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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

)
)
) Consolidated Case No. 75-13316
) (Wild & Scenic Rivers Act Claims)
)
) MEMORANDUM IN SUPPORT OF
) MOTION TO DISMISS OBJECTIONS
) OF IDAHO RIVERS UNITED, THE
) WILDERNESS SOCIETY, THOMAS R.
) STUART III, GENE BRAY, BONNIE
) SCHONEFELD, ALMA MARIE OSBORN,
) AND PHYLLIS K. KOCHERT AND
) RESPONSE TO IDAHO RIVERS UNITED'S

INTRODUCTION

The above-named Objectors (collectively “Federal Claims Coalition” or “Coalition”) by and through counsel of record, submit this *Memorandum in Support of Motion to Dismiss The Objections of Idaho Rivers United, The Wilderness Society, Thomas R. Stuart III, Gene Bray, Bonnie Schonefeld, Alma Marie Osborn, and Phyllis K. Kochert and Response to Idaho Rivers United’s and The Wilderness Society’s Motion to Intervene* in consolidated subcase no. 75-13316 (Wild and Scenic Rivers Act claims).

STATEMENT OF FACTS

The Idaho Department of Water Resources originally abstracted the United States’ federal reserved water right claims for the Main Salmon River, the Middle Fork of the Salmon River, the Rapid River, the Lochsa River, the Selway River, and the Middle Fork of the Clearwater River pursuant to the Wild and Scenic Rivers on April 17, 1995. The State of Idaho immediately filed its initial objections to these claims on September 18, 1995. This abstract only claimed “all unappropriated flows” as of the date of the federal designation for the Main stem and the Middle Fork of the Salmon River, and claimed specific flow values for the Rapid, Lochsa, Selway, and Middle Fork Clearwater Rivers. Subsequently, the United States filed amended claims on February 26, 1997 to include “all unappropriated flows” as the claimed amount for these last four rivers.

In 1998, the United States filed a motion for summary judgment on its claims. The SRBA Court, in granting the United States’ motion for summary judgment in part,

concluded that the United States was entitled to federal reserved water rights for the claimed rivers. *See Memorandum Decision Granting in Part and Denying in Part the United States' Motion for Summary Judgment on Reserved Water Right Claims*, consolidated subcase no. 75-13316 (7/24/98) ("1998 Order"). The Court, however, denied the United States' claim to "all unappropriated flows", holding instead that the United States is only entitled to the "minimum quantity of water necessary" to fulfill the purposes of the Wild and Scenic Rivers Act. *See 1998 Order* at 11. The Idaho Supreme Court affirmed and remanded the question of quantification of the United States' rights back to the SRBA Court. *See Potlatch Corp. v. United States*, 134 Idaho 912 (2000). That holding is now the law of the case and cannot be challenged. The United States is not legally entitled to "all unappropriated flows." On December 20, 2001, the SRBA Court issued an *Order Setting Objection Period and Scheduling Conference*. By stipulation of the parties, the United States was granted time to file amended claims, which it did on February 7, 2002. On May 10, 2002, the Federal Claims Coalition joined in the timely objections to these claims filed by the State of Idaho. On that same day, several individuals and two environmental groups also filed objections and sought leave to intervene in this proceeding.¹

¹ The following individuals and groups all filed objections to the United States' claims: Thomas R. Stuart III, Gene Bray, Bonnie Schonefeld, Alma Marie Osborn, Phyllis K. Kochert, Idaho Rivers United, and The Wilderness Society. The five individuals are hereafter referred to as public interest objectors, based upon the nature of their objections. The two special interest organizations are referred to as environmental groups.

ARGUMENT

I. **THE OBJECTIONS FILED BY THOMAS R. STUART III, GENE BRAY, BONNIE SCHONEFELD, ALMA MARIE OSBORN, PHYLLIS K. KOCHERT, IDAHO RIVERS UNITED, AND THE WILDERNESS SOCIETY FAIL TO STATE A JUSTICIABLE CLAIM IN THE SRBA AND MUST BE DISMISSED PURSUANT TO I.R.C.P. 12(b)(6)**

Idaho Code § 42-1412 provides that “any claimant who desires to object to a water right . . . shall file an objection with the district court within the time specified . . .”

