

RECEIVED 4-18 ✓
APR 18 1994
Department of Water Resources
Adjudication Bureau

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

Attorney Name: Laird J. Lucas
& Address: Land and Water Fund of the Rockies
Idaho Office
P.O. Box 1612
Boise, ID 83701
(208) 342-7024

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)
)

REPLY IN SUPPORT OF AMENDED
MOTION FOR LEAVE TO INTERVENE

DESCRIPTIVE SUMMARY

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

INTRODUCTION

The claimant of the water rights in question -- the United
States of America, acting through the Bureau of Reclamation --
has not objected to the amended intervention motion of the

Conservation Groups.¹ Neither has the State of Idaho objected. That fact that both these public representatives consent to participation of the Conservation Groups should be given considerable weight by this Court in determining the intervention motion.

Indeed, the only party opposing the Conservation Groups' intervention is A&B Irrigation District ("A&B"), a private contractual user of waters under these claims, which is opposed to any public interest review of its water usage. A&B's opposition fundamentally goes to the merits of the Conservation Groups' Amended Objection, which A&B claims have no foundation. However, the proper level of inquiry here is whether the Conservation Groups have adequately alleged interests in these sub-cases, sufficient to satisfy the requirements for intervention by right under I.R.C.P. 24(a); or for permissive intervention under I.R.C.P. 24(b). The Conservation Groups believe that they have easily passed both thresholds, and thus should be granted intervention to litigate the merits of their objection.

That said, the Conservation Groups do agree with A&B that it probably makes sense to stay these proceedings, and any decision on intervention, until there has been further clarification on several fronts about the future course of the adjudication generally, and of the Conservation Groups' role in it. Those

¹ Idaho Conservation League, Idaho Rivers United, Idaho Wildlife Federation, and Northwest Resource Information Center.

fronts include:

-- Decision by the Idaho Supreme Court on the Conservation Groups' appeal of the SRBA Court's denial of intervention to them in order to raise the Public Trust Doctrine in the SRBA. That appeal has been expedited by the Supreme Court, is being briefed, and will be argued May 9th.

-- Enactment of H.B. 969 and H.B. 990 by the Idaho legislature on April 1, 1994, which alters many aspects of the SRBA and raises many questions about the future course of the adjudication. The constitutionality of those provisions have apparently already been challenged in the SRBA court by Hagerman Water Users Association; and undoubtedly will be the subject of basin-wide proceedings in the near future. The Conservation Groups may pursue claims in those proceedings that the "local public interest" cannot be written out of the SRBA in connection with changed water rights, such as those claimed in these sub-cases.

In summary, the Conservation Groups believe that they have satisfied the requirements for intervention; but they concur that staying these sub-cases pending further developments probably makes sense.

ARGUMENT

I. THE CONSERVATION GROUPS HAVE SATISFIED THE REQUIREMENTS FOR INTERVENTION

A. Intervention Is To Be Liberally Granted

A&B's opposition to the Conservation Groups' amended intervention motion principally attacks the merits of the

Conservation Groups' objections.² However, the question presented is not whether the Conservation Groups will ultimately prevail in the sub-case litigation, but whether they should even participate in these proceedings.

A&B ignores the rule, as pronounced by the Idaho Supreme Court, that intervention should be liberally granted, and that the showing required for intervention is minimal. See Herzog v. City of Pocatello, 82 Idaho 505, 509, 356 P.2d 54, 55 (1960) ("This Court has consistently adhered to the view that the statutes providing for intervention should be given a liberal construction"); Duff v. Draper, 96 Idaho 299, 527 P.2d 1257, 1259-61 (1974) (intervention appropriate where applicant's interest "may" be affected). Federal courts construing the identical federal intervention rule have likewise emphasized that intervention is favored. See Trbovich v. United Mine Workers, 404 U.S. 528, 538 n. 10 (1972); Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 528 (9th Cir. 1983) (following Trbovich, 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*"); U.S. v. State of Oregon, 913 F.2d 576, 587 (9th Cir. 1990) (Rule 24(a) "is construed broadly in favor of applicants for intervention").

² For example, A&B pronounces as "frivolous" and "spurious" the allegations that water spreading is a problem in Idaho, but it does not -- and cannot -- deny that water spreading has occurred in connection with the waters claimed here.

A&B also ignores the fact that the interests required for intervention do not have to be actual property interests, as long as they are legally cognizable. See Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 135-36, 87 S.Ct. 932 (1967); Blake v. Pallen, 554 F.2d 947, 952-54 (9th Cir. 1977). Further, the U.S. Court of Appeals for the Ninth Circuit has specifically rejected A&B's argument that intervenors must prove "standing" on top of meeting the requirements for intervention. Yniguez v. Arizona, 939 F.2d 727, 737 (9th Cir. 1991); Portland Audubon Society v. Hodel, 866 F.2d 302, 308 n. 1 (9th Cir. 1988).³ Many courts -- both state and federal -- have recognized that conservation groups may properly intervene to protect environmental, recreational, and aesthetic interests of the kinds alleged by the Conservation Groups here. Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525 (9th Cir. 1983); Hardy v. Higginson, 123 Idaho 485, 849 P.2d 946 (1993); Shokal v. Dunn, 109 Idaho 330, 707 P.2d 441 (1985).

