

C. Tom Arkoosh, ISB #2253
Jay J. Kiiha, ISB # 6763
ARKOOSH LAW OFFICES, CHTD.
P.O. Box 32
Gooding, Idaho 83330
Telephone: (208) 934-8872
Facsimile: (208) 934-8873

*Attorneys for American Falls Reservoir
District #2*

John A. Rosholt, ISB #1037
John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
Paul L. Arrington, ISB #7198
BARKER ROSHOLT & SIMPSON LLP
P.O. Box 485
Twin Falls, Idaho 83303-485
Telephone: (208) 733-0700
Facsimile: (208) 735-2444

*Attorneys for A & B Irrigation District, Burley
Irrigation District, Milner Irrigation
District, North Side Canal Company, &
Twin Falls Canal Company*

Roger D. Ling, ISB #1018
P.O. Box 396
Rupert, Idaho 83350
Telephone: (208) 436-4717
Facsimile: (208) 436-6804

Attorney for A & B Irrigation District

RECEIVED

AUG 23 2007

DEPARTMENT OF
WATER RESOURCES

W. Kent Fletcher, ISB #2248
FLETCHER LAW OFFICE
P.O. Box 248
Burley, Idaho 83318
Telephone: (208) 678-3250
Facsimile: (208) 878-2548

Attorneys for Minidoka Irrigation District

**IN THE 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

)
) Subcase Nos.: SEE ATTACHMENT A
)
) **RESPONSE TO IDAHO GROUND**
) **WATER APPROPRIATORS, INC.'S**
) **MOTION TO PARTICIPATE**
)
)

COMES NOW, American Falls Reservoir District #2, A&B Irrigation District, Burley
Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal
Company and Twin Falls Canal Company (collectively "Surface Water Coalition" or
"Coalition"), by and through their undersigned attorneys of record, and submits this *Response to*

Idaho Ground Water Appropriators, Inc. 's Motion to Participate in the above-captioned subcases pursuant to AO1 § 10(k) and Idaho Rule of Civil Procedure 24. For the reasons set forth below, this Court should deny IGWA's motion.

INTRODUCTION

The SRBA Court is the quiet title action to waters in the Snake River Basin and the statutory authority for the Court and parties' ability to participate is expressly defined by Idaho Code §§ 42-1401 through -1428. Given the quiet title nature of the SRBA, a person's or entity's ability to participate in 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 it is not asserting ownership to any water rights and no person or entity is asserting ownership on its behalf, IGWA is not a party and, hence, is prohibited from filing a motion to participate.

Even if IGWA is authorized to file a motion to participate, IGWA cannot meet the requirements for intervention, either as of right or permissive. IGWA admits that it has no ownership interest in this matter, but that it is merely representing “members” who own “ground water rights.” *See Motion* at 1 ¶¶ 1-2. Furthermore, IGWA's motion is ambiguous. It is unclear which of its “members” are claimants in the SRBA, and whether some of the claimants in these subcases are members of IGWA or whether they are already represented by other counsel. Any non-claimants would not be permitted to participate in these proceedings and any member of IGWA who is a claimant already has his interest represented in these proceedings. Accordingly, the Court should deny IGWA's Motion to Participate.

ARGUMENT

I. IGWA 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*.

(Bold emphasis added).

According to the plain language of AO1 § 10(k), only a “party to the adjudication” may file motions 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 it has not been “served or joined,” IGWA would only be authorized to file a motion to participate if it 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.* It is undisputed that IGWA has not filed any claims for water rights with the SRBA. *See Motion* at 3 (“IGWA’s **members** own ground water rights and have an interest in what constitutes ground water in the state of Idaho”). In fact, IGWA does not even assert that its “members” are claimants in the SRBA – only that its “members” have “ground water rights.” *Id.* Having a “ground water right” is not the same thing as having a claim in the SRBA. IGWA’s motion does not identify a list of water rights that have been decreed or that are pending before any Special Masters.

Accordingly, notwithstanding IGWA's lack of authority to file a motion to participate, it is unclear which of IGWA's members would be so authorized.

II. An Association of Claimants has no Standing to Participate

The SRBA Court has already addressed the issue of whether an association representing claimants has standing to participate in the SRBA and rejected a similar attempt to participate in its *Order on Motion to Participate/Intervene, AO1 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 that case, two environmental associations, representing various SRBA claimants, attempted to participate. Judge Roger Burdick, the then-presiding judge over the SRBA, rejected this attempt:

IRU and TWS [the environmental associations] are not claimants in the SRBA and therefore do not satisfy the requisite statutory standing requirements to file objections and/or responses in the SRBA. In *Fort Hall Water User's Association v. United States*, 129 Idaho 39, 921 P.2d 739 (1996), the Idaho Supreme Court affirmed the ruling of the SRBA district court wherein the court denied standing to a water users association to file an objection in the SRBA where the water users association was not claiming ownership of a water right and therefore did not fit within the definition of "claimant" under Idaho Code section 42-1401A(1) ... IRU and TWS did not file claims in the SRBA on their own behalf nor did they previously or are they now asserting ownership of water rights on behalf of claimants. IRU and TWS hold no interest in the water rights claimed by [the parties they represent]. Rather, IRU and TWS seek to represent the interests of the Conservation Objectors in prosecuting objections to the water right claims of the United States. IRU and TWS argue that the Court has in the past allowed other parties to represent the interests of other claimants, as is the case with the federal claims coalition. The two situations are distinguishable. To this Court's knowledge the members comprising the federal claims coalition are claimants in the SRBA that are represented by common counsel in specific subcases as opposed to non-claimant party representing the interests for the coalition. ... The objections filed by IRU and TWS are hereby dismissed.

