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Department of Water Resources

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DISTRICT COURT-SRBA  
TWIN FALLS CO., IDAHO

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     | ) | Consolidated Subcase No. 75-13316    |
|                | ) | Wild & Scenic Rivers Claims          |
| Case No. 39576 | ) | (Encompassing subcases 75-13316, 77- |
|                | ) | 11941, 77-13844, 78-11961, 81-10472, |
|                | ) | 81-10513 and 81-10625)               |
|                | ) |                                      |
|                | ) | ORDER ON MOTION TO                   |
|                | ) | PARTICIPATE/INTERVENE, AOI           |
|                | ) | 10k, I.R.C.P. 24(a) & (b); ORDER ON  |
|                | ) | MOTION TO DISMISS                    |
|                | ) | OBJECTIONS TO AMENDED                |
|                | ) | CLAIMS, I.R.C.P. 12(b)(6)            |

**Summary of Ruling:** Allowing objections filed by claimants Thomas R. Stuart III, Gene Bray, Bonnie Schonefeld, Alma Marie Osborn, and Phyllis K. Kochert. Dismissing objections filed by Idaho Rivers United and The Wilderness Society. Denying motions to participate filed in the alternative by Idaho Rivers United and The Wilderness Society.

I.  
**PROCEDURAL HISTORY**

1. At issue are seven federal reserved water right claims for instream flows filed by the United States pursuant to the Wild and Scenic Rivers Act of 1968, 16 U.S.C. §§ 1271-1287. Abstracts for water right claims 81-10472 (Selway River), 81-10513 (Lochsa River), and 81-10625 (Middle Fork Clearwater River) were filed by the Idaho Department of Water Resources (IDWR) on March 31, 1994.<sup>1</sup> The abstract for each of the three water right claims initially contained specific flow rate values for various periods of the year with respect to the quantity element. However, the "remarks" section in each of these three abstracts also indicated that the total quantity claimed is "all unappropriated natural flows." Presumably, the specific values were intended as a

<sup>1</sup> The abstract is essentially a summary of the right as claimed. IDWR does not investigate or make recommendations for water rights based on federal law.

quantification of “all unappropriated natural flows.” Abstracts for water right claims 78-11961 (Rapid River), 77-13844 (Middle Fork Salmon River), 75-13316 (Salmon River) and 77-11941 (Salmon River) were filed April 17, 1995. The abstract for each of these water right claims omitted any reference to specific flow rate values with respect to the quantity element. However, the “remarks” section in each of these abstracts also stated that the total quantity claimed is: “The entire unappropriated flow as of the date of the designation.”

2. Objections to the abstracted claims were due and filed in 1995. The subcases were then consolidated by court order. In 1996, a discovery order was issued setting forth disclosure and discovery deadlines.

3. In 1997, the United States moved to amend the claims seeking, among other things, to amend the quantity elements for water rights 81-10472 (Selway River), 81-10513 (Lochsa River), and 81-10625 (Middle fork Clearwater River), to replace the specific flow values with a general claim for “all unappropriated natural flows.” Judge Hurlbutt, then Presiding, granted the motion to amend the claims. Judge Hurlbutt did not order an amended or supplemental abstract to be issued (*AOI* § 4k) for the amended claims nor did he reopen the claims to a new objection period and allow new parties to enter the consolidated subcase.

4. On January 16, 1998, the United States moved for partial summary judgment in all subcases on the legal issue of whether the Wild & Scenic Rivers Act created a federal reserved water right. The United States also sought a ruling on the issue of whether as a matter of law all unappropriated flows as of the date of the reservation were reserved for the main stem of the Salmon River and for the Rapid River.

5. On July 24, 1998, Judge Hurlbutt issued a memorandum decision and order granting in part and denying in part the United States’ motion for summary judgment. Judge Hurlbutt held that the Wild & Scenic Rivers Act created a federal reserved water right. As to the three claims for the Salmon and Rapid Rivers, Judge Hurlbutt ruled that the United States was not entitled to all unappropriated flows but only the minimum amount necessary to fulfill the primary purpose of the reservation. Certain of the objectors moved the Court for leave to file a permissive appeal. The appeal was filed on

September 28, 1998. The United States did not cross-appeal on the issue regarding all unappropriated flows.

6. In October of 2000, the Idaho Supreme Court affirmed Judge Hurlbutt's decision, holding that Wild and Scenic Rivers Act created an express reservation of water to fulfill the purpose of the Act. The Supreme Court also affirmed Judge Hurlbutt's ruling that the reservation did not extend to all unappropriated flows in the Salmon and Rapid River as claimed by the United States but rather only the minimum amount necessary to fulfill the primary purposes of the reservation. The matter was remanded to this Court for the purpose of determining the minimum amount necessary to fulfill the purposes of the Wild and Scenic Rivers Act.

