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BEFORE THE BOARD OF ENVIRONMENTAL QUALITY

IN THE MATTER OF SECTION 401)	Docket No. 0102-01-06
WATER QUALITY CERTIFICATION)	
FOR RELICENSING OF THE C.J.)	RECOMMENDED ORDER ON MOTIONS
STRIKE HYDROELECTRIC FACILITY)	FOR SUMMARY JUDGMENTS
_____)	

This matter is before the Hearing Officer based upon Motions for Summary Judgment filed by each of the parties and the Motion to Strike filed by Idaho Power. Oral argument was conducted on May 14, 2002. The Department of Environmental Quality was represented by Deputy Attorney General, Douglas Conde. Petitioners, Idaho River United and American Rivers, were represented by their attorneys William Eddie and Laird Lucas. Idaho Power was represented by Travis Thompson.

FINDINGS OF FACTS

On September 14, 2001, Idaho Power made application to the Idaho Department of Environmental Quality for a Section 401 Water Quality Certification as part of its application for relicensing of the C.J. Strike Hydroelectric Project. Relicensing is required by

the Federal Energy Regulatory Commission and as part of that process, Idaho Power must receive a Section 401 Water Quality Certification from the State of Idaho certifying that the project will comply with applicable provisions of the Clean Water Act and State Water Quality standards.

DEQ provided public notice of Idaho Power's request in a notice of July 2, 2001. A public hearing was conducted August 13, 2001, at which the Petitioners appeared and offered testimony in opposition to the request.

On September 13, 2001, DEQ issued a Section 401 Water Quality Certification. The request for certification by Idaho Power was dated September 14, 2000. The State has one (1) year from the date of the request for Certification to determine whether to issue the Certification. (See DEQ Idaho 401 Guidance document.)

Paragraph 4 of the Section 401 Certification of September 13, 2001, notes the segment of the Snake River within which the C.J. Strike facility is located is listed as water quality limited under Section 303(d) of the Clean Water Act. The Bruneau arm of the C.J. Strike reservoir is also listed as water quality limited. Consequently, DEQ is required to develop and submit to the United States Environmental Protection Agency "total maximum daily loads" or TMDLs for those water bodies. However, DEQ will not have the C.J. Strike TMDLs completed until January, 2005. TMDLs for the

Quality would control this pending proceeding, with the exception that Idaho Power reserved its right to subsequent appeal and appellate review of denial of their Motion to Dismiss.

CONCLUSIONS OF LAW

All parties filed separate Motions for Summary Judgment, including various supporting affidavits. IDAPA 58.01.23.213 provides that motions allowed by the Idaho Rules of Civil Procedure may be brought in DEQ proceedings. Subsection 02 specifically provides that Motions for Summary Judgment shall be governed by the Idaho Rules of Civil Procedure with respect to form, standards for determining the motion, procedures and time frames. It is well settled that summary judgment shall be rendered if the pleadings, together with any affidavits, show there is no genuine issue as to any material facts and the moving party is entitled to a judgment as a matter of law. Rule 56(c), I.R.C.P.

IDAHO POWER'S MOTIONS TO STRIKE

In response to Idaho Power's Motion for Summary Judgment, Petitioners filed affidavits of Rob Masonis, Sara Eddie and Dan Skinner. Idaho Power moved to strike the affidavits upon the grounds the affidavits of Sara Eddie and Dan Skinner are conclusory, speculative, lack foundation and are not based upon

personal knowledge. Idaho Power contends the affidavit Robert Masonis is not based upon personal knowledge.

In support of its Motion, Idaho Power cites Rule 7, Idaho Rules of Civil Procedure. Rule 7(b)(1), Idaho Rules of Civil Procedure, merely provides that applications to the court shall be made by motion. It is not clear how Idaho Power contends the Petitioners' affidavits would violate that Rule. Other subsections of Rule 7 are similarly inapplicable.

Idaho Power further cites Idaho Rules of Evidence, Rule 402 and 602. Rule 402 provides generally that evidence which is not relevant is not admissible. Rule 602 requires that testimony provided through a witness must be based on personal knowledge. Each of the affidavits submitted by Petitioners state the affiants have personal knowledge of the facts set forth in their affidavits and Idaho Power has failed to point to any specific allegations in the affidavits which are allegedly not based on personal knowledge.

Finally, Idaho Power argues the affidavits do not comport with Rule 56(e), Idaho Rules of Civil Procedure. That Rule provides supporting and opposing affidavits on motions for summary judgment must be made on personal knowledge and shall set forth facts admissible in evidence. Again, Idaho Power has failed to point out or establish the affidavits are not based upon personal knowledge or contain inadmissible evidence.

Snake River above and below C.J. Strike have been completed or will soon be completed.

Paragraph 6 of the Certification noted Idaho Power Company had been and continues to be involved in developing TMDLs for the Snake River. All of the TMDLs are intended to collect information regarding the loading capacity of the Snake River, the sources and contributors of pollutants and development of a plan to achieve State water quality standards on the Snake River. DEQ determined "the completion of the TMDLs is critical in determining water quality issues" relating to the C.J. Strike facility "and any conditions necessary to ensure compliance with State Water Quality Standards." Paragraph 7, September 13, 2001, Certification.

DEQ issued the 401 Certification with conditions which state:

CERTIFICATION AND CONDITIONS

Based on the foregoing, the Department hereby certifies pursuant to Section 401 of the Clean Water Act that, if IPC complies with the conditions listed below, there is a reasonable assurance the C.J. Strike facility will comply with applicable requirements of sections 301, 302, 303, 306 and 307 of the Clean Water Act and the Idaho Water Quality Standards.

