

any proceeding before the Court is significantly limited – to include only those with a direct interest in the proceeding or res, waters in the Snake River Basin. *See* AO1 § 10(k). Indeed, according to AO1 § 10(k), *only* a “party to the adjudication” may file a motion to participate. Since Susan Bedke (“Bedke”) does not own any water rights in the Snake River Basin she is not a party and, hence, is prohibited from filing a motion to participate in the above-referenced subcases.¹

In addition, Bedke cannot meet the requirements for intervention, either as of right or permissive, under Rule 24. Notably, Bedke’s alleged interest in the Martin’s decreed water rights is based upon litigation over Mr. Leroy Fairchild’s property. Any claimed interest in Mr. Fairchild’s property is speculative, and at best, unripe and premature. Consequently, the Court should deny Bedke’s Motion to Participate.

Finally, the Martins dispute and object to the various allegations raised in Bedke’s motion including those raised with respect to Eugene Matthews and the funding of Mr. Fairchild’s previously filed motion with this Court.

ARGUMENT

I. Bedke Has No Authority to File a Motion to Participate in this Matter.

The statutes and rules governing the procedures of the SRBA explicitly provide who may file a motion to participate in matters before this Court. Section 10(k) of AO1 provides:

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*.

¹ A search of IDWR’s on-line water right database reveals that Susan Bedke does not own any water rights in the Snake River Basin.

(Bold emphasis added).

According to the plain language of AO1 § 10(k), only a “party to the adjudication” may file a motion to participate in specific subcases. Section 42-1401A, Idaho Code, defines a “party” as “any person who is a *claimant* or any person who is served or joined.” (emphasis added). Since Bedke has not been “served or joined,” she would only be authorized to file a motion to participate if she were a claimant. The same statutory provision defines a “claimant” as “any person or entity asserting ownership of right to the use of water within the state or Idaho or on whose behalf ownership of rights to the use of water is asserted.” *Id.* Nothing in the record or in IDWR’s on-line water right file database demonstrates that Bedke has filed any claims for water rights with the SRBA. Bedke’s alleged interest in the water rights is conditioned upon “success[] in the civil action to take possession of Fairchild’s real property.” *Motion* at 2. It is insufficient to claim an interest in a water right for purposes of participation in the SRBA merely on the speculated success in litigation over real property in another court. Accordingly, Bedke has no statutory authority to file a motion in these subcases and her motion should be denied.

II. Bedke Cannot Meet the Requirements of Civil Rule 24.

Bedke incorrectly claims that she meets the requirements for intervention under Idaho’s civil rules of procedure. Although Bedke does not specify whether she meets the standard for intervention as of right (Rule 24(a)) or permissive intervention (Rule 24(b)), a response pursuant to both standards is provided below. As described, Bedke’s motion fails under both standards.

To intervene as a matter of right, a person must meet the criteria of Rule 24(a). Rule 24(a) provides:

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.

Notably, the Idaho Supreme Court and SRBA Court have already rejected similar attempts to participate in a subcase where the movant was not a claimant in the SRBA. *See Fort Hall Water User's Association v. United States*, 129 Idaho 39, 921 P.2d 739 (1996); *Order on Motion to Participate/Intervene*, AOI 10k, I.R.C.P. 24(a) & (b); *Order on Motion to Dismiss Objections to Amended Claims*, I.R.C.P. 12(b)(6) in Consolidated Subcase No 75-13316 ("*Wild & Scenic Order*"). In the *Wild & Scenic Order*, the SRBA Court addressed intervention of right as it related to the non-claimant's attempt to participate:

The instant motion does not satisfy the criteria for an intervention of right pursuant to AOI § 10(k) or I.R.C.P. 24(a). First, the Court finds that there is no statute or AOI rule that confers an unconditional right to IRU and TWS to intervene in the proceedings. IRU and TWS are not parties to the adjudication as required by AOI § 10(k) in order to file a motion to participate nor do IRU and TWS meet the statutory standing criteria set forth in Idaho Code § 42-1401A ... IRU and TWS do not claim ownership of any claims that share a factual or legal connection or dispute with the federal reserved water rights at issue.

