

Movant: State of Idaho

**ALAN G. LANCE
ATTORNEY GENERAL**

**CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division**

**JOHN R. KORMANIK
Deputy Attorney General
P.O. Box 44449
Boise, Idaho 83711-4449
Telephone: (208) 334-2400
FAX: (208) 334-2690
E-mail: jkormanik@ag.state.id.us
Idaho State Bar # 5850 (Kormanik)**

**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
	)	
	)	STATE OF IDAHO’S MEMORANDUM IN OPPOSITION
Case No. 39576	)	TO NOTICE OF PARTICIPATION IN CONSOLIDATED
	)	SUBCASE; AND MOTION TO INTERVENE
_____	)	

This memorandum sets forth the State of Idaho’s (“State”) opposition to the participation of Idaho Rivers United (“IRU”) and The Wilderness Society (“TWS”) (collectively “Associations”) as parties either individually or collectively, in this consolidated subcase. For the reasons set forth below the “objections” filed by certain claimants are not proper and should be stricken. Furthermore, the Associations should not be permitted to either “represent” the interests of certain claimants or to intervene pursuant to the Idaho Rules of Civil Procedure.

BACKGROUND

This consolidated subcase has been before the SRBA Court for approximately seven years.¹ In 1998, the United States sought summary judgment on its claims. On July 24, 1998, this Court issued a *Memorandum Decision Granting in Part and Denying in Part the United States' Motion for Summary Judgment on Reserved Water Rights Claims* ("1998 Memorandum Decision"). The Court determined the Wild and Scenic Rivers Act, 82 Stat. 909, 16 U.S.C. §§ 1271 through 1287 (1968) contains an express reservation of water by the United States. The Court, however, denied the United States' motion insofar as it sought all unappropriated flows for the Mainstem of the Salmon River and the Rapid River holding that the United States is entitled only to the minimum quantity of water necessary to fulfill the purposes of the Wild and Scenic Rivers Act.² The Court further held that the United States is required to prove such minimum quantity in light of the general purposes of the Wild and Scenic Rivers Act and the specific values for which each river was designated. The Idaho Supreme Court affirmed the SRBA Court's decision. *Potlatch Corp. v. United States*, 134 Idaho 912, 12 P.3d 1256 (2000). The matter was remanded to the SRBA Court for quantification of the United States' water right.

On December 20, 2001, the Court issued an *Order Setting Objection Period and Scheduling Conference* ("2001 Order"). By stipulation of the parties, the United States was granted time to file amended claims and did so. The State filed timely objections.

On May 10, 2002, Mr. Laurence ("Laird") J. Lucas and Mr. William M. Eddie filed "objections" on behalf of four members of the Associations, who also happen to be claimants in the SRBA, and who had not participated heretofore in any manner in this consolidated subcase:

¹ The State of Idaho filed its initial objections to the United States' claims on September 18, 1995.

² 1998 Memorandum Decision, p. 11.

(1) Gene Bray (a member of IRU and TWS); (2) Phyllis Kochert (a member of IRU); (3) Bonnie Schonefeld (a member of IRU); and (4) Thomas R. Stuart III (a member of IRU and TWS). The “objections” filed by Messrs. Lucas and Eddie were also purportedly filed on behalf of Alma Marie Osborn (a member of neither IRU nor TWS) as well as Idaho Rivers United and The Wilderness Society.³ Along with the “objections,” the Associations filed a *Notice of Participation in Consolidated Subcase; and Motion to Intervene* (“*Notice and Motion*”) claiming a right to represent individual claimants in this subcase and in “addition, and in the alternative” for intervention pursuant to Idaho Rule of Civil Procedure 24. Concurrently with the “objections” and the *Notice and Motion*, the Associations submitted eight affidavits.⁴

Although expressly recognizing that the objections are filed “on behalf of a group of individual water right claimants in the SRBA,”⁵ the Associations inexplicably conclude *they* “may properly participate in this consolidated subcase.”⁶ Indeed, the Associations themselves have gone so far as to file objections to the United States’ amended claims. As demonstrated below, the “objections” themselves are not proper and, thus, must be stricken. Moreover, the Associations do not have standing to file objections to the United States’ amended claims in this consolidated subcase. Furthermore, the Associations’ arguments regarding representation of other “objectors” amounts to no more than a thinly-veiled attempt to circumvent the standing requirements of the Idaho Code, which restrict the participation in the SRBA to parties and

³ There were a total of seven Standard Form 1 Objections filed by Laurence (“Laird”) J. Lucas and William M. Eddie. All seven contain the identical “Attachment A: List of Objectors.”

⁴ A ninth “affidavit,” that of Bonnie Schonefeld, is not verified and, thus, must be stricken and not considered by the Court.

⁵ *Notice and Motion*, p. 2.

⁶ *Id.* at 3.

claimants. Finally, the Associations cannot satisfy the requirements for intervention. Accordingly, the *Notice and Motion* must be denied.

ARGUMENT

A. The Associations' "Motion" to Participate Must Be Denied.

1. The "Objections" Concern Issues Beyond The Jurisdiction of the SRBA Court.

The "objections" allege the amount of water claimed by the Forest Service is **too little** to satisfy the requirements of the Wild and Scenic Rivers Act. The "objections" assert that "all natural flows at all times of year, as reflected on historic hydrographs"⁷ should have been claimed by the United States. Through discovery in this consolidated subcase, the State of Idaho is aware that the United States has spent literally millions of dollars conducting studies in order to determine the quantities of water it has claimed. The Associations provide no evidence contesting any of the work the United States has conducted nor any of the conclusions reached based on those studies. In essence the "objections" challenge the United States' determination that the flows sought by it are sufficient to satisfy the statutory requirements of the Wild and Scenic Rivers Act. These "objections" are not the types of objections that are within the jurisdiction of the SRBA.