Wild & Scenic Order at 7-8 (emphasis added).

Like IRU and TWS, IGWA is not a claimant, but is merely a non-claimant entity attempting to represent the interests of a group of ground water claimants. It has never filed claims with the SRBA on its own behalf and is not asserting any ownership of water rights on behalf of the claimants. Furthermore, IGWA is not authorized to represent the interests of claimants in the SRBA. IGWA has not made any argument justifying a departure from the holding of the Court in the *Wild & Scenic Order* and there is no reason to conclude otherwise. Associations cannot participate in the SRBA. To open the door to such groups would violate the statutory definition of a “claimant” and defeat the purpose of the SRBA, a quiet title action involving parties that claim an interest in waters of the Snake River Basin.

III. IGWA cannot Meet the Requirements of Civil Rule 24(a).

IGWA incorrectly claims that it had met the requirements for intervention as a matter of right under the civil rules. Civil 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.

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 AO1 § 10(k) or I.R.C.P. 24(a). First, the Court finds that there is no statute or AO1 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 AO1 § 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.

First, like IRU and TWS, “no statute or AOl rule [] confers an unconditional right to [IGWA] to intervene in the proceedings.” Since it is not a “claimant” or a “party” to the SRBA, no statute or rule provides IGWA with any right, mandatory or otherwise, to participate in this matter. Therefore, IGWA must show that it meets the requirements of Civil Rule 24(a)(2). However, since it has no interest in these proceedings, IGWA cannot meet this requirement.

These subcases deal with certain objections to specific water rights in Basins 01, 21, 22 and 27. IGWA has not claimed any right to water within these basins or anywhere else in the State of Idaho. . Accordingly, IGWA has no “significant protectable interest” in these proceedings. *See Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998) (indicating that the “interest” for purposes of Civil Rule 24(a) must be a “significant protectable interest”). IGWA does not dispute this. In fact, IGWA asserts that “IGWA’s members [*not IGWA*] own ground water rights and have an interest in what constitutes ground water in the state of Idaho.” *Motion* at 3; *see also id.* at 1 ¶ 1 (“IGWA is ... organized to represent the interests of Idaho ground water users”); ¶ 2 (“IGWA members hold water rights authorizing ground water diversions”); *id.* at 2 ¶ 3 (“Many of IGWA’s members’ ground water rights are diverted from wells within the” ESPA). Any interest that may be present in this case would rest squarely with the members of IGWA who are claimants in the SRBA¹ - not with IGWA. Accordingly, no decision by the Court in this matter will “impair or impede” IGWA’s “ability to protect” a nonexistent interest.

It is also important to note that IGWA’s motion is drafted in such a way as to make it unclear which of IGWA’s members are actually claimants in the SRBA or whether some of IGWA’s members are already participating in these subcases. IGWA’s motion merely asserts

¹ The Coalition does not concede that any such members should be permitted to participate in this matter. The Coalition is merely making the point that IGWA, as a non-claimant, does not have any interest in these proceedings.

that its members hold “ground water rights.” It does not indicate whether these individuals and entities with “ground water rights” have filed any claims in the SRBA. Any who are not claimants would not have authority to participate in this matter and those who are claimants in these subcases are already represented by other counsel. Yet, IGWA is attempting to participate and represent all of its members, without limitation.

Finally, IGWA has failed to show that the groundwater users currently involved in this action can not adequately represent the interests of IGWA’s membership. IGWA bears this burden. *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). IGWA proffers only two arguments for why the current parties may not adequately represent the interests of IGWA’s members. Both arguments fail. First, IGWA asserts that “they [the other groundwater users] do not represent IGWA’s members.” *Motion* at 3. In light of the fact that IGWA itself has no right to represent its members in this matter, this statement is irrelevant and is misleading if, in fact, some of IGWA’s members are already participating in these subcases. Second, IGWA asserts that “they do not represent ... the broader issues involved in defining ground water and recovered water.” *Id.* It is unclear what exactly IGWA means by this statement. In fact, IGWA provides no support for its apparent contention that the existing parties who are groundwater users are somehow incapable of understanding issues involving groundwater.

IGWA does not have legal standing in this matter and has failed to show that the current groundwater users cannot adequately represent the interests of its members. As such, this Court should deny IGWA’s motion to participate.

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

Likewise, this Court should reject IGWA'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 IGWA does not qualify as a "claimant," there is no statute that confers upon it a "conditional right to intervene." Therefore, IGWA 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 objections and the claims asserted by IGWA.

