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Movant's Name: Idaho Conservation League, Idaho Rivers
United, Idaho Wildlife Federation, and
Northwest Resource Information Center

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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) Sub-case Nos. 36-02080
) and 36-15127
Case No. 39576)
_____)

AMENDED MOTION FOR LEAVE TO INTERVENE

DESCRIPTIVE SUMMARY

Conservation Groups' Amended Motion for Leave to Intervene,
pursuant to I.R.C.P. 24 and Order Denying Motion For Leave To
Interevene entered January 25, 1994 by Special Master Dolan.

I. INTRODUCTION

The Idaho Conservation League (ICL), Idaho Rivers United,
the Idaho Wildlife Federation (IWF), and the Northwest Resource
Information Center (NWRIC) (collectively, the "Conservation
Groups") respectfully filed this Amended Motion for Leave to
Intervene, pursuant to I.R.C.P. 24 and the Order Denying Motion
For Leave To Interevene entered in these sub-cases on January 25,
1994 by Special Master Dolan. This motion accompanies the

Amended Objections filed herewith; and is supported by the accompanying Affidavit of Marti Bridges.

II. INTERESTS OF THE CONSERVATION GROUPS

The Conservation Groups assert several interests which they seek to protect through intervention in this proceeding, including their interests in the water resources affected, their interests in ensuring that all relevant "local public interest" and related statutory concerns are fully considered, and their interests in addressing the problem of "water spreading" involving Bureau of Reclamation water projects, including the water rights in question.

Each of these sets of interests is described in detail in this section.

A. Interests In The Affected Water Resources

Movants are four non-profit Idaho corporations dedicated to the protection, preservation, and wise management of Idaho's water resources, including the protection of the state's fish, wildlife, and recreational treasures. The ICL, IRU, IWF, and NWRIC are statewide organizations working to protect the Snake River, its tributaries, and Idaho's ground water resources. ICL has over 2,400 members, with over 2,200 residing in Idaho. IRU has over 800 individual members and 20 member groups in Idaho. The IWF has approximately 3,000 members in Idaho, while the NWRIC has been actively involved in Idaho water policy for many years.

Members of the Conservation Groups fish, raft, swim, wade, photograph, and otherwise use and enjoy the waters that are the

subject of the SRBA. In addition, members of the groups enjoy the aesthetic benefits of clean, free-flowing, and otherwise healthy aquatic environments in these areas. Further, some members of the Conservation Groups hold water rights claimed in the SRBA, and some own riparian property within the Snake River Basin. Member activities such as fishing, recreation and aesthetic enjoyment of the waters of the Snake River Basin; uses and enjoyment of riparian property and river habitat; and overall enjoyment of riverine ecology are directly related to the amount and quality of water in the streams and rivers of the basin, and will be affected by the SRBA. See accompanying Affidavit of Marti Bridges; and Affidavits of Larry Pennington, Jim Rindfleisch, and Robert S. Luntley.¹

These are recognized, protectable interests. Rights of the public to recreational use of navigable waterways are protected by statute, and have been affirmed by the Idaho Supreme Court. See Southern Idaho Fish and Game Ass'n v. Picabo Inc., 96 Idaho 360, 528 P.2d 1295 (1974); Parker, *Fishing From the Bank: Public Recreational Rights Along Idaho's Rivers and Lakes*, 21 Idaho L. Rev. 275 (1985). The Idaho Supreme Court has also repeatedly recognized the rights of members of the public to advance their

¹ These affidavits have been previously filed several times with the Court, including in support of the Conservation Groups' motions for leave to intervene in 34-00556 (filed July 1, 1993), and in Basin-wide Issue No. 1 (filed August 24, 1993). For sake of convenience and to avoid unnecessary duplication of papers filed with the Court, the affidavits are incorporated here by reference.

individual or public interests in the ecological, recreational and aesthetic use and enjoyment of water resources. Kootenai Environ. Alliance v. Panhandle Yacht Club, 105 Id. 622, 671 P.2d 1085 (1983); Shokal v. Dunnn, 109 Id. 330, 707 P.2d 441 (1985); Hardy v. Higginson, 123 Idaho 485, 849 P.2d 946 (1993). Finally, although riparian landowners may not have superior rights to water over appropriators, nevertheless the rights and interests of riparian landowners related to the water flowing along or through their properties are recognized in Idaho and are protectable, including the right to protest wasteful use of water by an appropriator. Schodde v. Twin Falls Water Co., 224 U.S. 107, 123-25 (1911); Hutchinson v. Watson Slough Ditch Co., 16 Idaho 484, 101 P. 1059, 1061-63 (1909).