The term "objection" is undefined in the Adjudication Code; therefore it is necessary to look to the legislative intent that underpins the SRBA and the objection process. The purpose of the SRBA is to adjudicate all of the water rights in the Snake River Basin. Objections are permitted in the SRBA to prevent a claimant being awarded an excess amount of water. Because of the scarcity and finite nature of the resource, it is important that water rights be limited to

⁷ See Page 2 of Objections filed by Messrs. Lucas and Eddie.

actual need. The filings labeled “objections” are not objections within the context of the SRBA because they seek to force a claimant to claim **more** water than sought. The Affidavits demonstrate that the “objections” filed simply seek to second-guess whether the United States has claimed sufficient quantities of water. As such, the “objections” are actually a challenge to the litigation decisions of the United States and simply cannot stand.

The case of Shoshone-Bannock Tribes v. Reno, 56 F.3d 1476 (D.C. Cir. 1995), is instructive. In that case, the Tribes sought a declaratory judgment and writ of mandamus seeking to force the United States to file claims in the SRBA on their behalf. The Shoshone Bannock Tribes court noted that 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.” Id. at 1480. The effect of the “objections” is to challenge the discretion of the United States in determining the quantity of water it will seek in this consolidated subcase. Such a decision, to the extent it does not claim an excess of water to which the United States may be entitled under the Wild and Scenic Rivers Act, properly rests solely in the United States as the claimant in this subcase.⁸

Importantly, the Shoshone-Bannock Tribes court also plainly stated that I.R.C.P. 11 requires “attorneys who sign and file pleadings and other papers to have a reasonable belief that the pleading or paper is well grounded in fact and is warranted by existing law or a good faith argument for the extension of existing law.” Shoshone-Bannock Tribes, 56 F.3d at 1482; I.R.C.P. 11. Both the Court and the State can only assume that the attorneys for the United States Department of Justice were cognizant of the strictures of Rule 11 when they filed their

⁸ The determination of whether the United States is entitled to the quantity claimed is, of course, the subject of the State’s objections.

amended claims in this consolidated subcase. With the requirements of Rule 11 in mind, the Department of Justice filed the amended claims it determined are well grounded in fact and warranted by existing law; the “objections” amount to nothing more than a challenge to the judgment of the attorneys who filed the amended claims. Therefore, the “objections” should be stricken in their entirety.

2. The Associations Lack Standing to Participate in This Consolidated Subcase and Seek to Circumvent the Statutory Requirements of the Idaho Code.

a. *The Associations lack statutory standing.*

Assuming the “objections” filed by certain claimants are proper, the Associations may not file objections or represent claimants in this consolidated subcase. The SRBA Court is a court of limited jurisdiction. Idaho Conservation League, Inc. v. State, 128 Idaho 155, 911 P.2d 748 (1995); Walker v. Big Lost River Irrigation Dist., 124 Idaho 78, 856 P.2d 868 (1993). The statutory grant of the SRBA Court’s jurisdiction is clearly and expressly set forth in Idaho Code §§ 42-1401 through –1428 (“Adjudication Code”). Insofar as objections are concerned, Idaho Code § 42-1412 states: (1) Any **claimant** who desires to object to a water right . . . shall file an objection with the district court” (Emphasis added.) A “claimant” is defined 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.” Idaho Code § 42-1401A(1); Fort Hall Water Users Ass’n v. United States, 129 Idaho 39, 41-42, 921 P.2d 739, 741-42 (1996). A “party” to the SRBA is “any person who is a claimant or any person who is served or joined,” Idaho Code § 42-1401A(7), and a “person” is “an individual, a partnership, a trust, an estate, a corporation, a municipal corporation, the state of Idaho or any political subdivision, the United States, an Indian tribe, or any other public or private entity . . .” Idaho Code § 42-1401A(8).

Although the Associations seek to file objections to the United States' amended claims,⁹ they do not assert ownership rights to the use of water within the state of Idaho nor do any of the affiants claim water on the Associations' behalf. Accordingly, the Associations are not claimants within the meaning of title 42, chapter 14 of the Idaho Code. Likewise, the Associations have not been joined in the SRBA and, thus, are not parties in the SRBA. Therefore, the Associations lack standing to participate in this subcase and, thus, their objections must be stricken.

b. The rules for "associational" or "institutional" standing do not apply in the SRBA.

In an effort to skirt the statutory requirements limiting standing to claimants and parties, however, the Associations attempt to assert what can only be termed "institutional" or "associational" standing by virtue of the fact certain select members are claimants in the SRBA and have allegedly "authorized"¹⁰ the Associations to represent their individual interests. Permitting the Associations to "represent" the interests of not only the individually named claimants but also all their members in this consolidated subcase, however, violates the Adjudication Code's express limitations regarding standing.

The Associations have submitted eight sworn affidavits, four of which demonstrate the Associations' attempt to circumvent the statutory requirements for participation in the SRBA. For example, the Affidavit of Joseph A. Daly indicates he is the co-owner of a small business and a member of IRU. However, nowhere in his affidavit does Mr. Daly aver he is a "claimant"

⁹ Objections filed by Messrs. Lucas and Eddie, Attachment A: List of Objectors.