Wild & Scenic Order at 9 (emphasis added).

In *Fort Hall Water User's Association*, the Idaho Supreme Court affirmed the ruling of the SRBA district court wherein the court denied standing to a water users association to file an objection in the SRBA where the water users association was not claiming ownership of a water right and therefore did not fit within the definition of "claimant" under Idaho Code section 42-1401A(1). 129 Idaho at 41-42. Next, like the non-claimant associations in the *Wild & Scenic* matter, "no statute or AOI rule [] confers an unconditional right to [Bedke] to intervene in the

proceedings.” Since Bedke is not a “claimant” or a “party” to the SRBA, no statute or rule provides her with any right, mandatory or otherwise, to participate in the present subcases. Therefore, Bedke must show that she meets the requirements of Rule 24(a)(2). However, since Bedke has no interest in these proceedings, she cannot meet this requirement either.

These subcases concern Mr. Fairchild’s previous motion to set aside the Martins’ decrees. Bedke’s only interest is that she has instituted litigation over the sale of Mr. Fairchild’s real property. Whether or not she ever acquires an interest in Mr. Fairchild’s property is speculative at this point. To take the next step and allege an interest in the Martins’ decreed water rights is even more speculative and without justification. Mr. Fairchild’s decisions with respect to his previously filed motion with the Court are not for Bedke’s disposition. Accordingly, no decision by the Court in this matter will “impair or impede” Bedke’s “ability to protect” a nonexistent interest.

Moreover, Bedke’s present claims regarding an interest in this proceeding are not ripe and therefore fail as a matter of law. Ripeness is a fundamental prerequisite to invoke a court’s jurisdiction – a harm must be sufficiently matured to warrant judicial intervention. *See Mannos v. Moss*, 143 Idaho 927, 155 P.3d 1166, 1175 (2007); *Davidson v. Wright*, 143 Idaho 616 (2006). Idaho’s ripeness doctrine requires a plaintiff to prove: “1) that the case presents definite and concrete issues, 2) that a real and substantial controversy exists, and 3) that there is a present need for adjudication.” 155 P.3d at 1175. There are no definite and concrete issues and no real and substantial controversy exists between Bedke and the Martins. Although Mr. Fairchild has filed a motion to set aside the Martins’ decrees, there is no need for an adjudication between Bedke and the Martins. Bedke’s alleged interest in Mr. Fairchild’s property is based upon

separate litigation and it does not give her legal standing to participate in these proceedings. Hence, Bedke's motion is not ripe and should be denied.

Finally, Bedke has failed to show that Mr. Fairchild cannot adequately represent his interests in this matter. *See, e.g., Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972); *United States v. City of Los Angeles, Cal.*, 288 F.3d 391 (9th Cir. 2002). Bedke bears the burden with respect to this element and has offered no supporting reasons, other than further speculation that "Fairchild may settle the matter without litigating the issues." *Motion* at 3. How Mr. Fairchild resolves his previously filed motion is Mr. Fairchild's decision, not Bedke's. Furthermore, Mr. Fairchild is presently represented by counsel in these subcases and there is no reason to suspect that he cannot adequately represent his interests here.

Bedke does not have legal standing in this matter. As such, this Court should deny her motion to participate.

IV. Bedke Cannot Meet the Requirements for Civil Rule 24(b)

Likewise, this Court should reject Bedke's motion for permissive intervention. Civil Rule 24(b) 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.

See also In re Doe, 134 Idaho 760, 763, 9 P.3d 1226, 1229 (2000).

Since Bedke does not qualify as a "claimant," there is no statute that confers upon her a "conditional right to intervene." Therefore, Bedke must rely upon meeting the elements of Rule 24(b)(2) in order to intervene and participate. In other words, there must be a common question of law or fact between the issues raised in the motion and the claims asserted by Mr. Fairchild.