B. The Conservation Groups Claim Cognizable Interests In The Subject Waters

Leaving aside the question of the "local public interest," the Conservation Groups have adequately alleged two sets of interests in the waters that are the subject of this proceeding.

First, the Conservation Groups have alleged general environmental, recreational, aesthetic and other interests in the

³ "Standing," of course, has developed in federal courts as part of the Article III "case or controversy" requirement -- a requirement that does not apply to Idaho state courts.

waters of Basin 36 generally; and in the waters that are the subject of the instant claims. Second, the Conservation Groups have also adequately alleged interests in the issue of "water spreading," which is undeniably present in these sub-cases. Since the opening brief explicated these interests in detail, they will not be re-hashed here. These interests thus justify granting intervention, whether or not the "local public interest" is to play a role in the adjudication of the rights claimed in these sub-cases.⁴

It is erroneous for A&B to claim these interests are irrelevant or not cognizable in these sub-cases, simply because groundwater pumping is at issue. As every irrigator in the State of Idaho must now know -- following the recent Musser decision⁵ and the IDWR's promulgation of "conjunctive management" rules -- ground and surface water in the Snake River Plain are hydrologically interconnected. Diversions as large as the ones in the present rights -- some 1100 cfs total -- can and do affect both ground water levels and surface flows. Whether or not A&B is ultimately found to be correct in its claim that these diversions do not impact any interests of the Conservation Groups

⁴ A&B wrongly contends that 36-2080 is only a licensed rights, to which "local public interest" objections are inappropriate under the SRBA Court's January 14, 1994 Order. The director's report for 36-2080 expressly states: "Right includes accomplished change in point of diversion pursuant to Idaho Code 42-1416A. Right includes accomplished change in place of use pursuant to Idaho Code 42-1416A." Director's Report for Basin 36, page A-1052.

⁵ Musser v. Higginson, No. 20807, 1994 Opinion No. 23 (Idaho Supreme Court, 2/28/94), petition for rehearing pending.

or their members is a matter for resolution through the litigation process (i.e., trial or summary judgment), but it is not a valid basis for denying intervention.

The Conservation Groups do agree with A&B that advancing these interests is not necessarily the same as the statutory "local public interest," which is the third basis for their amended intervention motion (although the local public interest may embrace similar concerns). But they disagree with A&B when it claims that the SRBA Court's January 14, 1994 Order precludes them from alleging such interests as grounds for intervention. The January 14th order certainly did not address the question of "water spreading," nor did it address the general interests of the Conservation Groups in environmental protection, recreational use, and other interests in the Snake River and its tributaries. Thus, it would be improper to read the January 14th Order as requiring denial of the amended motion to intervene on that ground.

In summary, the Conservation Groups respectfully submit that they have satisfied the test for intervention in this matter. The lack of objection from either the claimant, or the State of Idaho, demonstrates that granting intervention would be appropriate.

II. A STAY OF THE PROCEEDINGS MAY BE APPROPRIATE

While the Conservation Groups are willing to submit the intervention motion for decision now, they do agree with A&B that it may make better sense from the perspective of judicial economy

to stay these proceedings pending further developments in related fora.

First, the Idaho Supreme Court on March 22, 1994 set an extremely expedited schedule on the Conservation Groups' appeal of the SRBA Court's January 14th Order denying intervention to raise the Public Trust Doctrine.⁶ A&B Irrigation District is a respondent in that appeal, as is the State of Idaho. Opening briefs have already been filed, and argument is set for May 9, 1994. Thus, a decision on this issue can be expected from the Supreme Court reasonably soon. Obviously, if the Supreme Court reverses the SRBA Court's January 14th order denying them intervention, and allowing public trust objections to be raised by the Conservation Groups, such ruling would compel granting intervention to the Conservation Groups in these sub-cases.

Second, enactment of H.B. 969 and 990 by the Idaho legislature raises numerous issues that should probably be resolved in another forum (i.e., the SRBA court, per Judge Hurlbutt, and/or the Idaho Supreme Court), before intervention in this case is determined. Those include questions of whether the Idaho legislature can amend the SRBA statutes and procedures while the adjudication is on-going; the constitutionality of the newly-revised presumption and accomplished transfer statutes; and -- an question which the Conservation Groups contemplate raising -- whether the legislature can eliminate public interest

⁶ A copy of the March 22nd order from the Supreme Court is attached as Exhibit 1.

review with respect to changed water rights claimed in the SRBA.

Clive Strong, Deputy Attorney General, publicly stated in the H.B. 969 legislative hearings that the State of Idaho would seek quick resolution of the constitutionality of the new statutes; and Hagerman Water Rights Owners Ass'n has apparently already filed a motion seeking to designate the validity of the new statutes as a basin-wide proceeding. Since resolution of these questions could impact the present motion to intervene, it probably makes sense to await those decisions before proceeding further here.