¹⁰ The Affidavits of Gene Bray, Phyllis K. Kochert, and Thomas R. Stuart III, each contain the following statement: "I want Idaho Rivers United and The Wilderness Society to address my concerns in this matter on my behalf, in order to protect wild and scenic water rights in the Salmon River and other designated Wild and Scenic Rivers in Idaho; and I authorize them and their attorneys with the Land and Water Fund of the Rockies to represent my interests in the determination of federal reserved wild and scenic rights in the SRBA."

in the SRBA; therefore he cannot participate in this subcase. Likewise, the affidavit of Peter Grubb indicates he is the owner of a business located in Coeur d'Alene, but Mr. Grubb does not aver he is a "claimant" in the SRBA; thus, he likewise cannot participate in this subcase. Finally, the affidavits of Sara Eddie and Craig Gehrke fail to reveal whether those two individuals are "claimants" within the SRBA; accordingly neither Mr. Gehrke nor Ms. Eddie can participate in this subcase.

If the "interests" of Messrs. Daly, Grubb, Gehrke, Ms. Eddie, and those of untold numbers of other individuals who fail to satisfy the express standing requirements set forth in the Adjudication Code¹¹ can be represented by the Associations simply because a few select members of the Associations happen to be claimants in the SRBA, any organization with, at a minimum, one member who is also a claimant in the SRBA could "represent" the interests not only of that claimant-member, but all of its non-claimant-members as well. Indeed, the Associations could very well be "representing" the interests of a member who resides somewhere, for instance, in the state of Maine, who has never been to Idaho, and who is not a claimant or party in the SRBA. Such a result would turn the express legislative grant of standing to participate in the SRBA on its head.

Moreover, because of the uniqueness of the SRBA, the "normal" rules governing associational standing to participate in this consolidated subcase do not apply. In Fort Hall Water Users Ass'n, 129 Idaho 39, 921 P.2d 739 (1996), the Idaho Supreme Court determined the Fort Hall Water Users Association lacked standing to file objections. In that case, the court did

¹¹ According to Ms. Eddie's Affidavit, IRU has "over 2000 individual, family, and business members"; however there is no indication of how many of those members are "claimants" or "parties" in the SRBA. According to Mr. Gehrke's Affidavit, TWS is a "national" organization, "having more than 200,000 members nationwide, including 1,300 in Idaho." Like Ms. Eddie's Affidavit, Mr. Gehrke's Affidavit provides no indication of how many of those members are "claimants" or "parties" in the SRBA.

not analyze the issue utilizing the associational standing analysis set forth in the case law; it simply looked to the plain language of the statutes conferring standing in the SRBA. Justice Schroeder, in his special concurrence, recognized it was “obvious” that “a very large body of water users have a clear interest in the events that have taken place [in the case] and that rights which they have may be adversely impacted by those events.” *Id.* at 42, 921 P.2d at 742 (Schroeder, J., specially concurring). Regardless of that fact, however, Justice Schroeder cogently articulated the fact that standing in the SRBA “is determined by statute, I.C. § 42-1401A(1), not by the policy of this Court” *Id.* at 43, 921 P.2d at 743 (Schroeder, J., specially concurring). Because the Associations do not satisfy the statutory requirements for standing, their motion must be denied.¹²

c. The Associations cannot meet the general requirements for “associational” or “institutional” standing.

Assuming *arguendo* the rules governing associational standing apply in the SRBA, they cannot be met here. In Hunt v. Washington State Apple Advertising Comm’n, 432 U.S. 333 (1977), the United States Supreme Court described when an industry group may represent its members in litigation as follows:

[A]n association has standing to bring suit on behalf of its members when (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

432 U.S. at 343. This analysis has been adopted in Idaho. Selkirk-Priest Basin Ass’n v. State, 127 Idaho 239, 241, 899 P.2d 949, 951 (1995); Glengary-Gamlin Protective Ass’n v. Bird, 106

¹² As the Associations point out, several groups have represented the interests of their members in subcases in the SRBA. However, each member of those groups is apparently a claimant in the SRBA and those groups do not assert what is essentially the “public interest” in any subcase. The same cannot be said for either IRU or TWS.

Idaho 84, 87-88, 675 P.2d 344, 347-48 (Ct. App. 1983). The final element necessary to determine if an association may permissibly represent its members in an action is “neither the claim asserted nor the relief requested **requires** the participation of individual members in the lawsuit.” Hunt, 432 U.S. at 343 (emphasis added). The statutes governing the SRBA require a “claimant” to file an objection to a claimed water right. Idaho Code § 42-1412. The participation of the claimants who filed objections in this consolidated subcase is necessary because, as recognized by the Associations, they would be unable to participate in this consolidated subcase without them. Fort Hall Water Users Ass’n, 129 Idaho 39, 921 P.2d 739. The standing provisions of the Idaho Code require the participation of the individual claimants. Accordingly, the Associations should not be permitted to participate in this subcase.

d. The Associations assert nothing more than “taxpayer” standing.