I.C. § 42-1412. A “claimant” has been further defined to mean “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. Persons or entities that fit the above definitions have a statutorily conferred right, or legal “standing”, to object to any other claims filed in the SRBA. Whether or not a claimant’s “objection” is within the scope of the SRBA court’s jurisdiction, however, is another question.

In this consolidated subcase, several individual claimants (collectively the “public interest objectors”) and two environmental groups filed objections to the United States’ amended federal reserved water right claims for the rivers designated pursuant to the Wild & Scenic Rivers Act, 16 U.S.C. § 1271 *et seq.*² Each of the objectors only objected to the “quantity” element of the United States’ claims and stated the following reason for the objections:

Quantity should be: All natural flows at all times of year, as reflected on historic hydrographs.

² Claims were filed for the Main Salmon River (no. 75-13316), the Middle Fork of the Salmon River (77-11941), the Rapid River (no. 78-11961), the Lochsa River (no. 81-10513), the Selway River (no. 81-10472), and the Middle Fork of the Clearwater River (81-10625).

*See SF1 Objection at 2.*³

As set forth for the reasons discussed below, these objections raise issues that are beyond the scope of the SRBA, are not based in fact or law, and are nothing more than an attempt to “force” the United States to make unsupported claims.

A. The Objections Raise Issues Beyond the Scope of the SRBA.

By statute and order of the Idaho Supreme Court, the SRBA district court was conferred exclusive jurisdiction to determine all of the claims arising in the Snake River basin. The SRBS is a separate division of the district court for the fourth judicial district and exercises the “unique” jurisdiction given it by the legislature. *See Walker v. Big Lost River Irr. Dist.*, 124 Idaho 78, 81 (1993). A claim to a water right made in the SRBA is essentially akin to a quiet title, or in rem, action. *See Order on Challenge (Consolidated Issues) of “Facility Volume” Issue and “Additional Evidence” Issue*, subcases 36-02708 *et al.* (12/29/99) (“*Facility Volume Decision*”) at 26. As such, the Court is charged with determining “ownership rights”, or property rights, to the use of water within the Snake River basin. The procedure for filing claims and objections in the SRBA has been further defined by statute, I.C. § 42-1401 *et seq.*, and the Court’s own order, *Administrative Order No. 1* (amended 10/10/97). The two environmental groups, Idaho Rivers United (IRU) and The Wilderness Society (TWS), do not have claims in the SRBA, and therefore cannot file objections, to other claims in the SRBA.⁴

³ All cites to the *SF1 Objection* refer to the objections filed by the public interest objectors to the United States’ water right claim no. 75-13316. Since the objections to the rest of the United States’ Wild and Scenic Rivers are identical, there is no need to reference each objection separately.

⁴ The objections filed by Idaho Rivers United and The Wilderness Society are the same as the objections filed by the public interest objectors, and therefore the groups’ objections may be dismissed for the same reasons as well.

The public interest objectors, as “claimants”, may file objections to any water right claim in the SRBA. I.C. § 42-1412. However, in order to be heard and participate in this consolidated subcase, the public interest objectors must raise proper “objections” that are within the scope of the SRBA. For example, In *Fort Hall Water Users Ass’n v. United States*, 129 Idaho 39 (1996), the Idaho Supreme Court specifically determined that:

I.C. § 42-1412 provides the means by which objections may be made *to the assertion of water rights*.

129 Idaho at 41 (emphasis added).

This statement necessarily implies that claimants in the SRBA may only file objections to water right claims that have been “asserted.” The term “assert” means “to state or declare positively,” or “to demonstrate the existence of”; and the term “assertion” denotes “the act of asserting.” See *Webster’s Ninth New Collegiate Dictionary* at 109 (1987). Here, the public interest objectors have filed objections based on the United States’ “non-assertion” of water rights. Such an objection is not allowed by statute or *Administrative Order No. 1*, and cannot be lawfully entertained by the SRBA Court for this reason. Apart from objecting to the “non assertion” of water rights, the public interest objectors also raise issues that do not apply to decreeing water rights in the SRBA.

