idaho 109, 996 P.2d 809.

In this case, the record shows good cause exists for BJGWD's Petition being filed when IGWA filed its opposition to SWC's Motion for Summary Judgment. SWC filed a motion for summary judgment in December 2022 seeking to prevent IGWA from having a hearing pursuant to Idaho Code § 42-1701A(3) to challenge the *Final Order Regarding Compliance with Approved Mitigation Plan* it is entitled to. But, as set forth in its Petition to Intervene, IGWA did not raise all legal arguments and defenses adequate to protect the legal interests of BJGWD's members. BJGWD moved to take a stand once it saw the issues framed. Accordingly, BJGWD petitioned to intervene for the limited purpose of preserving and not waiving certain legal arguments and defenses not raised by IGWA. Therefore, the Director should view all the circumstances requiring

BJGWD to file its Petition motivated by a direct desire to protect the legal interests of its members in light of SWC's Motion for Summary Judgment and IGWA response and opposition thereto.

Finally, SWC argues that “[a]llowing Bonneville to intervene at this stage of the case, just weeks before the hearing is scheduled to be held would prejudice the Coalition” and its “inclusion as an intervenor would unduly broaden the issues in this contested case.” SWC Opposition pp. 5. Yet, BJGWD has not requested any further discovery nor sought to continue or otherwise delay the February 8, 2023, hearing. BJGWD's arguments are mainstream questions of contract interpretation and similar matters that are not “exotic” in nature. Therefore, SWC cannot show it will be prejudiced by BJGWD's Petition.

BJGWD also has not broadened the scope of the litigation beyond the issues SWC raised. Importantly, SWC seeks to terminate the February 8, 2023, hearing itself. Therefore, the relief sought in its Motion for Summary Judgment, if granted, would preclude IGWA and BJGWD from ever having a full opportunity to be heard before the Director and present its affirmative defenses to the issue initially submitted to the Director for review – breach of the Settlement Agreement by IGWA in 2021. SWC raised the issue by submitting it to the Director, and neither IGWA nor BJGWD has had an opportunity for an evidentiary hearing on the matter. Therefore, SWC defined the scope of the legal issues by bring the question of breach before the Director and now seeks to constrain the ability of the opposing parties (in particular BJGWD) to put on a full defense. That is fundamentally unfair.

In its Response, BJGWD asserted legal arguments and defenses to be heard before the Director that it views are necessary to respond to the issues SWC alleged, and BJGWD asserts that it has a right to a hearing on these issues before the Director. Simply put, BJGWD support the Director holding an evidentiary hearing because IGWA and its members have a right to present

evidence and legal arguments and affirmative defenses to SWC’s underlying allegation of breach of the Settlement Agreement. Accordingly, BJGWD’s Petition nor its Response do not add issues not already placed in controversy by SWC, and its Response joins in support of the arguments raised by IGWA and merely raised affirmative defenses to such alleged breach. *See* IGWA Response. Raising affirmative defenses and contradicting legal arguments from a party in a contested case is a common and necessary litigation practice.¹ Therefore, permitting BJGWD to intervene and present legal arguments and defenses will not expand the scope of the issues raised by SWC.

II. BJGWD should be permitted to change counsel and submit briefing representing its legal interests.

SWC opposes BJGWD from substituting counsel in this action, even though it argues BJGWD is already a party to the case. BJGWD filed its Petition to Intervene and its Substitution of Counsel with the aim of ensuring that its legal rights are represented at summary judgment and before the Director in the February 8, 2023, hearing.

In opposing BJGWD’s Substitution of Counsel, SWC alleges that because Racine Olsen, PLLP has not withdrawn its representation of IGWA, BJGWD cannot substitute Olsen Taggart PLLC as its counsel. In support of this theory, SWC cites the portion of IDAPA 37.01.01.204 which states “[p]ersons representing a party in a contested case before the agency who wish to withdraw their representation must immediately file with the agency a notice of withdrawal of representation” (emphasis added). All this section of IDAPA 37.01.01.204 is stating is that if

¹ “Black’s Law Dictionary defines an “affirmative defense” as “[a] defendant’s assertion of facts and arguments that, if true, will defeat the plaintiff’s or prosecution’s claim, even if all the allegations in the complaint are true.” *Walker v. Meyer*, 170 Idaho 408, 511 P.3d 828, 831 (2021) (citing *Affirmative Defense*, BLACK’S LAW DICTIONARY (11th ed. 2019)).

counsel for a party wishes to withdrawal from representing that party, then counsel may withdrawal. It has nothing to do with: (1) an intervenor; or (2) a party who seeks to change representation.