The objections filed in the relevant subcases each challenge the source and place of use of the specific water rights. In particular, the claimants/objectors allege that water under the rights is recovered for use within a specific area. IGWA, on the other hand, indicates that the common question of law or fact is "what constitutes ground water and whether or not the State recognizes certain water withdrawn from wells as recovered water and its potential affect on recharge or conjunctive administration of the ESPA." *Motion* at 3. These proceedings will not define what constitutes groundwater or determine how the Department should conjunctively manage the waters of the ESPA. Clearly, IGWA is attempting to expand the issues before the Court beyond their reasonable bounds.

However, even assuming, for arguments sake, that IGWA 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 IGWA's motion for permissive intervention on the grounds that it does not meet the statutory requirements for standing in the SRBA. *See Wild & Scenic Order, supra.*

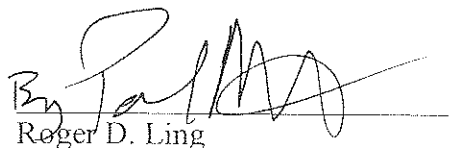
Furthermore, IGWA has failed to demonstrate that its alleged "interests" in these subcases are not adequately represented by the existing groundwater claimants who are parties in the SRBA and who are participating and being represented by other counsel. This Court should exercise its discretion and deny IGWA's motion to participate.

CONCLUSION

The SRBA Court has already determined that associations of claimants do not have standing to participate in the SRBA. IGWA 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 IGWA's motion. In sum, existing law makes it clear that the SRBA is not an open forum for organizations without water right claims to be

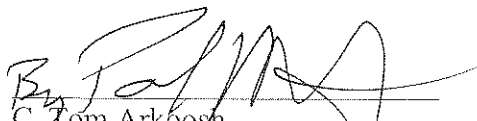
heard. For the foregoing reasons, the Coalition respectfully requests that this Court deny IGWA's *Motion to Participate*.

Dated this 22nd day of August, 2007.


Roger D. Ling

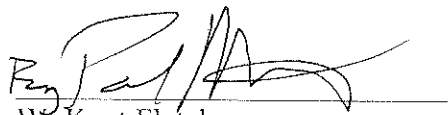
Attorneys for A & B Irrigation District

ARKOOSH LAW OFFICES CHTD.


C. Tom Arkoosh
Jay J. Kiiha

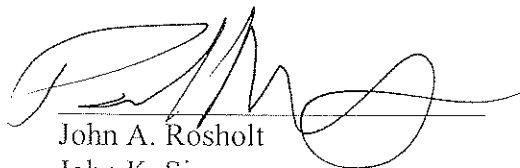
*Attorneys for American Falls Reservoir
District #2*

FLETCHER LAW OFFICES


W. Kent Fletcher

Attorneys for Minidoka Irrigation District

BARKER ROSHOLT & SIMPSON LLP


John A. Rosholt
John K. Simpson
Travis L. Thompson
Paul L. Arrington

*Attorneys for A & B Irrigation District, Burley
Irrigation District, Milner Irrigation
District, NSCC, and TFCC*

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of August, 2007, I served a true and correct copy of the foregoing **RESPONSE TO IDAHO GROUND WATER APPROPRIATORS, INC.'S MOTION TO PARTICIPATE** on the person(s) listed below, in the manner indicated:

Idaho Department of Water Resources
P.O. Box 83720
Boise, ID 83720-0098

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

Jerry R. Rigby
**RIGBY THATCHER ANDRUS RIGBY
KAM & MOELLER, CHTD.**
PO Box 250
Rexburg, ID 83440-0250

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

US Department of Justice
Division of Env. & Natural Resources
550 W. Fort Street, MSC 033
Boise, ID 83706-1234

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

Idaho Attorney General's Office
Natural Resources Division
PO Box 44449
Boise, ID 83711-4449

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

Randall C. Budge
Candice M. McHugh
**RACINE OLSON NYE BUDGE &
BAILEY, CHTD.**
PO Box 1391
Pocatello, ID 83201

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

Jeanette Wolfley
Special Counsel
Shoshone-Bannock Tribe
202 N. Arthur
Pocatello, ID 83202

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

Brady Scott

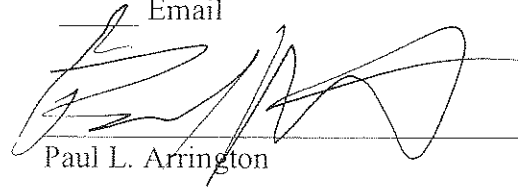
☒ U.S. Mail, Postage Prepaid

Karin Scott
214 E 450 N
Firth, ID 83236

_____ Hand Delivery
_____ Overnight Mail
_____ Facsimile
_____ Email

W. Sherman Whitten
315 N 400 E
Blackfoot, ID 83221

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


Paul L. Arrington

ATTACHMENT A

27-798
27-2125A
27-2126
27-7005
27-7065
27-7089
27-7093
27-7095
27-7098
27-7260
27-7306
27-7315
27-7561