7. Pursuant to a status conference following remand, the United States informed the Court of its intent to amend its claims to reflect specific flow rate values in order to quantify the minimum amount of water necessary per the ruling of the Supreme Court. The United States and State of Idaho also filed a stipulated joint motion for a tentative scheduling order, which included a time frame for the United States to amend its claims.

8. In order to identify the parties intending to remain in the consolidated subcase for purposes of setting a trial schedule and ordering mediation, this Court required all parties of record to file with the Court a notice of intent to remain in the consolidated subcase. Parties of record that did not file notices were deemed withdrawn from the consolidated subcase. Parties seeking to enter the subcase for the first time were required to follow SRBA procedure and seek to enter the consolidated subcase either through a motion to file a late objection or a motion to participate. At that time some parties were denied participation based on having only generalized interests in the outcome of the proceedings.<sup>2</sup> However, the Court did indicate that if the United States amended its claims the Court may open the consolidated subcase to new objections and new parties.

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<sup>2</sup> As this Court has explained on numerous occasions, because of the potential for law of the case to arise out of any subcase in the SRBA, parties to the SRBA have standing to file objections (or motions to alter or amend a special master's report) with respect to any claim in the SRBA regardless of the nexus or connectivity to their own water right. However, once the time period for filing objections or motions to alter or amend has elapsed, one of the criteria the court takes into account in determining whether or not to allow a new party to enter a subcase is the nature of the interest in the outcome of the subcase.

9. Following the identification of the parties, the Court issued a scheduling order setting a deadline for the United States to file its amended claims as well as a tentative trial date for spring of 2003. At a prior status conference the United States and the State of Idaho indicated that although discovery had been ongoing each would require another season of field work in the spring within which to complete discovery. Accordingly, the Court set the tentative trial date to allow for the respective seasons of field work.

10. On March 23, 2001, the Court entered an order requiring all parties of record to participate in mandatory mediation. The mediation track has been ongoing to the present. According to the periodic mediation reports received by the Court, the parties have made extensive progress towards reaching a settlement.

11. On February 7, 2002, the United States timely filed amended claims to include specific flow rate values for each of the seven claims at issue. In response the Court set an objection and response period for the amended claims. Although the primary purpose behind requiring the filing of new objections and responses was to determine whether the amended claims would eliminate any of the issues or objections as between the existing parties to the subcase, new parties were also permitted to enter the consolidated subcase.

12. On May 10, 2002, Idaho Rivers United (IRU), The Wilderness Society (TWS)(hereinafter "IRU and TWS"), and Thomas R. Stuart III, Gene Bray, Bonnie Schonefeld, Alma Marie Osborn, and Phyllis K. Kochert (hereinafter "Conservation Objectors"), through common counsel, timely filed objections in accordance with the Court's scheduling order. The objections raise the principal issue that the amended claims do not claim sufficient water to fulfill the requirements of the Wild and Scenic Rivers Act. IRU and TWS are conservation groups and are not water right claimants or parties to the SRBA as defined by *AOI* § 2(d) & (q) and Idaho Code § 42-1401A(1) & (6). IRU and TWS seek to represent the interests of Stuart, Bray, Shonefeld, Osborn, and Kohert, all of whom are claimants in the SRBA. In the event the Court were to disallow IRU and TWS from representing the interests of the claimants, IRU and TWS seek in the alternative to intervene in the consolidated subcase pursuant to I.R.C.P. 24 and *AOI* § 10(k).

13. The State of Idaho and numerous other parties to the consolidated subcase filed memoranda in opposition to participation by IRU and TWS, and the parties they seek to

represent, on various grounds. Certain parties also filed a motion to dismiss the objections pursuant to I.R.C.P. 12(b)(6) based on standing and the content of the objections.

## **II. ISSUES PRESENTED**

IRU and TWS seek to participate in the consolidated subcase on behalf of the aforementioned claimants. IRU and TWS assert that their objections were timely filed in accordance with the Court's order and therefore do not require leave of Court to participate in the subcase. Alternatively, IRU and TWS assert that their motion satisfies the criteria for a motion to participate pursuant to *AOI* § 10(k) and I.R.C.P. 24. The following issues have been raised:

- 1) Whether leave of Court is required in order for IRU and TWS, or the Conservation Objectors they seek to represent, to object and gain party status in the SRBA?
- 2) Whether IRU and TWS have standing to object?
- 3) Whether the objections raised by IRU, TWS and the Conservation Objectors is an action that is cognizable in the SRBA? (i.e. objecting on the basis that the United States has claimed insufficient water for a federal reserved water right).

