

describe the essence of the court's decision as follows:

The Court observed that the Association neither objected to the United States' claim of ownership nor filed a competing claim for ownership of the subject water rights. It is thereby undisputed that the Association is not the legal owner of the water rights at issue in this case. It is also undisputed that the Association has filed no water right claims in the SRBA. See e.g., Affidavit of David Shaw, dated February 23, 1995. Thus, based on these undisputed facts, the Court held that the Association lacked standing and granted the motions to dismiss.

Joint Opposition at 2.

The "undisputed" facts are three: 1) The FHWUA did not object to the United States' ownership of the rights;¹ 2) that the FHWUA did not file a competing claim; and 3) that the FHWUA has not filed water right claims in the SRBA. The legal conclusion that the FHWUA has no interest in the water rights involved within the contemplation of I.C. §42-1401A does not follow.

¹ The pleadings set forth the following allegations with respect to "ownership" of the claim filed for the non-Indian water:

Notice of Claim:

"1. Name of Claimant (s) UNITED STATES OF AMERICA"

"14. Remarks SEE ATTACHED. THE WATER RIGHTS ARE CLAIMED BY THE UNITED STATES FOR USE ON LAND OWNED BY NON-INDIAN INDIVIDUALS WHICH ARE SERVED BY THE FORT HALL IRRIGATION PROJECT."

Partial Final Decree:

"WATER RIGHTS HELD BY THE UNITED STATES FOR USE ON NON-INDIAN OWNED LANDS ON THE FORT HALL IRRIGATION PROJECT AND FOR THE BUREAU OF INDIAN AFFAIRS, FORT HALL AGENCY." Page 50 Partial Final Decree.

Nothing in the pleadings define in any way the "contract" relationship between the United States and the members of the FHWUA.

FHWUA'S REPLY TO THE JOINT
OPPOSITION TO THE MOTIONS TO
AMEND AND FOR RECONSIDERATION 2

The FHWUA is uncertain just what the joint movants mean by “legal owner,” but apparently they believe that ownership within the contemplation of the SRBA statutes means absolute ownership. Black defines ownership as “[t]he right of one or more persons to possess and use a thing to the exclusion of others.” By this definition, the United States is not the “owner” of the rights in question because it neither possesses nor uses the water. In the Partial Final Decree -- the only thing to which objections could be filed -- the United States posits that the “water right [is] held by the United States for use on non-Indian owned lands on the Fort Hall Irrigation Project,” i.e., the members of the FHWUA. The rights are “held” by the United States not for its benefit, but for the benefit of the members of the FHWUA.

In this regard, the SRBA statutes do not limit potential “claimants” to absolute owners. As we have noted, I.C. §42-1401A creates two classes of claimants, viz., “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.” Without discussing the “second prong” of the statute, the joint movants make the following statement:

The Court’s logic is unassailable. The Association lacks standing because it has failed to properly plead the necessary facts. . . . [A]gain there are no assertions in the pleadings that the Project water rights claimed by the United States are claimed “on behalf of” the Association.

Joint Opposition at 5. There is nothing in the SRBA statutes in general, however, and nothing in §42-1401A in particular that requires a “second prong” claimant to make a statement on his objection form that is redundant of the statutory language that allows him to file the objection.

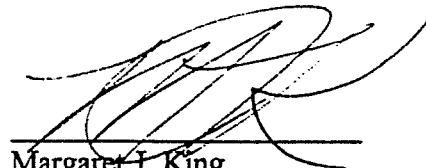
Accordingly, the FHWUA cannot be accused of failing “to properly plead the necessary

facts.” The joint movants now maintain that their motion to dismiss asserted that the FHWUA lacked standing because it was neither a first prong claimant nor a second prong claimant. The motion, however, was based solely on the assertion that the FHWUA was not a claimant in the SRBA because it had filed no claim. See Affidavit of David B. Shaw. Nowhere in the motion to dismiss is there a legal assertion that the members of the FHWUA are not persons on whose behalf the claim was filed, and the joint movants did not provide any evidence of such a proposition. Had they done so, the FHWUA would have responded with facts proving them patently wrong. As the Idaho Supreme Court has held, the FHWUA has no responsibility whatsoever to “respond as to all issues and submit factual materials on all issues, even though those ‘issues’ have not been asserted.” Thomson v. Idaho Insurance Agency, ___ Idaho ___, 887 P.2d 1034, 1038 (1994).

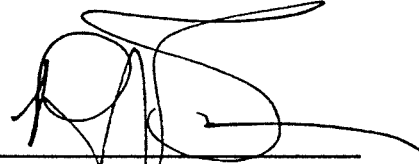
As to the issue of standing, the court has held that a non-moving party on a motion for summary judgment is properly saddled with the burden of divining issues not raised in the motion and responding to them both legally and factually. The FHWUA respectfully suggests that such a burden is impossible to meet.

DATED this 31st day of May, 1995.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

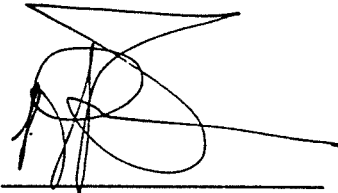
I hereby certify that on this 31st day of May, 1995, I caused true and correct copies of the foregoing FHWUA'S REPLY TO THE JOINT OPPOSITION TO THE MOTIONS TO AMEND AND FOR RECONSIDERATION were served by placing the same with the United States mail, first class postage prepaid addressed as follows:

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

Richard A. Simms