In each of their objections, the public interest objectors argue that the United States’ claims “are not sufficient to preserve and protect the outstandingly remarkable values for which the river was designated under the Wild and Scenic Rivers Act.” In addition, the public interest objectors assert that they are concerned about preserving federal reserved water rights for wild and scenic rivers “to ensure a fully functioning

natural hydrograph for Idaho's wild and scenic rivers"; or "to protect recreation opportunities"; or "to protect water quality and fish." *See Affs. of Thomas R. Stuart III* at 2, *Gene Bray* at 1; *Bonnie Schonefeld* at 2; and *Phyllis K. Kochert* at 2. Such "interests" are not at issue in this subcase and do not concern what this Court has already determined to be the "general purposes" of the Wild & Scenic Rivers Act. Furthermore, these issues do not apply to, or do not affect the public interest objectors' individual water right claims that have been filed in the SRBA. Instead, the "issues" the public interest objectors seek to raise resemble the issues considered under the "local public interest" standard or under a public trust theory. Such "public interests," however, have been held to be inapplicable for determining and decreeing water rights in the SRBA.

In *Idaho Conservation League, Inc. v. State*, 128 Idaho 155, 157 (1995), several environmental groups, including Idaho Rivers United (IRU), petitioned for leave to intervene in the SRBA under I.R.C.P. 24(a) and (b) to represent the interests of the public through the public trust doctrine and the statutory doctrine of the local public interest. The SRBA court denied the groups motion holding that the limited jurisdiction of the SRBA did not provide the court with the authority to consider the public trust doctrine. On reconsideration, the SRBA court did find that the groups could intervene for the limited purpose of asserting the local public interest in certain subcases where water rights were filed under I.C. §§ 42-1416 and 42-1416A. On appeal, the Idaho Supreme Court held that "the district court correctly concluded that the public trust doctrine is not an element of a water right used to determine the priority of that right in relation to the competing claims of other water right claimants." *See* 128 Idaho at 157. In addition, the Court specifically held that the repeal of I.C. §§ 42-1416 and 42-1416A eliminated the

“local public interest” standard from being considered as a condition prior to decreeing certain water rights in the SRBA. *See id.* Finally, the Court determined that without the “local public interest” consideration, certain environmental groups, including IRU, did not have grounds to intervene in the SRBA.

The objections raised by the public interest objectors in this consolidated subcase are nothing more than an attempted “end-around” the Idaho Supreme Court’s decision in *Idaho Conservation League, Inc. v. State*. The public interest objectors’ claimed “interests” in protecting Wild and Scenic Rivers, and the “outstandingly remarkable values” of those rivers, is simply an attempt to raise “public” concerns that are shared equally by a substantially large portion, if not the entire, population of the state of Idaho. Since the “public trust doctrine” and the “local public interest” have been excluded from consideration in the SRBA, the similar “public interest” objections raised by these objectors have no recognizable basis in law or fact, and must be dismissed accordingly.

B. The Objections Should Be Dismissed as a Matter of Law.

Alternatively, should the Court find that the objections raised by the public interest objectors are within the scope of the SRBA, it is clear the specific issue raised by the objections has already been ruled upon, and the Court should dismiss the objections as a matter of law. The SRBA Court previously denied the United States’ motion for summary judgment asking for all “unappropriated flows” for its water right claims to the Wild and Scenic Rivers, and instead limited those claims “to the minimum quantity necessary to fulfill the purposes of the Wild and Scenic Rivers Act . . .” *See 1998 Order* at 8. The United States did not appeal this ruling. Apparently the public interest objectors would have the parties re-litigate this issue.

The standard for determining the extent of the United States' claims, or the "minimum quantity necessary", has already been decided as a matter of law and therefore that decision stands as the law of the case. Whereas this Court previously denied claims to "all unappropriated flows" for the Wild and Scenic Rivers, it follows that claims to "all natural flows", or claims in a much greater amount than "all unappropriated flows", should also fail as a matter of law. Indeed, if the United States were granted "all natural flows at all times of year" for the six Wild and Scenic Rivers, no other diversions could take place either within or outside the designated boundaries, irrespective of priority date and purpose of use. Oddly enough, such a claim on the Main Salmon River would deny one public interest objector, Mr. Thomas R. Stuart III, of the ability to lawfully divert and use his irrigation water right.⁵ Since this Court previously denied the United States' claims to even all "unappropriated" water that was available within each Wild and Scenic River as of the date of the federal designation, the United States' claims do not reach "all natural flows," which necessarily contain water that is destined for lawful diversion and beneficial use by those who own state acquired water rights, either within, or above the designated boundaries of the Wild and Scenic Rivers.