## **III. DISCUSSION**

**1. The Conservation Objectors, who are also parties to the adjudication, have appropriate standing to file objections to the amended claims and become parties to the consolidated subcase.**

The Conservation Objectors assert that their objections are timely and in accordance with SRBA procedure as well as the Court's December 20, 2001, scheduling order setting the objection period for the amended claims and therefore leave of Court is not required in order to enter the consolidated subcase. This Court agrees but only as to those parties that are claimants in the SRBA, not as to IRU and TWS.

In the SRBA, any *party to the adjudication* can file an objection or response to a claim reported in a director's report or abstract of federal reserved water rights and

become a *party to a subcase*. I.C. §§ 42-1412 and 42-1411(5). *AOI* defines “party to the adjudication” as “any claimant as defined in I.C. § 42-1401A(1) and (6).” *AOI* § 2(q). Idaho Code section 42-1401A defines “claimant” as “any person asserting ownership of rights to the use of water within the state of Idaho or on whose behalf ownership of rights to the use of water is asserted. I.C. § 42-1401A(1). Idaho Code section 42-1401A(6) defines “party” as “any person who is a claimant or who is served or joined.” I.C. § 42-1401A(6).

In subcases where objections and responses have previously been filed to a reported or abstracted claim and leave to amend the claim is subsequently granted the extent to which parties to the contested subcase, as well as parties to the adjudication, may respond to the amended claims is discretionary with the Court.<sup>3</sup> *AOI* § 4(l), *AOI* § 10(f)(3). The discretionary standard regarding the scope of response to an amended pleading is also consistent with the Idaho Rules of Civil Procedure. *See Snake River Equip. Co. v. Christensen*, 107 Idaho 541, 546-47, 691 P.2d 787 (Ct. App. 1985)(under I.R.C.P. 15(a) extent to which party can respond to amended claims remains subject to discretion of court). *AOI* § 4(l) provides that the “Presiding Judge or Special Master shall determine how to proceed when an amendment is granted and whether a supplemental Director’s Report is required.” *AOI* § 4(l). *AOI* § 10(f)(3) provides that the “court may request that IDWR prepare an Amended Director’s Report for any amended claim, including claims amended at trial to conform to the evidence.” *AOI* § 10(f)(3).

In this case, the Court did not order that the amended claims be abstracted again but did allow parties to the adjudication not previously parties to the consolidated subcase to file objections. In fact, certain parties who were previously denied participation in the consolidated subcase were subsequently permitted to file or join in objections and enter the consolidated subcase after the claims were amended. *Cf. Order Denying Motion to Participate; Order Allowing Amicus Curie Participation of Legal Issues*, Subcase 79-

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<sup>3</sup> A court acts within its discretion if it perceives the issue as discretionary, acts within the outer boundaries of its discretion and consistently with applicable legal standards, and reaches its decision by exercise of reason. *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991).

13597, Consolidated Subcase 75-13316 (April 23, 2001)( regarding Harrison, Burgess and Peoples Canal & Irrigation Companies; Progressive, Enterprise, New Sweden, Snake River Valley and Idaho Irrigation Districts; Egin Bench Canals, Inc.; and North Fremont Canal Systems, Inc., A&B and Burley Irrigation Districts, Twin Falls and North Side Canal Companies) and *Notice of Joinder to State's Objection to Amended Claim* (May 10, 2002)(regarding same parties).

The primary intended purpose of the Court's December 20, 2001, order setting the objection period for the amended claims requiring the parties to re-file objections was to attempt to narrow or eliminate issues for trial as between the parties to the consolidated subcase. The parties to the subcase may have not contested the specific flow values being claimed as to certain stream reaches. However, in order to satisfy due process concerns, the other purpose of the order was to allow parties to the adjudication notice of the amended claims in the event the claims as amended potentially impaired new or different interests not affected by the prior claims. The Court notified the parties that the amended claims may open the consolidated subcase to new parties.