The Idaho Legislature specifically noted the wide-ranging scope of the SRBA in I.C. § 42-1406A, stating that:

Effective management in the public interest of the waters of the Snake River Basin requires that a comprehensive determination of the nature, extent and priority of the rights of all users of surface and ground water from that system be determined.

In decreeing all rights to use of the waters of the Snake River Basin, the SRBA will determine or affect the quantity and quality of Idaho's streams, rivers, and lakes available to protect the health of Idaho's fish, wildlife, and recreation resources in the basin. These issues are central to the missions of the Conservation Groups and are of vital and direct importance to their members.

The water right claimed in this proceeding will affect these

interests directly, including by potential impacts on aquifer levels in the Snake Plain Aquifer, and streamflows, water quality, aesthetics, recreation opportunities, and habitat in the middle Snake River and tributaries. See Bridges Affidavit.

B. Statutory "Local Public Interest" And Related Interests

The Conservation Groups and their members also have interests in ensuring that relevant "local public interest" and similar statutory concerns are fully considered before the claimed water rights are decreed in the SRBA.

Idaho law requires that to obtain a new water right, to amend a permitted right, or to change all or part of an existing right (point of diversion, place of use, period of use, or nature of use), the claimant must normally apply to the director of the Department of Water Resources for permission. See I.C. §§ 42-203A, 42-211, 42-222(1). The director, in turn, is required to provide public notice of the application in accordance with the requirements of I.C. § 42-203A. Id. Where a change is sought, the application can only be approved by the director if it satisfies several criteria, including that the change causes no injury to other water right holders, does not constitute "an enlargement in use of the original right," is "consistent with the conservation of water resources within the state of Idaho," and "is in the local public interest as defined in § 42-203A(5), Idaho Code." See I.C. § 42-222(1). Similarly, an application for a new water right, or to amend a permitted right, cannot be granted if the requested right will "reduce the quantity of water

under existing rights," the water supply "is insufficient for the purpose," the application is not "in good faith," the application is "contrary to the conservation of water resources within the state of Idaho," or if it "will conflict with the local public interest, where the local public interest is defined as the affairs of the people in the area directly affected by the proposed use." See I.C. § 42-203A(5); § 42-211.

Whether a new, amended or changed right is sought, Idaho law affords any person who is "concerned" or "who desires" the right to file a protest on grounds set forth in the relevant statutes, and to have that protest heard at the agency level, with further judicial review available.² This means that the Conservation Groups and their members are entitled to protest applications for new, amended or changed rights.

Moreover, as the Idaho Supreme Court held in Hardy v. Higginson, supra, the "local public interest" as used in I.C. §§ 42-203A(5) and 42-222(1) specifically allows protestants to oppose applications for a new, amended or changed right on grounds of "locally important factors," even if they do not own water rights, property, or reside in the immediate area. Based on the extensive discussion of relevant considerations in Shokal

² For new applications, "[a]ny person, firm, association or corporation concerned in any such application" may file a protest on which a hearing must be held, with judicial review available. See I.C. 42-203A(4)-(6). For changes in existing rights, "anyone who desires to protest the proposed change" may file a protest and receive a hearing, and "any person or persons feeling themselves aggrieved" by the department's determination may seek judicial review. See I.C. 42-222(1) & (3).

v. Dunn, 109 Idaho 330, 707 P.2d 441 (1985), Hardy explains that the "local public interest" embraces a variety of concerns including "recreation and tourism" as well as "aesthetic and environmental ramifications." Id. Thus, persons who recreate, fish, or enjoy the aesthetic or environmental qualities of a particular area affected by an application for a new, amended or changed water right are entitled to raise protests on "local public interest" grounds, whether or not they live or own water rights or property in the area. Id.

These statutory requirements for notice, protest, hearing and judicial review under I.C. 42-203A, 42-211 and 42-222 represent important procedural and substantive rights of those persons who may desire to oppose a new, amended or changed water right on "local public interest" or other statutory grounds. E.g., Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148 (1982). In particular, they are rights enjoyed by the Conservation Groups and their members, who (as set forth above) fish, swim, boat, and otherwise recreate in the waters to be adjudicated within the SRBA; who own water rights or property within the SRBA region; and who otherwise enjoy and appreciate aesthetic and environmental values associated with water quality, water quantity, and aquatic and riparian habitat within the scope of the SRBA.