Accordingly, the objections filed by the public interest objectors do not raise any pertinent issues to disposition of the claims, but rather are based on a theory that has already been denied by this Court, by the Supreme Court and is the law of the case.. Therefore, these objections must be dismissed.

⁵ In his affidavit, Thomas R. Stuart III, testifies that he has made a claim to .03 cfs (no. 71-04012) from the Salmon River for irrigation purposes with a priority of May 1, 1944. *See Aff. of Thomas R. Stuart III*, at 1. Although this claim predates the Wild and Scenic River designation for the main stem of the Salmon River, since the objection is unclear with respect to "all natural flows," it appears that Mr. Stuart desires to have the United States claim "all" water that occurs in the river, at "all" times of the year, thereby preventing even prior appropriators from diverting and applying water to a beneficial use.

C. The Public Interest Objectors Cannot “Force” the United States to Make Certain Claims in the SRBA.

The public interest objectors argue that the United States’ claims are “not sufficient to preserve and protect the outstandingly remarkable values for which the river was designated under the Wild and Scenic Rivers Act” and that the claims should include “all natural flows.” *SFI Objection* at 2. In essence, the public interest objectors assert that the United States is not claiming “enough” water to satisfy the Wild and Scenic Rivers Act water right claims. Through their objections, the public interest objectors seek to place themselves “within the shoes” of the United States, or the claimant in this subcase, and make the claims for the United States. This technique of procedural misdirection is squarely at odds with federal statutes and case law governing the conduct of litigation to which the United States is a party. Since the SRBA is a general stream adjudication, the United States was formally joined as a “party” pursuant to the McCarran Amendment, 43 U.S.C. § 666. Over the fifteen-year history of the case, the United States, and several of its agencies, have filed various federal reserved and state based water right claims. Decisions regarding the filing of those claims, including how to handle those claims in court, are committed to the respective agencies and their attorneys from the Justice Department. 28 U.S.C. § 516 specifically provides that “the conduct of litigation in which the United States . . . is a party, . . . is reserved to officer of the Department of Justice, under the direction of the Attorney General.” 28 U.S.C. § 516. Additionally, the Attorney General is charged with the duty of supervising all litigation to which the United States is a party. 28 U.S.C. § 519. These statutes specifically preclude “outside” parties or interests from controlling litigation decisions made by Justice and the

Attorney General. Despite the statute's clear language, others have tried to "force" the United States to make certain claims in the SRBA, but to no avail..

In *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476 (D.C. Cir. 1995), the Tribes sought an order from the court compelling the Attorney General to file certain "off-reservation" water right claims on the Tribes' behalf. In upholding the district court's dismissal of the Tribe's action, the D.C. Circuit Court of Appeals held:

In both civil and criminal cases, courts have long acknowledged that the Attorney General's authority to control the course of the federal government's litigation is presumptively immune from judicial review.

56 F.3d at 1480.

In other words, a special interest cannot "force" the United States, by judicial intervention, to file certain claims in the SRBA. Those decisions lie with the Attorney General and the Department of Justice. The fact that the public interest objectors are dissatisfied with the Attorney General's and the Justice Department's litigation positions and decisions not to appeal certain rulings do not allow them to "second-guess" the Justice Department's decision for filing claims in the SRBA. For the reasons set forth in *Shoshone-Bannock Tribes v. Reno*, the objections by the public interest objectors should be dismissed.

II. THE MOTION TO INTERVENE FILED BY IDAHO RIVERS UNITED AND THE WILDERNESS SOCIETY MUST BE DENIED.

Idaho Rivers United's (IRU) and The Wilderness Society's (TWS) *Motion to Intervene* in this consolidated subcase must be denied because the groups fail to meet Idaho's "standing" requirements for the SRBA, and they do not meet the criteria of I.R.C.P. 24.