Conservation Objectors Thomas R. Stuart III, Gene Bray, Bonnie Schonefeld, Alma Marie Osborn, and Phyllis K. Kochert are all claimants in the SRBA as defined by I.C. § 42-1401A(1) as each has asserted ownership of a water right claim in the SRBA. Therefore each has appropriate standing to file objections and/or responses in the SRBA and enter the consolidated subcases. IRU and TWS are not claimants in the SRBA and therefore do not satisfy the requisite statutory standing requirements to file objections and/or responses in the SRBA. In *Fort Hall Water User's Association v. United States*, 129 Idaho 39, 921 P.2d 739 (1996), the Idaho Supreme Court affirmed the ruling of the SRBA district court wherein the court denied standing to a water users association to file an objection in the SRBA where the water users association was not claiming ownership of a water right and therefore did not fit within the definition of "claimant" under Idaho Code section 42-1401(A). The basis for the Supreme Court's decision turned on the interpretation of Idaho Code § 42-1401A(1) and the definition of "claimant." IRU and TWS did not file claims in the SRBA on their own behalf nor did they previously or are they now asserting ownership of water rights on behalf of claimants. IRU and TWS hold

no interest in the water rights claimed by the Conservation Objectors. Rather, IRU and TWS seek to represent the interests of the Conservation Objectors in prosecuting objections to the water right claims of the United States. IRU and TWS argue that the Court has in the past allowed other parties to represent the interests of other claimants, as is the case with the federal claims coalition. The two situations are distinguishable. To this Court's knowledge the members comprising the federal claims coalition are claimants in the SRBA that are represented by common counsel in specific subcases as opposed to a non-claimant party representing the interests for the coalition.

For the above-stated reasons, the Court finds that the Conservation Objectors are claimants in the SRBA pursuant to Idaho Code § 42-1401A and therefore have appropriate statutory standing to file objections in the consolidated subcase. The objections filed by IRU and TWS are hereby dismissed.

**2. IRU and TWS's motion does not satisfy the criteria for a motion to participate/intervene under either I.R.C.P. 24(a) or (b).**

In the alternative, IRU and TWS move for leave of court to intervene in the consolidated subcase. *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*.<sup>4</sup>

**A. Intervention of right.**

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

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<sup>4</sup> *AOI* § 2(p) defines "party to a subcase" as:

The claimant, any objector or respondent to a water right recommendation, any party to a subcase which has been consolidated with another subcase, any party to the adjudication granted leave to participate in a subcase by the Presiding Judge or Special Master, and any party to the adjudication filing a *Motion to Alter or Amend the Special Master's Recommendation*.

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).

The instant motion does not satisfy the criteria for an intervention of right pursuant to *AOI* § 10(k) or I.R.C.P. 24(a). First, the Court finds that there is no statute or *AOI* rule that confers an unconditional right to IRU and TWS to intervene in the proceedings. IRU and TWS are not parties to the adjudication as required by *AOI* § 10(k) in order to file a motion to participate nor do IRU and TWS meet the statutory standing criteria set forth in Idaho Code § 42-1401A. Second, the interest alleged by IRU and TWS to be impaired as a result of the amended claims is one of a generalized nature held in common with the general public. IRU and TWS do not claim ownership of any claims that share a factual or legal connection or dispute with the federal reserved water rights at issue. Towards that end, the Court finds that the United States and the Conservation Objectors are adequately representing the alleged interest at stake. Therefore the Court denies the *Motion to Participate* under I.R.C.P. 24(a).

#### **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) ("*Smith Springs*"), 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 exercising its discretion denies the *Motion to Participate* under I.R.C.P. 24(b). Again, IRU and TWS are not parties to the adjudication as required by *AOI* §

10(k) in order to file a motion to participate. IRU and TWS do not claim ownership of any claims that share a factual or legal connection or dispute with the federal reserved water rights at issue. The Court finds that the United States and the Conservation Objectors are adequately representing the alleged interest at stake. Therefore the Court denies the *Motion to Participate* under I.R.C.P. 24(b).

**3. The Objections asserted by the Conservation Objectors are cognizable within the SRBA.**

The State of Idaho and other objectors make the argument that the objections filed by the Conservation Objectors are not proper or legally cognizable objections within the SRBA. This argument is based upon the nature of the Conservation Objector's objections – i.e. the assertion that the United States is not claiming sufficient water to fulfill the purposes of the reservation, and the requisite amount is “all natural flows at all time of year, as reflected on historic hydrographs.” As explained below, this Court holds that the objections filed by the Conservation Objectors raise issues that are legally cognizable and redressable in the SRBA.

This case is not starting from “square one.” On remand the Idaho Supreme Court gave this Court the express directive with respect to these subcases to determine the minimum amount of water necessary to effectuate the primary purpose(s) of the reservation. Toward that end it is the intent of the Court to take evidence, consider any applicable legal arguments, and make findings of fact and conclusions of law directed at quantifying the federal reserved water rights. In this regard it will be necessary for this Court to ultimately decree a specifically enumerated quantity for each of the claims, as opposed to a general statement of “all unappropriated flows,” or the like. The recent amendments to the claims provide a starting point for this process by assigning a specific amount of water for each of the claims. However, the amount of water claimed by the United States is not controlling as to what amount may ultimately be determined by this Court. In other words, it is possible that the amount of water needed to fulfill the purpose(s) of the reservation may be greater than or less than that what is currently claimed.