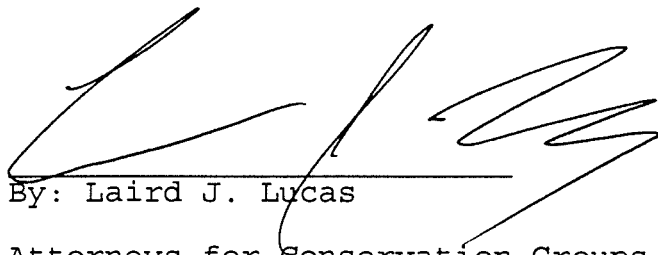
CONCLUSION

For the foregoing reasons, the Conservation Groups respectfully request that their Amended Motion For Leave To Intervene be granted; or alternatively, that these sub-cases be stayed for an appropriate period, pending further developments in the SRBA Court and the Idaho Supreme Court.

Dated: April 14, 1994

Respectfully submitted,

LAND AND WATER FUND OF THE ROCKIES


By: Laird J. Lucas

Attorneys for Conservation Groups

CERTIFICATE OF SERVICE

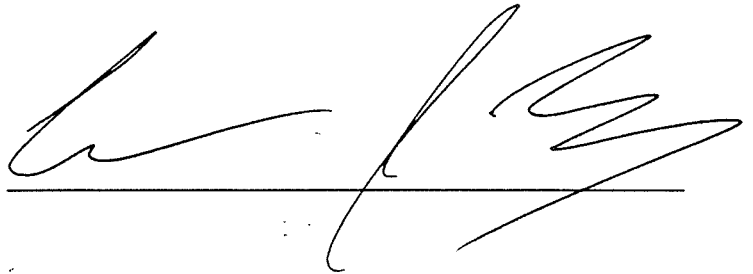
I certify that a true and correct copy of the foregoing Reply Re: Amended Motion for Leave to Intervene, was mailed on April 14, 1994, with sufficient first-class postage prepaid, to the following:

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
P.O. Box 2707
Twin Falls, Idaho 83303-2707

Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, Idaho 83711-4449

Daria Zane
United States Department of Justice
Environment and Natural Resource Division
550 West Fort Street, Box 33
Boise, Idaho 83734

Roger Ling
PO Box 396
Rupert Idaho 83350

A handwritten signature in black ink, appearing to read 'Roger Ling', is written over a horizontal line. The signature is stylized and cursive.

In the Supreme Court of the State of Idaho

IN RE: SRBA - CASE NO. 3976.)

-----)
IDAHO CONSERVATION LEAGUE, INC.,)
ET AL,)

Petitioners-Appellants-)
Cross Respondents,)

v.)

STATE OF IDAHO; ET AL,)

Respondents,)

and)

BOISE-KUNA IRRIGATION DISTRICT;)
ET AL,)

Respondents-Cross)
Appellants.)

ORDER EXPEDITING APPEAL,
SETTING DUE DATES FOR
APPEAL RECORD AND RECORD
AND DATE FOR ORAL ARGUMENT

NO. 21144

The Court has determined to expedite the Appeal Record, briefing and oral argument in this appeal; therefore, good cause appearing,

IT HEREBY IS ORDERED that this appeal shall be retained by this Court and proceedings shall be EXPEDITED as follows:

1. Reporter's Transcript and Clerk's Record shall be served on the parties and filed with this Court on or before March 25, 1994. Settlement of the Reporter's Transcript and Clerk's Record in the District Court shall be waived and any corrections shall be filed in this Court as provided by I.A.R. 30.1 within seven (7) days from the service date.

2. Appellants' brief and Cross-Appellants' briefs shall be filed with this Court and served on the parties no later than April 8, 1994.

3. Respondents' brief and Cross-Respondents' briefs shall be filed with this Court and served on the parties no later than April 22, 1994.

4. Any Appellants' reply brief and any Cross-Appellants' reply briefs shall be filed with this Court and served on the parties no later than April 29, 1994.

5. Oral argument is scheduled for Monday, May 9, 1994, at 11:10 a.m. in the Supreme Court Building, Boise, ID.

6. No requests for extension of time to file any brief shall be granted nor shall proceedings be suspended by the filing of any motions for the reason this appeal has been expedited for consideration by the Court.

7. Service of briefs by the respective parties shall be by the most expeditious means, such as personal delivery, overnight mail service or Federal Express.

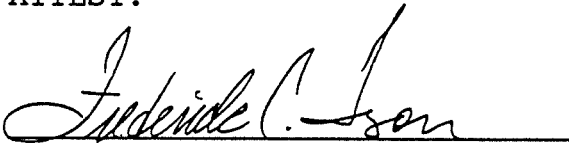
DATED this 22nd day of March, 1994.

By Order of the Supreme Court



Chas. F. McDevitt, Chief Justice

ATTEST:



Frederick C. Lyon, Clerk

cc: Counsel of Record
District Court Clerk
District Judge Daniel C. Hurlbutt
Reporter Schneberger