Assuming the Associations are able to overcome the statutory and practical restrictions on standing present in the SRBA, they still cannot satisfy ordinary standing requirements. The Associations contend they have been “active participants in advocating for the designation of Wild and Scenic Rivers in Idaho”¹³ However, that designation has already taken place with regard to the rivers at issue in this consolidated subcase. The Associations argue that they “have strong organizational interests in ensuring that designated Wild and Scenic Rivers in Idaho (and in other states) enjoy the full protection of the “outstandingly remarkable values for which they were designated under the Wild and Scenic Rivers Act” Their organizational interests in the quantification of water rights, in the context of rivers that have already been designated as Wild and Scenic Rivers, is no greater than that of any other citizen of the United States.

¹³ *Notice and Motion*, p. 4.

It is a fundamental tenet of American jurisprudence that an entity wishing to invoke a court's jurisdiction must have standing. Van Valkenburgh v. Citizens for Term Limits, 135 Idaho 121, 125, 15 P.3d 1129, 1133 (2000). "The doctrine of standing focuses on the party seeking relief and **not** on the issues the party wishes to have adjudicated." Miles v. Idaho Power Co., 116 Idaho 635, 641, 778 P.2d 757, 763 (1995) (emphasis added). In order to satisfy the requirement of standing, the Associations must "allege or demonstrate an injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury." Id. A citizen and taxpayer, however, "may not challenge a governmental enactment where the injury is one suffered by all citizens and taxpayers alike." Id. In Miles the Idaho Supreme Court held that in order to have standing, a party must have a "personal stake" in the outcome of the litigation. That is, a party must suffer a "distinct palpable injury" and there must be a "fairly traceable" causal connection between the claimed injury and the challenged conduct. 116 Idaho at 641, 778 P.2d at 736 (quoting Duke Power Co. v. Carolina Env. Study Group, 438 U.S. 59, 72 (1978)). Accordingly, the Associations must "establish a peculiar or personal injury that is **different** than that suffered by any other member of the public." Selkirk-Priest Basin Ass'n v. State, 128 Idaho 831, 833-34, 919 P.2d 1032, 1034-35 (1996) (emphasis added).

In Selkirk-Priest Basin Ass'n, the Idaho Supreme Court held that an environmental group (Selkirk-Priest Basin Association "SPBA") had not demonstrated a distinct and palpable injury sufficient to confer standing. 128 Idaho at 833, 919 P.2d at 1034. The Court went on to summarize whatever injury the SPBA and its members might have suffered as "at best a generalized grievance." Id. at 834, 919 P.2d at 1035.

Like the SPBA, the Associations in this case suffer only a generalized grievance. Once a river is designated pursuant to the Wild and Scenic Rivers Act, each and every taxpayer and

citizen in the United States has an interest in seeing the purposes of the Act fulfilled. The Associations assert that their members “use and enjoy these rivers for a variety of recreational, aesthetic, commercial, and other purposes.”¹⁴ Members of the general public, who are not members of the Associations, however, also use the rivers subject to quantification in this subcase for the same purposes. Accordingly, the Associations’ interests in this subcase are no greater than that of any other taxpayer or citizen. Thus, the Associations cannot demonstrate a peculiar or personal injury that is different than that suffered by any other member of the public and, therefore, cannot meet the most basic requirement of standing.

B. The Associations Are Not Entitled To Intervention Pursuant To I.R.C.P. 24.

1. Introduction.

The Associations seek intervention in this consolidated subcase under both I.R.C.P. 24(a) and 24(b). For the reasons set forth below, the Associations’ motions should be denied.

2. The Associations Do Not Satisfy The Requirements For Intervention As A Matter Of Right Pursuant to I.R.C.P. 24(a).

a. Introduction.

The Associations’ motion for intervention as a matter of right is governed by I.R.C.P. 24(a), which states:

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.

¹⁴ Notice and Motion, p. 4.

The Associations cannot satisfy the requirements of I.R.C.P. 24(a) and, thus, should not be permitted to intervene in this subcase as a matter of right. Initially, it must be noted that no statute grants the Associations an “unconditional right to intervene”; accordingly, they must rely on subsection 2 of the statute in support of their argument.

Idaho Rule of Civil Procedure 24(a) is identical in all material respects to its federal counterpart, F.R.C.P. 24(a); accordingly, this Court may look to rulings on the scope of the federal rule in interpreting the Idaho rule. Compton v. Compton, 101 Idaho 328, 334 n.1, 612 P.2d 1175, 1180 n.1 (1980). *See also* Chacon v. Sperry Corp., 111 Idaho 270, 273, 723 P.2d 814, 817 (1986) (general rule of construction regarding the adoption of statutory language from another jurisdiction is to give the statute the meaning that jurisdiction gave it).

In determining whether intervention is appropriate, this Court is **not** called upon to examine “theoretical interests of proposed intervenors that would justify the initiation or defense of a lawsuit in appropriate circumstances. ‘In the context of intervention the question is not whether a lawsuit should be begun (or defended), but whether already initiated litigation should be extended to include additional parties.’” Wade v. Goldschmidt, 673 F.2d 182, 184 (7th Cir. 1982) (quoting Smuck v. Hobson, 408 F.2d 175, 179 (D.C. Cir. 1969)). This consolidated subcase should not be expanded to include the Associations.

As succinctly put by the Third Circuit Court of Appeals:

[T]he polestar for evaluating a claim for intervention is always whether the proposed intervenor’s interest is direct or remote. Due regard for the efficient conduct of the litigation requires that intervenors should have an interest that is specific to them, is capable of definition, and will be directly affected in a substantially concrete fashion by the relief sought. The interest may not be remote or attenuated. The facts assume overwhelming importance in each decision.