Moreover, under 42-1416 and 42-1416A, where new, amended or changed water rights are claimed in the SRBA, but have not been permitted by the director of Water Resources, such claimed rights

must comply with the substantive criteria of 42-203A or 42-222 before they can be decreed by the SRBA court. The Conservation Groups seek to ensure that "local public interest" and related concerns are fully considered in this proceeding, and that the claimed right does not conflict with such concerns -- or that appropriate conditions or limitations are imposed upon the claimed right to prevent undue conflict with local public interest and related concerns. The SRBA Court has recognized these interests of the Conservation Groups, through its Order Granting, In Limited Part, Motion To Reconsider (filed January 14, 1994).

C. Interests In "Water Spreading"

The Conservation Groups and their members also have interests in this proceeding because the issue of "water spreading" of Bureau of Reclamation project water is involved.

As set forth in the accompanying Affidavit of Marti Bridges, "water spreading" involves illegal or unauthorized uses of Bureau water in various ways, including uses outside district boundaries, expansions or changes in seasons or places of use, water "stacking," or outright use of water where there is no contractual right. Water spreading is a significant problem in Idaho and the Northwest generally; and the Bureau of Reclamation has instituted various measures (including a task force of which IRU Water Policy Director Marti Bridges is a member) to address the issue. Id.

Since water spreading involves water usage which is not

authorized under federal law or regulations -- yet the water use is through projects financed by taxpayers and citizens of the states, including Idaho -- the Conservation Groups have direct and legitimate interests in addressing the problem. Further, water spreading may affect Conservation Groups' interests in river flows, water quality, riverine ecology, health of the Snake Plain Aquifer, and others.

III. MOVANTS MAY INTERVENE AS OF RIGHT

The Conservation Groups fulfill the requirements for intervention as of right under Rule 24(a) of the Idaho Rules of Civil Procedure. Rule 24(a) provides as follows:

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 he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The Idaho Supreme Court "has consistently adhered to the view that the statutes providing for intervention should be given a liberal construction." Herzog v. City of Pocatello, 82 Idaho 505, 509, 356 P.2d 54 (1960).³ Federal courts, interpreting the identical test in the Federal Rules, likewise hold that "[t]he rule is construed broadly in favor of applicants for intervention." U.S. v. State of Oregon, 913 F.2d 576, 587 (9th

³ Although Herzog dealt primarily with permissive intervention under Rule 24(b), the intent of the Court to apply a broad interpretation to all types of intervention is clear.

Cir. 1990).

Both Idaho and federal courts have laid out a four-part test for intervention under Rule 24(a):

1. The application must be timely;
2. The applicant must have a demonstrable interest in the subject of the litigation;
3. Disposition of the action may impair or impede the applicant's ability to protect its interest; and
4. The existing parties may not adequately represent the applicant's interest.

Duff v. Draper, 96 Idaho 299, 527 P.2d 1257, 1259 (1974); Blake v. Pallen, 554 F.2d 947, 952 (9th Cir. 1977). All four requirements are met here.

A. The Application For Intervention Is Timely

In its April 20, 1993 Order, the SRBA Court denied the Conservation Groups' previous intervention motion without prejudice, and held it was "timely filed." Order Denying Motion in the Adjudication Case (April 20, 1993), at 2. The Order specifically permits the Conservation Groups to file subsequent motions to intervene accompanying timely pleadings.

Pursuant to that Order, the Conservation Groups filed their original Objections and Motion to Intervene in these sub-cases. That motion was denied by Special Master Dolan, in the Order Denying Motion for Leave to Intervene (filed January 25, 1994), based on the Order Granting, In Limited Part, Motion to Reconsider, issued by Judge Hurlbutt on January 14, 1994. The January 25th Order permitted the Conservation Groups' to file this Amended Motion To Intervene and amended objections.

Accordingly, movants have satisfied the timeliness requirement of I.R.C.P. 24(a).

B. The Conservation Groups Claim Interests In The Basin-wide Proceeding

Rule 24(a)(2) requires that an applicant claim "an interest relating to the property or transaction which is the subject of the action." Although Idaho courts have not spoken directly on this issue, the U.S. Supreme Court held that the interest claimed by the applicant in intervention does not have to be a direct interest in the property or transaction at issue, provided that it is an interest that would be impaired by the outcome. Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 135-36, 87 S.Ct. 932 (1967).⁴

Further, the Ninth Circuit has held the "interest" test thus does not require a party seeking intervention to prove "standing." Yniguez v. Arizona, 939 F.2d 727, 737 (9th. Cir. 1991); Portland Audobon Society v. Hodel, 866 F.2d 302, 308 n. 1 (9th. Cir. 1988). Instead, the "interest" required for intervention includes any legally protectable interest, and is not limited to a specific legal or equitable right. Blake v.