The State argues that the legislative intent behind the SRBA statutes is that “[o]bjections are permitted in the SRBA to prevent a claimant being awarded an excess amount of water.” In this Court’s view, this interpretation is too narrow. In an open objection and response period, the Court does not initially scrutinize objections to determine the intended purpose of the objection. The SRBA is replete with examples of situations where an objector is not so much concerned with the parameters of the particular water right being objected to, but rather the objection is aimed at providing input on a legal issue that may ultimately establish precedence. Further, in a situation where a water right is dependant on return flows or groundwater recharge from another up-gradient water right, it is conceivable that the claimant of such a water right may want to file an objection of the type now complained of. In this Court’s view, at least with respect to an open objection and response period, objections may properly be filed for any number of legitimate reasons aimed at protecting the objector’s interests – either factual or legal.

For example, the water rights of many of the objectors to this consolidated subcase apparently share no nexus or connection with the federal reserved water right claims at issue. Even though these parties are asserting less water than claimed by the United States they are really just asserting a generalized interest as their water rights are apparently not directly affected by the water rights at issue. This type of objection may result in an undue hardship for a claimant who has to defend against a party with no identifiable interest in the outcome of the proceedings, nonetheless because of the scope of the SRBA and the inability to second-guess the impact of a particular subcase, parties to the adjudication are permitted to file such objections. Consequently, to argue that a generalized objection must be for less water than claimed is inconsistent with the underlying reasoning which allows parties to the adjudication to be heard on generalized issues.

#### **4. Issues relating to trial and settlement.**

To the extent the United States stipulates to a quantity that is in agreement with all parties but the Conservation Objectors, the Court will take up the matter at that time.

The Court also notes that this is not the first instance wherein parties to a subcase of this magnitude have asserted an interest in the outcome of the proceedings that can be best characterized as general. Past experience has demonstrated that because of the nature of the generalized interest at stake on occasion some parties are primarily only interested in participating in the settlement aspect of the proceedings and fail to adequately prepare for the litigation component of the proceedings. When the matter does not settle the party has no intention of proceeding to trial. This tactic tends to severely undermine the efficacy of the settlement efforts. As such, the parties are on notice that in the event the matter does not settle, the Court expects all parties to be prepared to proceed with the litigation track in accordance with the Court's forthcoming scheduling order. Any party not prepared to proceed with the litigation track will be subject to sanction including dismissal of objections and assessment of attorney's fees and costs occasioned by any delay in either the settlement or litigation proceedings.

Finally, based on some of the comments made at the hearing on the motion, it should be again reiterated that the Court views the issue of quantification on remand as primarily a factual issue, although there remains some legal issues with respect to narrowing and clarifying the express purposes of the Act. While the minimum quantity necessary to fulfill the primary purposes of the reservation may factually be determined by this Court to require a quantity equal to all unappropriated flows as of the date of the reservation, the argument that strictly as a matter of law (i.e. statutory interpretation), the minimum quantity necessary to fulfill the primary purpose of the reservation requires all unappropriated flows is really nothing more than a semantical recharacterization of the same issue, which was previously decided by the Idaho Supreme Court. That being said, in accordance with the Court's expectation that the parties be prepared for the litigation phase of the proceedings, parties should be prepared with more than just legal argument.

#### **IV. CONCLUSION**

For the above-stated reasons the Court finds the objections filed through counsel by Thomas R. Stuart III, Gene Bray, Bonnie Schonefeld, Alma Marie Osborn, and Phyllis

K. Kochert to be timely and proper and hence the I.R.C.P. 12(b)(6) motion is denied as to these parties. The objections and alternative motions to participate filed by Idaho Rivers United and The Wilderness Society are dismissed and denied respectively. The Court will be setting a scheduling and status conference for purposes of setting pretrial deadlines for September 2002. Separate notice will follow.

IT IS SO ORDERED.

DATED: 7-29-02



ROGER S. BURDICK  
Presiding Judge  
Snake River Basin Adjudication

# CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER ON MOTION TO PARTICIPATE /INTERVENE AND ORDER ON MOTION TO DISMISS OBJECTIONS TO AMENDED CLAIMS was mailed on July 29, 2002, with sufficient first-class postage to the following:

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