A. IRU and TWS Lack Standing to Participate in the SRBA.

It is obvious that IRU's and TWS's *Motion* is simply a creative attempt to "piggy-back" the organizations' "interests" onto certain members who are "claimants" in the SRBA and be heard in this proceeding. Initially IRU and TWS offer two Ninth Circuit decisions, *Yniguez v. Arizona*, 939 F.2d 727 (9th Cir. 1991) and *Portland Audubon Society v. Hodel*, 866 F.2d 302 (9th Cir. 1988), for the proposition that an intervener does not need to prove "standing" on top of meeting the requirements for intervention. *See Motion* at 10. First, IRU and TWS erroneously rely on *Yniguez*, a decision that the United States Supreme Court vacated in *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997). Accordingly, that decision is wholly without precedential authority. *See Durning v. Citibank*, 950 F.2d 1419 (9th Cir. 1991). Second, IRU and TWS misconstrue the Ninth Circuit's statements regarding "standing" in the context of motions to intervene under Rule 24 in *Portland Audubon Society*. Although in that decision the Ninth Circuit declined to incorporate an independent standing inquiry into the intervention test, it nonetheless noted that "the standing requirement is at least implicitly addressed by our requirement that the applicant must 'assert[] an interest relating to the property or transaction which is the subject of the action.'" 866 F.2d at 308 n.1. Clearly, "standing" is at the least relevant for determining whether or not an applicant under Rule 24 has an "interest" relating to the subject of the litigation.

Other courts have either required an intervener to meet "standing" requirements, or demonstrate an "interest" greater than that necessary to demonstrate "standing." *See Mausolf v. Babbitt*, 85 F.3d 1295, 1300 (8th Cir. 1996); *United States v. 36.96 Acres of Land*, 754 F.2d 855, 859 (7th Cir. 1985). The unique nature of the SRBA Court's

jurisdiction to define property rights suggests that IRU and TWS must meet the “standing” criteria established by the legislature, and this Court’s rules of procedure, in order to intervene and participate in this subcase.

Idaho Code § 42-1412 provides that “[a]ny *claimant* who desires to object to a water right . . . shall file an objection with the district court within the time specified . . .,” I.C. § 42-1412 (emphasis added). A “‘claimant’ means any person or entity 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. It is undisputed that IRU and TWS do not have claims in the SRBA, and therefore cannot meet the statutory definition of “claimant.” In addition, a “party” has been defined as “any person who is a claimant or any person who is served or joined.” I.C. § 42-1401A(6). Importantly, *AOI* § 10k sets out the procedure that a “party” may use to participate in a subcase, if that party has not filed a timely objection or response:

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*.

AOI § 10k (emphasis added).

Under the plain language of *AOI* § 10k, only “parties” to the SRBA may file motions to participate in specific subcases. Given the nature of the SRBA as being similar to a quiet title action, this procedure makes sense and provides for an efficient method for resolving individual subcases. Neither IRU nor TWS has been “served or joined” to the SRBA, and hence is not a “party.” Accordingly, they cannot even file a

motion to participate in the first place. However, even if IRU and TWS can seek participation, failing to meet the statutory definition of a “claimant” is dispositive for their “standing”, and their motion must be denied.

The Idaho Supreme Court has specifically addressed the “standing” issue in the context of the Snake River Basin Adjudication in *Fort Hall Water Users Association v. United States*, 129 Idaho 39 (1996). In that case, the Fort Hall Water Users Association (“Association”) objected to the 1990 Fort Hall Indian Water Rights Agreement. The SRBA Court dismissed the Association’s objections because the Association lacked standing. On appeal, the Idaho Supreme Court affirmed and concluded that the Association did not have standing because it did not claim water rights in its own name, nor had anyone (including the United States), filed claims on its behalf. *See Fort Hall*, 129 Idaho at 41. The Court also noted that the “United States did not assert *ownership* of the water rights on behalf of the FHWUA. . . . The FHWUA is not a claimant within the definition of I.C. § 42-1401A(1) because it is not asserting ownership rights and because the United States did not assert ownership rights on its behalf.” *See id.* at 42 (emphasis in original). Inherently, the failure to assert “ownership” of water rights predicated the dismissal of the Association’s objections.