Kleissler v. United States Forest Serv., 157 F.3d 964, 972 (3d Cir. 1998).

There can be no doubt that whatever interest the Associations may possess is remote. As stated above, the Associations themselves have not made claims in the SRBA. Moreover, the affidavits submitted by the Associations and their briefing demonstrate that the “objections” amount to no more than the assertion of some type of public interest in this litigation. As previously held by the Idaho Supreme Court, such public interest concerns are not elements of a water right within the purview of the SRBA Court. Idaho Conservation League, Inc., 128 Idaho 155, 911 P.2d 748. Therefore, the Associations fail to meet the polestar for intervention.

Furthermore, in order to determine whether the requirements of I.R.C.P. 24(a) have been satisfied, the following four-part test should be applied:

- (1) the motion must be timely; (2) the applicant must claim a “significantly protectable” interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest; and (4) the applicant’s interest must be inadequately represented by the parties to the action.

Forest Conservation Council v. United States Forest Service, 66 F.3d 1489, 1493 (9th Cir. 1995); Kleissler, 157 F.3d at 969. The Associations cannot satisfy the requirements of I.R.C.P. 24(a) and, thus, their motion should be denied.

b. Under all the circumstances, the Associations’ motion is untimely.

The Associations assert that their motion to intervene is timely simply because it accompanies “timely Objections to the amended claims of the United States for quantifying the federal reserved Wild and Scenic River rights”¹⁵ In the context of the SRBA, however, **all circumstances** must be considered in determining whether a motion to intervene is timely. State

¹⁵ *Notice and Motion*, p. 10. As set forth above, the filings of the Associations are not “objections” within the context of the SRBA and the Associations’ “objections” must be stricken.

v. United States (Minidoka Nat'l Wildlife Refuge), 134 Idaho 106, 109, 996 P.2d 806, 809 (2000). In determining the timeliness of a motion to intervene, three factors are considered: (1) the stage of the proceeding; (2) the prejudice to the parties; and (3) the reason for and length of delay in filing the motion to intervene. United States v. Oregon, 913 F.2d 576, 588 (9th Cir. 1990).

As stated above, this case has been ongoing for approximately seven years. The issue of whether the United States is entitled, as a matter of law, to the entire unappropriated flow in the any of the Wild and Scenic Rivers in this subcase has already been decided. In Potlach, the Idaho Supreme Court held that under the federal reserved water right contained in the Wild and Scenic Rivers Act, the United States is entitled to only the quantity of water necessary to fulfill the requirements of the Act. 134 Idaho at 916, 12 P.3d at 1260. Thus, the Associations' intervention to assert that the historic hydrograph should be maintained is not only untimely but also contrary to the law of the case. See Swanson v. Swanson, 134 Idaho 512, 515-16, 5 P.3d 973, 976-77 (2000) ("a decision by the appellate court upon a point distinctly made and essential to its determination upon a previous appeal is in all subsequent proceedings in the same case a final adjudication.").¹⁶ To the extent the Associations will do nothing more than attempt to reargue issues governed by the previous rulings in this subcase, their intervention can serve no useful purpose.

Moreover, the United States has expended millions of dollars conducting studies regarding the quantity of water necessary to satisfy the requirements of the Wild and Scenic

¹⁶ Indeed, the decision by the Idaho Supreme Court that under the Wild and Scenic Rivers Act the United States is not entitled, as a matter of law, to all unappropriated flow is binding in all subcases in the SRBA. *Memorandum Decision and Order on Challenge; and Order of Partial Decree*, Wood v. Troutt, Subcase 65-05663B (May 9, 2002).

Rivers Act. The Associations' bald statement regarding maintaining the historical hydrograph is unsupported by any admissible evidence and the Associations have given no indication that such evidence will be forthcoming. Therefore, permitting the Associations to intervene at this point in this consolidated subcase will surely lead to delay and, thus, all current parties will be prejudiced. Butler, Fitzgerald & Potter v. Sequa Corp., 250 F.3d 171, 183 (2d Cir. 2001).

There are numerous other factors to consider in determining whether the Associations' motion for intervention is timely each of which weigh against intervention. For example, the Court's Order Setting Objection Period and Scheduling Conference, issued December 20, 2001, provides: "A scheduling conference is set for June 18, 2002, at 1:30 p.m. at the SRBA Courthouse At that time the court will set a firm trial date. Parties should be prepared to provide input on the matter." The hearing on the Associations' *Notice and Motion* is set for the same date and time. It is difficult to fathom what "input" the Associations could provide on a trial date when they have waited until this late date to even have the Court consider whether they should be permitted to participate in this subcase.

Additionally, the Associations' primary purpose in seeking intervention in this matter appears to be to thwart any negotiations regarding the United States' claims. This purpose is abundantly evident in correspondence sent to all counsel in this subcase where Mr. Lucas "request[s], in the most forceful terms, that we be immediately apprised of the status of such negotiations and included in all future negotiations."¹⁷ The Associations' purpose is also expressed in the *Notice and Motion*: "[M]ovants are deeply concerned that, through settlement negotiations which have evidently been going on behind closed doors in this proceeding, the

¹⁷ Submitted contemporaneously herewith and incorporated by reference hereby is an Affidavit of Counsel. The letter from Messrs. Lucas and Eddie is Exhibit 1 thereto.