The motion filed by Mr. Fairchild seeks to set aside partial decrees issued to the Martins. Bedke does not own any property served by these water rights. Bedke has instituted a lawsuit over the sale of Mr. Fairchild's property. Bedke's only claimed interest here arises from the speculative outcome in that separate case filed in Cassia County District Court. Presently, Bedke has no interest whatsoever in these proceedings.

However, even assuming, for arguments' sake, that Bedke does meet the Rule 24(b)(2) requirements, the Court still retains the discretion to deny its 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 such factor, an applicant's "standing," may serve as the basis for denying permissive intervention. *See, e.g., Chinchurreta v. Evergreen Management, Inc.*, 117 Idaho 588, 589, 790 P.2d 369, 370 (Ct. App. 1989) (indicating that an individual's "motion to intervene was denied due to lack of standing"); *see also In re Doe*, 134 Idaho at 764, 9 P.3d at 1230 n. 3 (standing is a "factor courts may consider in exercising their discretion to grant permissive intervention once the requirements of Rule 24(b) are satisfied"). As such, the Court should deny Bedke's motion for permissive intervention on the grounds that she does not meet the statutory requirements for standing in the SRBA. *See Wild & Scenic Order, supra.*

Furthermore, Bedke has failed to demonstrate that her alleged "interest" in these subcases is not adequately represented by Mr. Fairchild who is a party in the SRBA and who is

participating and being represented by other counsel. This Court should exercise its discretion and deny Bedke's motion to participate.

CONCLUSION

The Idaho Supreme Court and SRBA Court have already determined that non-claimants do not have standing to participate in the SRBA. Bedke has no legal standing and has not met the requirements for intervention. The Court should follow the relevant statutes and rules, the Idaho Supreme Court's decision in *Fort Hall Water Users Association*, and the Presiding Judge's decision in the *Wild & Scenic Order* and deny Bedke's motion. In sum, existing law makes it clear that the SRBA is not an open forum for persons without water right claims to be heard. Bedke's motion is based upon speculative success in a separate lawsuit. Moreover, there is no justification to expand the scope of the SRBA to hear non-claimants just because they may file a lawsuit on a separate matter, particularly when the rights at issue have already been decreed for two years.

For the foregoing reasons, the Martins respectfully request that this Court deny Bedke's *Motion to Participate*.

Dated this 15th day of August, 2007.

BARKER ROSHOLT & SIMPSON LLP


Travis L. Thompson

Attorneys for Harold Rex and Anne Martin

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of August, 2007, I served a true and correct copy of the foregoing **RESPONSE TO SUSAN BEDKE'S MOTION TO PARTICIPATE** on the person(s) listed below, in the manner indicated:

Idaho Department of Water Resources
P.O. Box 83720
Boise, Idaho 83720-0098
(208) 287-6700

☐ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☐ Overnight Mail
☒ Facsimile
☐ Email

Michael Tribe
Robinson & Associates
P.O. Box 396
Rupert, Idaho 83350
(208) 436-6804

☐ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☐ Overnight Mail
☒ Facsimile
☐ Email

Don Chisholm
P.O. Box 1118
Burley, Idaho 83318
(208) 878-4998

☐ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☐ Overnight Mail
☒ Facsimile
☐ Email


Travis L. Thompson

Barker, Rosholt & Simpson L.L.P.

ATTORNEYS AT LAW

JOHN A. ROSHOLT
ALBERT P. BARKER
JOHN K. SIMPSON
TRAVIS L. THOMPSON
SHELLEY M. DAVIS
PAUL L. ARRINGTON

Twin Falls Office
113 Main Street West, Suite 303
P.O. Box 485
TWIN FALLS, IDAHO 83303-0485
TELEPHONE (208) 733-0700
FAX (208) 735-2444

1010 W. Jefferson St., Suite 107
Post Office Box 2130
Boise, ID 83701-2130
(208) 338-0700 telephone
(208) 344-1034 facsimile
brr@barkerosholt.com

MULTIPLE FACSIMILEFROM: Travis ThompsonDATE: 8/1/07FILE/CLIENT: Manti - SRBA S-Score# OF PGS. INCLUDING COVER SHEET: 9

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