⁴ Other circuits also take a broad view of the interest test. "To [strictly] require that the movant in intervention have a direct interest in the outcome of the lawsuit strikes us as being too narrow a construction of Rule 24(a)(2)." Natural Resources Defense Council v. Nuclear Regulatory Commission, 578 F.2d 1341, 1344-45 (10th Cir. 1978) (emphasis in original). "We know from the recent amendments to the civil rules that in the intervention area the 'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." Nuesse v. Camp, 385 F.2d 694, 700 (D.C. Cir. 1967).

Pallen, 554 F.2d at 952-54.

Moreover, the Ninth Circuit has taken a broad view of intervention by conservation groups, finding an "interest" under Rule 24(a)(2) for "environmental, conservation and wildlife interests." Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525 (9th Cir. 1983) (refuting argument that the interest test requires an applicant to have a property interest at stake in the action).

Here, as set forth in section II above, the Conservation Groups and their members assert protectable interests in the issues raised in this proceeding, including their interests in water resources that will be directly affected by the right claimed here, their rights to raise "local public interest" and other grounds with respect to the claimed rights, and their interests in "water spreading." These interests have been recognized, in part, by Judge Hurlbutt's January 14th Order Granting, in Limited Part, Motion to Reconsider.

Accordingly, they amply meet the "interest" requirement of I.R.C.P. 24(a).

C. The Conservation Groups Are So Situated That The Disposition Of This Proceeding May As A Practical Matter Impair Or Impede Their Ability To Protect Their Interests

The Idaho Supreme Court in Pittock v. Buck, 15 Idaho 47, 96 P. 212, 214 (1908), citing People ex rel. Glidden v. Green, 1 Idaho 235 (1869), declared that in order to be sufficient to intervene of right, an interest "must be in the matter in litigation, and of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation

and effect of the judgment."

In 1974, the Court refined this view, stating that

The language of Rule 24(a)(2) indicates that the drafters did not contemplate that the petitioner in intervention be required to show that [the petitioner] "is" bound by the judgement. . . . It was sufficient that . . . the applicant "may" be bound by a judgment in the action.

Duff v. Draper, 527 P.2d at 1260.

As shown above, the Conservation Groups have direct interests in the "matter" of this proceeding. Those interests are go directly to the Conservation Groups' 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. For example, if the Conservation Groups are denied intervention, their interests in ensuring that all relevant "local public interest" and other concerns are addressed in this proceeding will be affected; and their interests in the affected water resources may be damaged. Further, their interests in the water spreading issue will be impaired. Accordingly, the third requirement of I.R.C.P. 24(a) is satisfied.

D. The Conservation Groups' Interests Are Not Adequately Represented By Existing Parties

The Court in Duff v. Draper stated that "[t]he language of Rule 24(a)(2) indicates that the drafters did not contemplate that the petitioner in intervention be required to show that the representation 'is' inadequate. . . . It was sufficient that the petitioner show that the representation 'may' be inadequate." 527 P.2d at 1260. As set forth above, the interests of the

Conservation Groups at stake include their interests in the fish, wildlife, recreation and other public values in the Snake River Basin; their rights to protect those interests through raising issues such as the "local public interest," where new water rights or where changes in water rights are claimed; and their interests in "water spreading."

No other party represents these interests of the Conservation Groups and their members. No party will raise the same legal and factual arguments as the Conservation Groups will raise. No other party to this proceeding is a public interest group, with interests in protecting the public's rights in connection with the waters of the Snake River Basin. Therefore, no other party will represent these interests as adequately and as vigorously as the Conservation Groups will, such that the fourth requirement of I.R.C.P. 24(a) is met.