IRU and TWS attempt to “side step” this statutory requirement by alleging that the public interest objectors have directed the groups to “represent their interests in pursuing their objections in this matter.” *Motion* at 6. As noted above, the “interests” the public interest objectors seek to raise in this proceeding do not concern their individual water right claims, but instead are “public interests” beyond the scope of the SRBA. Furthermore, although IRU and TWS are not “claimants,” they nonetheless allege that

“quantifying federal reserved water rights for the Wild and Scenic Rivers in the Snake River Basin Adjudication is of great importance” to the organizations. While federal water rights for Wild and Scenic Rivers may be “of great importance” to river advocacy groups and others, unfortunately that is not the legal standard for participating in the SRBA. Just as Fenway Park may be “of great importance” to Boston Red Sox fans, that “concern” does not warrant those fans’ participation in an action brought by the owners to divide the ownership interests in the stadium. Clearly, *Fort Hall* is controlling for purposes of IRU’s and TWS’ motion to participate, and demands that their motion be denied for lack of “standing.”

B. IRU and TWS Do Not Meet the Requirements of I.R.C.P. 24(a)

Alternatively, the Court should deny IRU’s and TWS’ *Motion to Intervene* because they fail to meet the criteria set forth in I.R.C.P. 24(a). Idaho Rule of Civil Procedure 24(a) provides for intervention of right in a civil proceeding when either of the following criteria are met:

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).

As for the first criteria, I.C. § 42-1401A(1) confers standing upon anyone who files a claim to water right in the SRBA. *See, e.g. Fort Hall*, 129 Idaho 39, 42-43 (1996) (standing issue in this case [SRBA] revolves around the statutory interpretation of I.C. § 42-1401A(1) and the meaning of claimant) (“in this case [SRBA] standing is determined

by statute, I.C. § 42-1401A(1), not the policy of this Court”)(Schroeder, J. specially concurring). As explained earlier, an entity cannot participate in the SRBA unless it meets the statutory definition of the term “claimant.” It is undisputed that IRU and TWS cannot meet this standard since they do not have claims in the SRBA.

Turning to the second criteria, and assuming that intervention under I.R.C.P. 24(a)(2) can be made in the SRBA, IRU and TWS would have to demonstrate that 1) they have an “interest” that is the subject of the SRBA and this consolidated subcase; 2) they are so situated that the issuance of the final decree in the SRBA will impair or impede their ability to protect that “interest”; and 3) their interest is not adequately represented by another party in the case. Courts have further defined an “interest” for purposes of Rule 24(a) as a “significant protectable interest.” *See e.g., Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998).

Since IRU and TWS have not filed claims in the SRBA, there is no question they have no legal “interest” in the outcome of the adjudication. The question becomes whether or not their general “public interests” are sufficient to establish a “significant protectable interest.” First, IRU and TWS generally allege that they are “interested in the quantification of federal reserved water rights for Idaho’s Wild and Scenic Rivers” for such reasons as their organizations’ “mission[s] to preserve and protect these rivers,” and that their members “use and enjoy these Idaho Wild and Scenic Rivers for many recreational, commercial, aesthetic, scientific and other purposes.” *Motion to Intervene* at 11. While IRU’s and TWS’ advocacy efforts may be worthwhile endeavors, and their members may use Wild and Scenic Rivers for a variety of purposes, such “interests” are not “significant protectable interests” for purposes of participating in the SRBA or this

consolidated subcase. If that was the standard, any non-claimant could assert that certain claims made by other groups or governmental agencies were “of interest” and demand participation in the SRBA. As explained earlier, at best these interests are “public interests” which have already been held to be inapplicable for determining and decreeing water rights in the SRBA.

In addition to the lack of a direct “interest” in this consolidated subcase, IRU and TWS also fail to show how the outcome of this litigation will impair their ability to protect their alleged “interests.” Although IRU and TWS are concerned about Wild and Scenic Rivers, and their members’ recreational use and reliance upon these rivers for certain outfitting businesses, defining the United States’ water rights for these rivers will not impair these generally public “interests” in any way. IRU and TWS will still be able to advocate for Wild and Scenic Rivers in Idaho, and their members will still be able to float and recreate in these rivers for years to come. The following Idaho Supreme Court decision is instructive on whether or not the outcome of a subcase in the SRBA will “impede or impair” another’s interests.