United States may agree to further reduction of these claims or other modifications”¹⁸

Under all the circumstances, the Associations’ motion to intervene under I.R.C.P. 24(a) is untimely and should be denied.

c. The Associations do not possess a significantly protectable interest in the subject matter of this subcase.

The Associations are unable to satisfy another fundamental requisite for intervention as of right—they cannot demonstrate they possess a “significantly protectable interest” in the subject matter of this consolidated subcase. In order to demonstrate they possess such an interest, the Associations must establish that: “(1) the interest asserted is protectable under some law, and (2) there is a relationship between the legally protected interest and the claims at issue.” Northwest Forest Res. Council v. Glickman, 82 F.3d 825, 837 (9th Cir. 1996). The “significantly protectable interest” requirement implicitly addresses the requirement that a party seeking intervention possess standing. Portland Audubon Soc’y v. Hodel, 866 F.2d 302, 308 n.1 (9th Cir. 1989).

The subject matter of this subcase is the quantification of water rights claimed by the United States under the Wild and Scenic Rivers Act. The Associations have no property interest in the federal reserved water right that is being quantified.¹⁹ Rather, they seek to challenge the determination of the United States with regard to the quantity of water it has claimed. Neither the United States’ decision on how much to claim (provided it is not a claim in excess of its entitlement) nor the Associations’ challenge to it is within the jurisdiction of the SRBA Court.

¹⁸ *Notice and Motion*, pp. 14-15.

¹⁹ Indeed, because they have not filed claims in the SRBA, the Associations have no property interest in any of the waters subject to adjudication in the SRBA.

Fort Hall Water Users Ass'n, 129 Idaho 39, 921 P.2d 739. The Associations must seek relief, to the extent they may be entitled to do so, via a petition to the federal government. Accordingly, the Associations possess no significantly protectable interest in the quantification decision of this Court.

The Associations rely on several cases in support of their argument that, “as a matter of law” their interests are sufficient to meet the significantly protectable interest test. An analysis of those cases, however, demonstrates the Associations’ reliance is misplaced. As admitted by the Associations themselves, the cases cited by them “recognized that conservation groups with similar organizational and membership interests have standing to sue to enforce the requirements of the Wild and Scenic Rivers Act.”²⁰ Such a statement demonstrates the Associations’ fundamental misconception of the instant subcase and is a mischaracterization of the proceedings before the SRBA Court. The Associations are not moving to intervene to “object” to a water right claim, but are seeking to have the public’s concerns heard in this subcase. The Associations may well be seeking to enforce the requirements of the Wild and Scenic Rivers Act. Such enforcement, however, is beyond the jurisdiction of the SRBA Court. The Associations are attempting to use this proceeding to challenge the United States’ decision regarding the quantity of water it deems necessary to satisfy the provisions of the Act. Such a challenge has no place in the SRBA Court, indeed it is beyond the jurisdiction of the Court.

d. The Associations will not be “bound” by the quantification determination of this Court.

The Associations claim to satisfy the third requirement of I.R.C.P. 24(a) because they will be “bound” by the result of the quantification proceedings. The Associations appear to

²⁰ Notice and Motion, p. 11.

equate the term “bound” with “affected.” The Associations are not water rights claimants in the SRBA; therefore, they can in no way be bound by the quantification decision by this Court.

There can be no doubt that all members of the public may possibly be affected by the quantification determination of this Court. However, to say the members of the public will be somehow “bound” by that decision is to stretch the concept beyond recognition. Indeed, if the Associations’ argument is taken at face value, anyone and everyone will be “bound” and, thus, presumably be entitled to intervention in this consolidated subcase. The Associations’ argument is simply without merit.

e. The Associations’ interests, to the extent they exist, are adequately represented by the United States.

To the extent the Associations possess a significantly protectable interest relating to the quantification proceedings in this consolidated subcase, that interest is adequately represented by the United States. The Associations bear the burden of demonstrating that the United States’ representation of their purported interests may be inadequate. *See Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (rule satisfied when “*applicant* shows that representation of his [or her] interests ‘may be inadequate’” (emphasis added)); *Forest Conservation Council*, 66 F.3d at 1498 (it is the applicant-intervenor’s burden to show inadequate representation); *Bottoms v. Dresser Indus., Inc.*, 797 F.2d 869, 872 (10th Cir. 1986) (applicant “carries the burden of showing” its interests are inadequately represented). In order to shoulder its burden, the Associations must demonstrate the parties already present in this action may not adequately represent their interests. *Forest Conservation Council*, 66 F.3d at 1499.

The fact that the Associations are attempting to intervene in a matter in which the United States is representing the interests of the general public and the Associations is of no small

import. A “presumption of adequate representation generally arises when the representative is a governmental body or officer charged by law with representing the interests of the absentee.” Pennsylvania v. Rizzo, 530 F.2d 501, 505 (3d Cir. 1976). Rare is the case where a member of the public is “allowed to intervene in an action in which the United States, or some other governmental agency, represents the public interest”; such intervention is permitted only where there is a “very strong showing of inadequate representation.” Washington v. Keller, 479 F. Supp. 569, 572 (D. Md. 1979) (quoting 7A C. Wright & A. Miller, Federal Practice and Procedure § 1909 at pp. 530-31 (1972)).