First, as set forth above, BJGWD is not a party to this case – IGWA is the party. As such, there is no requirement that intervenor’s counsel withdrawal from the case before an intervenor may substitute new counsel because the intervenor was not represented by counsel to begin with. Instead, all that is required, pursuant to IDAPA 37.01.01.351 and 200, is that the petition to intervene “identify the party’s representative, if any . . .” IDAPA 37.01.01.200. This is precisely what BJGWD accomplished when in the Petition to Intervene it identified Olsen Taggart PLLC as its representative.

However, if the director were to find that BJGWD is a party to the case, it has properly substituted Olsen Taggart PLLC as its counsel. The first part of IDAPA 37.01.01.204 (which SWC fails to quote) provides the process for a party to change its representation. All that is required is that a party provide “notice to the agency and all other parties.” This is precisely what BJGWD accomplished when it filed its Substitution of Counsel giving notice to all the parties that “Olsen Taggart PLLC, [] hereby substitutes as counsel on behalf of Intervenor, Bonneville-Jefferson Ground Water District.” Therefore, even if the Director were to find that BJGWD is already a party to this contested action, BJGWD has property substituted Olsen Taggart PLLC as their counsel.

III. SWC’s Motion to Strike should be denied.

This Court should not strike BJGWD’s summary judgment response because it is moot. SWC argues that BJGWD cannot submit a response to SWC’s motion for summary judgement because BJGWD’s intervenor status is pending with the Director. However, as set forth above,

BJGWD has either properly intervened in the case and, therefore, is entitled to file a Response brief, or it may file a brief as a party to the case.

Furthermore, SWC provides no authority for the proposition that a person seeking intervenor status cannot file a response to a summary judgment motion while the Director decides whether to grant the person's petition to intervene. Pursuant to IDAPA 37.01.01.051, the Director is to "liberally construe[]" the rules in this chapter to ensure a "just, speedy and economical determination of all issues presented to the agency." Allowing, a response to a summary judgment motion, prior to be granted intervenor status, gives all parties notice of the person's theories and, in fact, speeds up the process for resolving disputes if the person is granted intervenor status. As such, the Director should not strike BJGWD's summary judgment motion because it would violate the purpose of these rules.

SWC also argues—in conclusory form—that BJGWD's interest are already protected by IGWA's representation. However, BJGWD has plainly stated its interests are not being adequately represented by IGWA because IGWA is not presenting all the arguments it views are necessary to protect its members. Again, the purpose of these rules is "to ensure [a] just . . . determination of all issues . . ." IDAPA 37.01.01.051. IGWA's failure to present all the issues to the Director would not ensure a just determination of the issues in this case. Therefore, IGWA is not adequately representing BJGWD's interest and, pursuant to the purpose of these rules, BJGWD should be granted intervenor status.

Lastly, SWC argues that if BJGWD is a party, its response is duplicative. Even if this were the case, pursuant to Idaho Rules of Civil Procedure 56, which governs summary judgment motion, if a party files a summary judgment and "the adverse party wishes to oppose summary judgment, the party must serve an answering brief." I.R.C.P. 56(b)(2). Thus, if a party files a summary

judgment motion against multiple parties, then multiple parties must provide an “answering brief” in order to oppose the motion. This inevitably may result in parties providing duplicative answering briefs, but duplicative answers do not render the arguments moot, it just means defending parties share legal theories but approach them differently. Here, BJGWD has not provided duplicative arguments. In fact, the very reasons it seeks to intervene is because it has separate arguments as to why SWC’s motion for summary judgment should be dismissed. As such, regardless of whether the arguments in BJGWD’s response is duplicative or not, this is not a reason to strike the response.

Therefore, for the above reasons, this Court should not strike BJGWD’s response.

CONCLUSION

For the reasons set forth above, the Director should permit BJGWD to intervene in this matter, so it may present legal arguments that protect its interests at summary judgment and during the February 8, 2023, hearing.

DATED: January 17, 2023

OLSEN TAGGART PLLC

/s/ Skyler C. Johns

SKYLER C. JOHNS

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of January, 2023, I served the foregoing document on the persons below via email as indicated:

/s/ Skyler C. Johns
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