Intervention should be granted when there is any question at all over whether existing parties will adequately represent the intervenor-applicant's interests. Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525 (9th Cir. 1983), involved an action by Sagebrush Rebellion, Inc. against Secretary of Interior Watt challenging the legality of former Secretary Andrus' recommendation of the creation of a Snake River Birds of Prey National Conservation Area in Idaho and the withdrawal of nearly 500,000 acres of land in the area from selection and entry under the Desert Lands and Carey Acts. The court held that the Idaho Conservation League, the Idaho Wildlife Federation, several other

non-profit Idaho organizations with environmental, conservation and wildlife interests, and four individuals, should be allowed to intervene. The court stated that it "consistently followed Trbovich v. United Mine Workers, 404 U.S. 528, 538 n. 10, 92 S.Ct. 630, 636 n. 10 (1972) in holding that the requirement of inadequacy of representation is satisfied if the applicant shows that representation of its interests *may* be inadequate and that the burden of making this showing is *minimal*." Sagebrush at 528 (emphasis added).

Ninth Circuit courts have also approved intervention as a means to facilitate information gathering. They acknowledge the value of the contributions that intervenors can make to issue resolution and judicial decision-making, and are inclined to allow intervention for this reason. See, e.g., Sagebrush Rebellion, 713 F.2d at 528 ("In addition to having expertise apart from that of the Secretary, the intervenor offers a perspective which differs materially from that of the present parties to this litigation."); Blake v. Pallen, 554 F.2d 947, 954-55 (9th Cir. 1977) (a factor to consider in determining whether there is already adequate representation is: "if permitted to intervene, would the intervenor add some necessary element to the proceedings which would not be covered by the parties to the suit?"); County of Fresno v. Andrus, 622 F.2d 436, 438-39 (9th Cir. 1980) (same).

Here, the Conservation Groups intend to raise unique arguments and will offer a perspective on issues raised by this

proceeding different from any other party. Accordingly, the Court should grant intervention.

IV. PERMISSIVE INTERVENTION

In the alternative, movants request permissive intervention, under which they clearly meet the requirements of Rule 24(b) of the Idaho Rules of Civil Procedure. Rule 24(b) states:

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. . . . 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.

In interpreting this rule, the Supreme Court of Idaho stated that it "has consistently adhered to the view that statutes providing for intervention should be given a liberal construction." Herzog v. City of Pocatello, 82 Idaho 505, 356 P.2d 54, 55 (1960). "Under Rule 24(b)(2), I.R.C.P., the court has discretion to permit anyone to intervene whose claim or defense has a question of law or fact in common with the main action." Id. This is a lower burden than the interest test for intervention of right under Rule 24(a)(2). "Under [Rule 24(b)(2)] there is no requirement that the intervener shall have a direct or personal pecuniary interest in the subject of the litigation." Herzog, 356 P.2d at 56.

Here, permissive intervention is appropriate because the interests raised by the Conservation Groups involve questions of law or fact common to the issues to be resolved in this sub-case.

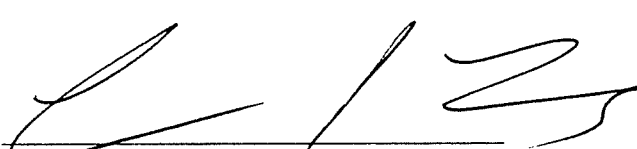
Moreover, as noted above, this motion is timely, such that intervention by the Conservation Groups will not unduly delay this proceeding or unfairly prejudice the rights of any parties. In Herzog, the court found that because the motion to intervene in that case was timely, "we feel that there is no merit to the finding that to permit the intervention would unnecessarily and unreasonably delay the trial of the issues between the original parties." Herzog, at 56. Accordingly, permissive intervention should be granted here if intervention of right is not.

V. CONCLUSION

For the foregoing reasons, the Conservation Groups respectfully request that their Amended Motion For Leave To Intervene be granted.

Dated: February 25, 1994 Respectfully submitted,

LAND AND WATER FUND OF THE ROCKIES



By: Laird J. Lucas

Attorneys for Conservation Groups

CERTIFICATE OF SERVICE

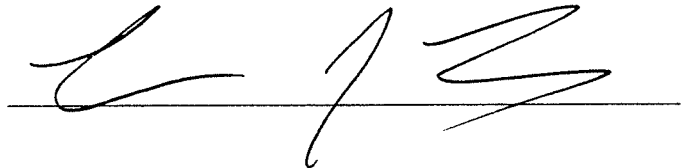
I certify that a true and correct copy of the foregoing Amended Motion for Leave to Intervene, Amended Objection, and Affidavit of Marti Bridges was mailed on February 25, 1994, with sufficient first-class postage prepaid, to the following:

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A handwritten signature in black ink, appearing to read 'R. Ling', is written over a horizontal line.