The Ninth Circuit has enumerated three factors that assist in assessing the adequacy of representation: (1) whether the party will undoubtedly make all of the applicant’s arguments; (2) whether the party is capable of and willing to make such arguments; and (3) whether the applicant offers a necessary element to the proceedings that would be neglected. Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 528 (9th Cir. 1983). In the guise of “objections,” the Associations are merely asserting the public’s interests in this subcase. Such public interest concerns are not within the purview of the SRBA, Idaho Conservation League, Inc., 128 Idaho 155. Moreover, to the extent the “objections” do not fall within the category of public interest concerns, the Associations have set forth no evidence to show that the United States will not make all of its arguments in this subcase. Neither have the Associations provided evidence that the United States is unable or unwilling to make such arguments. Finally, the Associations have not provided evidence that they will offer a necessary element to these quantification proceedings that would be neglected in their absence.

Representation of the Associations’ interests, if there be any, will be considered inadequate if there is proof of: (1) collusion between the United States and any other party in

this subcase; (2) the United States having or representing an interest adverse to the Associations; or (3) the United States failing in the fulfillment of its duty under the Wild and Scenic Rivers Act. United States v. Detroit Int'l Bridge Co., 7 F.3d 497, 502 (6th Cir. 1993) (quoting Standin v. Union Elec. Co., 309 F.2d 912, 919 (8th Cir. 1962). *See also* Ass'n for Fairness in Business, Inc. v. New Jersey, 193 F.R.D. 228, 231 (D. N.J. 2000) (inadequate representation demonstrated where “(1) the interests of the applicant and of the representative party diverge; (2) the representative party and the opposing party collude; or (3) the representative party does not diligently pursue the lawsuit”).

The Associations have not submitted any admissible **evidence** in support of an argument that the United States is colluding with any other party in this consolidated subcase or that some conflict exists between the goal of the United States and the Associations. The United States and the Associations have the same objective in this consolidated subcase—to claim the minimum amount necessary to satisfy the requirements of the Wild and Scenic Rivers Act. There is a presumption of adequate representation when an applicant for intervention and an existing party have the same ultimate objective in the litigation. Coalition of Arizona/New Mexico Counties v. Dep't of Interior, 100 F.3d 837, 845 (10th Cir. 1996). In circumstances where the applicant and a party have the same ultimate objective, the applicant “must demonstrate, at the very least that some conflict exists.” Meridian Homes Corp. v. Nicholas W. Prassas & Co., 683 F.2d 201, 205 (7th Cir. 1982). There is simply no **evidence** presented by the Associations demonstrating a conflict.

Rather, the Associations base their motions to intervene on pure conjecture. In contrast, the record demonstrates that the United States has aggressively pursued the Wild and Scenic Rivers Act claims for seven years. Without the presence of the Associations as parties, the

United States vigorously advocated the position that it was entitled, as a matter of law, to all the unappropriated flows of the Main Stem of the Salmon River and the Rapid River. The SRBA Court concluded the United States' position was incorrect. In Potlatch, the decision of the SRBA Court was affirmed. 134 Idaho at 916, 12 P.3d at 1260. To this point, the United States has vigorously and adequately represented whatever interests the Associations may have in the matter; there is no **evidence** the United States will not continue to do so.

The Idaho Supreme Court has determined that the United States is entitled to only the amount of water necessary to satisfy the purposes of the Wild and Scenic Rivers Act in this consolidated subcase. Id. Given that prior determination, the United States has presumably filed claims for the amount of water it believes necessary to accomplish the purposes of the Act. The Associations have failed to set forth **evidence** upon which this Court could conclude that the United States failed to make a sufficient claim. Rather, they argue, based upon a decision with which they disagree, that the United States has not claimed the amount of water its members desire to be claimed. This difference of opinion between the United States and the Associations is not sufficient to demonstrate inadequate representation. See Te-Moak Bands of Western Shoshone Indians v. United States, 18 Cl. Ct. 82, 87 (1989) (difference of opinion insufficient to satisfy inadequate representation test, if it were otherwise, intervention of right would become "almost automatic").

The Associations lament the fact that "only the United States has stepped forward throughout adjudication of the Wild and Scenic River Claims subcases to argue that any federal reserved right exist."²¹ It should not be necessary to state the obvious: The rights under the

²¹ Notice and Motion, p. 13.

Wild and Scenic Rivers Act are those of the United States and, thus, what other entity should “step forward” to assert such rights? Under the Adjudication Code, no other entity could properly claim a federally reserved water right pursuant to the Act. Indeed, if this fact was of such great concern to the Associations one must ask: “Why did the Associations wait until after the eleventh hour to try to participate in this subcase?” Finally, regardless of the fact that “only” the United States of America is asserting rights in this consolidated subcase, the federal government has proven more than capable of representing its own interests in the SRBA.

The Associations’ argument that “the United States has now quantified its claimed Wild and Scenic River reserved rights in amounts less than are needed to fully protect and preserve the ‘outstandingly remarkable’ values for which the rivers were designated” is nothing more than a conclusory statement that lacks documentary evidence or scientific support.²² Such a statement further demonstrates that the Associations are challenging the United States’ legal judgment and litigation strategy in this matter. The SRBA is not the proper forum for such a challenge; the Associations must seek redress, if there be any, in an appropriate forum. The Court should not consider the Associations’ unsupported statement and, further, such statements do not contribute, in any manner, to the Associations’ task of satisfying their burden to show the United States’ representation of their purported interest in the subject matter of this subcase may be insufficient.