In *State v. United States*, 134 Idaho 106 (2000) (“*Smith Springs*”), certain irrigation entities filed a joint motion to participate in subcase no. 36-15452, the subcase for the United States’ claim to certain springs occurring within Minidoka National Wildlife Refuge. The special master denied the irrigators’ joint motion to participate, and the SRBA Court affirmed in its *Order Accepting, in part, and Denying, in part, Special Master’s Report and Recommendation*, subcase no. 36-15452 (10/10/97) (“*Smith Springs Order*”). In that order, the SRBA Court noted that since all water in the SRBA is “theoretically” interrelated, every “party” has the ability to claim “some interest” in every

subcase. *Smith Springs Order* at 5. With respect to a party's "interest" in a subcase, however, the Court went on to further conclude:

[T]his generalized interest is insufficient to intervene in a subcase as a matter of right . . . In order to give I.C. § 42-1412 meaning, parties must show *a specific interest* in order to intervene as a matter of right under I.R.C.P. 24(a).

Id (emphasis added).

The Idaho Supreme Court affirmed the SRBA Court, and characterized the SRBA Court's decision as "concluding that *the generalized interest* the Irrigators had in the subcase *was insufficient to support intervention of right.*" 134 Idaho at 110 (emphasis added). Examining the criteria under I.R.C.P. 24(a), the Idaho Supreme Court also held that the special master did not abuse his discretion in denying the irrigators' motion for intervention because "they made no showing that disposition of the United States' claim might impair their ability to protect their interests." 134 Idaho at 111. If actual claimants who held rights to use water in Lake Walcott (a part of the Minidoka National Wildlife Refuge) were denied intervention because the Court determined the outcome of the United States' claims would not affect their interests, there is no question that IRU and TWS, who have *no claims* in the SRBA, should be denied intervention in this consolidated subcase for the same reason. IRU and TWS argue that they have "direct interests" in this consolidated subcase and that "[t]hose interests are [sic] go directly to the movants' legal rights and interests, and are of such a direct and immediate character that they will gain or lose by the outcome of this proceeding." *Motion to Intervene* at 13. Despite these conclusory allegations, IRU and TWS offer no support for the theory that they have "legal rights and interests" that will be affected by this consolidated subcase. Admittedly, neither IRU nor TWS have filed claims in the SRBA and thus have no legal

rights protectable in the SRBA. In fact, IRU and TWS admit that their interests are actually those of the general public:

At a minimum, these conservation groups [IRU and TWS] should be present in Court in order to object to any proposed settlement *that is not in the public interest* . . .

Motion to Intervene at 15 (emphasis added).

Again, the Idaho Supreme Court's decision in *Idaho Conservation League, Inc. v. State*, and the repeal of I.C. §§ 42-1416 and 42-1416A leave no doubt that consideration of "public interests" is not appropriate or within the scope of the SRBA. Accordingly, IRU and TWS do not have a "significant protectable interest" and may only claim a "generalized" or "public" interest in the United States' water right claims in this consolidated subcase. IRU and TWS fail to meet the criteria for I.R.C.P. 24(a) and therefore their motion to intervene must be denied.

B. Intervention is Not Warranted Under IRCP 24(b)

IRU and TWS have also requested leave to intervene under I.R.C.P. 24(b), or permissive intervention. I.R.C.P. 24(b) provides the following:

Upon timely application anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

I.R.C.P. 24(b).

The Idaho Court of Appeals, in *In re Doe*, 134 Idaho 760 (Ct. App. 2000), interpreted I.R.C.P. 24(b) to establish the following test for an applicant seeking permissive intervention:

A party may intervene: 1) where a statute confers a conditional right to intervene, or 2) where an applicant's claim or defense has a question of law or fact in common with the matter in which the applicant seeks intervention.