Finally, the Associations point to the fact that the United States has chosen not to appeal certain decisions of the Idaho Supreme Court in other federal reserved water rights cases in support of their argument. The Associations are apparently displeased with the United States’ decision to not seek certiorari in two cases notwithstanding apparent pressure from “the

²² Indeed, the Associations’ demand for “[a]ll natural flows at all times of year, as reflected on historic hydrographs” is not a proper claim and would violate the federal reserved water rights doctrine to the extent it would apparently divest senior water rights. Such an action would also amount to a constitutional taking.

conservation community.”²³ The federal government’s discretionary determination to decline to seek certiorari in the cases complained of is “presumptively immune from judicial review.” Shoshone-Bannock Tribes, 56 F.3d at 1480. As such, the Associations cannot reasonably rely on those decisions to support their argument for intervention under I.R.C.P. 24(a).

3. The Associations Are Not Entitled To Permissive Intervention Pursuant to I.R.C.P. 24(b).

The Associations also seek permissive intervention in this matter. Permissive intervention is governed by I.R.C.P. 24(b), which provides:

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.

The Associations fail to satisfy the requirements of this rule as well.

There is no statute that confers upon them “a conditional right to intervene” and, thus, the Associations must rely solely upon I.R.C.P. 24(b)(2). The Associations challenge the decision of the United States to claim less water than the Associations would like. As stated throughout this memorandum, the SRBA is not the proper forum for such a claim, if one exists. Accordingly, there is no question of law or fact in common between the subject matter of this consolidated subcase and the Associations’ claims.

²³ Affidavit of Sara Eddie, p. 3; Affidavit of Craig Gehrke, p. 2.

Assuming the requirements of I.R.C.P. 24(b) have been satisfied, this Court retains discretion to deny the Associations' motion. Chiles v. Thornburgh, 865 F.2d 1197, 1213 (11th Cir. 1989). Rule 24(b) vests this Court with the discretion to determine the most efficient method of handling this consolidated subcase. Venegas v. Skaggs, 867 F.2d 527, 530 (9th Cir. 1989), aff'd, 495 U.S. 82 (1990).

As set forth fully above, the Associations' motion to intervene is untimely and would eviscerate the expressly limited standing permitted in the SRBA. Moreover, the Associations' interests, if there be any, are adequately represented by the United States. Furthermore, under the guise of "objections" to the United States' amended claims, the Associations are attempting to challenge the United States' litigation decision. By filing "objections," the Associations are simply seeking to avoid the holding in Shoshone-Bannock Tribes and, in a fashion, seek judicial review of the United States' decision in conducting this litigation. Simply because it is dressed in sheep's clothing, the wolf is still a wolf and, thus, the Associations' argument must fail.

The question before this Court is not whether the Associations may have some colorable interest in this Court's decision in the present litigation, but whether the litigation in this complicated consolidated subcase should be expanded at this late stage. The State asserts that inclusion of the Associations in this matter at this time is inappropriate. Therefore, this Court should exercise its discretion and deny the motion for permissive intervention.

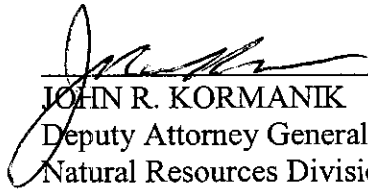
CONCLUSION

Idaho Rivers United and The Wilderness Society are neither claimants nor parties in the SRBA and, thus, any objections they make to the United States' amended claims in this consolidated subcase must be stricken. Moreover, the "objections" are not within the jurisdiction of the SRBA Court. Furthermore, Idaho Rivers United and The Wilderness Society cannot

represent the interests of the certain objectors in this matter because permitting them to do so would eviscerate the requirements for standing in the SRBA by, in effect, allowing perhaps thousands of individuals who are not parties or claimants to participate in this case. Idaho Rivers United and The Wilderness Society cannot satisfy the requirements for intervention pursuant to I.R.C.P. 24(a) and, thus, their motion for intervention as a matter of right should be denied. Finally, under all the facts of this case, the Court should exercise its discretion and deny Idaho Rivers United and The Wilderness Society's motion for permissive intervention pursuant to I.R.C.P. 24(b).

DATED this 14th day of June 2002.

ALAN G. LANCE
Attorney General

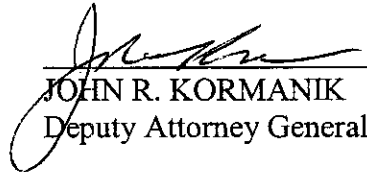


JOHN R. KORMANIK
Deputy Attorney General
Natural Resources Division

CERTIFICATE OF SERVICE

I certify that on the 14th day of June 2002, I caused to be served a true and correct copy of the foregoing **STATE OF IDAHO'S MEMORANDUM IN OPPOSITION TO NOTICE OF PARTICIPATION IN CONSOLIDATED SUBCASE; AND MOTION TO INTERVENE** by placing a true and correct copy thereof in the United States mail, postage prepaid, addressed as follows:

1. To all parties listed on the SRBA Court's Certificate of Mailing for Wild & Scenic Rivers Claims, dated June 14, 2002.
2. Laurence ("Laird") J. Lucas
William M. Eddie
Land and Water Fund of the Rockies
PO Box 1612
Boise, ID 83701-1612



JOHN R. KORMANIK
Deputy Attorney General

Q:\SRBA\PLDGSUB\WILD&SCE\2163nka Opposing IRU's Objs-Mot-Intervene.doc