134 Idaho at 763.

As for the first criteria, since IRU and TWS do not qualify as "claimants" under I.C. § 42-1401A(1), there is no other statute that confers upon them a "conditional right to intervene." Therefore, IRU and TWS must rely upon meeting the elements of I.R.C.P. 24(b)(2) in order to intervene and participate. IRU and TWS object to the United States' amended claims for the Wild and Scenic Rivers on the theory that the United States has failed to claim "enough water" to satisfy the purposes of the act. Their objections are not within the scope of the SRBA, but instead are "generalized public interest" concerns that may only be addressed through Congress or the administration. Accordingly, IRU and TWS fail to present a question of law or fact in common between the subject matter of this consolidated subcase and their claims.

Assuming for argument's sake, however, that IRU and TWS do meet the requirements of I.R.C.P. 24(b)(2), the Court still retains the discretion to deny their motion, and may consider a number of factors in making that decision. *See Spangler v. Pasadena City Board of Educ.*, 552 F.2d 1326 (9th Cir. 1977). One of these factors, an applicant's "standing," may serve as the basis for denying permissive intervention. *See e.g. Chinchurreta v. Evergreen Management, Inc.*, 117 Idaho 588, 590 (Ct. App. 1989); *Fouke Co. v. Mandel*, 386 F.Supp. 1341, 1353 (D. Md. 1974). Accordingly, the Court

should deny IRU's and TWS' motion for permissive intervention on the grounds that they do not meet the statutory requirements for standing in the SRBA. *See Fort Hall*, 129 Idaho at 42-43.

Additionally, the Court should deny the groups' motion for other reasons. First, the timing of IRU's and TWS' motion to intervene in this consolidated subcase must be questioned. They are incredibly tardy in asserting their objections. The United States had filed amended claims for "all unappropriated flows" for as of the date of each river's federal designation for each river by 1997. Certainly had IRU and TWS believed that "all natural flows" were necessary for purposes of the act, the groups would have sought to intervene when the claims were filed. They did not intervene when the case went to the Supreme Court and did not intervene when it was remanded.⁶ IRU and TWS demand that the United States claim "all natural flows," an amount much greater than the originally claimed "all unappropriated flows" as of the date of the federal designation. Consequently, IRU and TWS claim that they waited to file objections to those claims only after they were amended rings hollow. Instead, IRU and TWS waited until the United States and the other parties to the subcase have spent enormous time and resources in quantifying specific flow values and amending their claims and negotiating over the scope of the quantification.. This tactic of waiting to see how things turn out has been roundly condemned by this Court and the Supreme Court in other contexts. *See North Snake Ground Water District v. Gisler*,_ Idaho,_ Docket No. 26773 (January 18, 2002)

⁶ The Court will recall that, at the United States' insistence, several parties were denied intervention after remand for failure to timely object.

IRU and TWS also fail to demonstrate how their alleged "interests" in this consolidated subcase are not adequately represented by the United States. The United States is the owner of these federal reserved water right claims, and as the legal owner, has every interest to vigorously pursue these claims. Litigation decisions made by the Attorney General and the Justice Department, while not always popular with every sector of the public, are nonetheless unreviewable by this Court. How can this Court allow the general public to challenge the legal decision to claim a certain amount of water and no more in this case, without opening the floodgates to challenge from any direction that any water right claimed by any public entity is insufficient to meet the one particular segment of the public's desires?

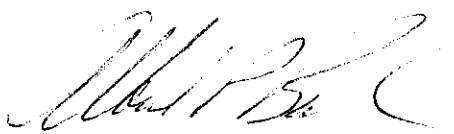
For the above reasons, the Coalition submits that allowing IRU and TWS into the consolidated subcase at this time is inappropriate and will prejudice the parties and the proceedings in this subcase. This Court should exercise its discretion and deny IRU's and TWS' motion for permissive intervention.

CONCLUSION

For the foregoing reasons, the Coalition respectfully requests this Court to dismiss the objections filed by the public interest objectors and the two environmental organizations. In addition, the Coalition requests this Court to deny IRU's and TWS' *Motion to Intervene*.

DATED this 14th day of June, 2002.

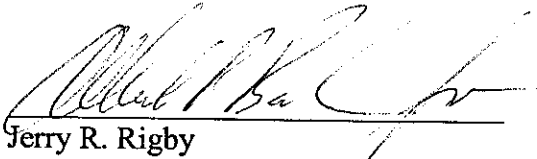
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