1. By January 1 of each year after the date of this certification, and until the C.J. Strike TMDLs are completed, IPC shall pay \$50,000 to the Department to assist in the development of the C.J. Strike and Snake River-Succor Creek TMDLs.
2. After the C.J. Strike, Snake River-Hells Canyon and Snake River-Succor Creek TMDLs are completed, IPC shall implement those

measures determined by the Department to be necessary to achieve allocations assigned to the C.J. Strike facility consistent with state and federal law requirements. The Department's final determination regarding such measures shall be a condition of this 401 certification. The Department shall attempt to reach agreement with IPC regarding such measures before making its final determination.

By Petition received October 18, 2001, Idaho Rivers United and American Rivers appealed DEQ's decision. The Petition was brought pursuant to Idaho Code §39-107(5), the Idaho Administrative Procedure Act and DEQ rules governing contested case appeals and declaratory rulings, citing IDAPA 16.05.03. In their prayer for relief, Idaho Rivers United and American Rivers prayed that a contested case hearing be conducted; that the 401 Certification be reversed and set aside and remanded to DEQ for further proceedings; and for injunctive or declaratory relief including attorney's fees and costs. Idaho Power was granted the right to intervene in the pending Petition.

After the Petition was filed, but before the matter came to hearing, DEQ adopted new Rules of Administrative Procedure Before the Board of Environmental Quality. IDAPA 58.01.23.

Idaho Power filed a Motion to Dismiss the Petition arguing the appeal was filed untimely. That Motion was denied by Order dated January 3, 2002. Thereafter, the parties stipulated the new Rules of Administrative Procedure Before the Board of Environmental

Based upon the foregoing, Idaho Power's Motion to Strike the affidavits of Robert Masonis, Sara Eddie and Dan Skinner is DENIED.

IDAHO POWER'S MOTION FOR SUMMARY JUDGMENT

In its Motion for Summary Judgment dated April 17, 2002, Idaho Power requests dismissal of the Petition filed by Idaho Rivers United and American Rivers. Idaho Power filed a memorandum in support of the motion. Idaho Power seeks dismissal of the Petition based upon the argument the Petitioners are not "aggrieved persons" entitled to initiate a contested case appeal and lack standing. Petitioners filed affidavits of three (3) individuals in a effort to establish standing.

The affidavit of Dan Skinner states he is an employee and member of Idaho Rivers United, a non-profit organization dedicated to the conservation of Idaho's rivers and fish. He states he has visited the Snake River below C.J. Strike many times and has camped, boated, hiked, bird watched, mountain biked and flown within the area over the years. Within the last five years, he has floated through the Birds of Prey twice, mountain biked in the area twice, hiked with his wife in the Discovery Park area and float boated on Hells Canyon. He never swims in the Snake River above or below C.J. Strike, except on one occasion, because the water is murky and the water quality has removed swimming from the realm of possibility. Mr. Skinner's affidavit further states, if the river

were clean, he would visit the area more often. He is aware of other members of Idaho Rivers United who use the mid-Snake River for recreation, fishing, bird watching and commercial guiding activities.

The Affidavit of Sara Eddie states she is also an employee and member of Idaho Rivers United, which has approximately 2,000 members. Ms. Eddie's affidavit avers the membership includes numerous commercial outfitters, including whitewater, hunting, fishing and float boat guides who operate throughout Idaho, including the Snake River. She claims such outfitters are injured economically by diminished water quality and degraded fish and wildlife habitat.

Paragraph 2 of Ms. Eddie's affidavit indicates IRU's members wish to protect their privacy. Being involved publically on issues to protect water quality in Idaho is an essential part of Idaho Rivers United conservation mission. Idaho Rivers United actively participates in hydropower relicensing proceedings in Idaho, as well as Clean Water Act proceedings related to hydropower dams, including TMDL formation and 401 certifications. Idaho Rivers United has actively participated in a variety of environmental hearings and proceedings. Idaho Rivers United is a intervenor in all FERC licensing proceedings on the Snake River, including the C.J. Strike project.

Ms. Eddie further states DEQ's certification of C.J. Strike facility impairs Idaho Rivers United's interests and its members' interests in protecting and restoring water quality in the Snake River. She has personally boated, hiked and camped along the Snake River downstream and immediately upstream of the C.J. Strike project. Her enjoyment of the area was hampered by the visual blight created by the C.J. Strike hydropower project.

The two affidavits of Robert Masonis note he is the Director of the Northwest Regional Office of American Rivers. American Rivers is a national, non-profit, conservation organization with 30,000 members nationwide, including 2,000 members in the Pacific Northwest and 200 members in the State of Idaho. Their mission is to preserve and restore free flowing rivers and their landscapes. One of their principal goals is to participate in administrative and legislative advocacy, public education and outreach and litigation to protect and restore healthy river ecosystems. He claims hydropower plants have had many deleterious effects on river ecosystems. American Rivers, like Idaho Rivers United, has intervened in FERC relicensing proceedings and other litigation.

The affidavit of Mr. Masonis generally states American Rivers' members and staff use and enjoy the Snake River for recreational and aesthetic purposes, including fishing, boating, camping, hiking and wildlife viewing. He states he has personally hiked the Snake River in the vicinity of the C.J. Strike project. He submitted a

second affidavit stating that several American Rivers' members are commercial river boat companies in Idaho guiding on the Snake, Salmon, and Lochsa Rivers. Other corporate members are in the river recreation business, such as raft manufacturers and sellers of fishing gear.

With respect to standing, Petitioners have the burden to establish standing. Idaho Code §39-107(5) provides:

Any person aggrieved by an action or inaction of the department shall be afforded an opportunity for fair hearing upon request therefore in writing pursuant to chapter 52, title 67, Idaho Code, and the rules promulgated thereunder.

The Rules of Administrative Procedure Before the Board of Environmental Quality define an aggrieved person as follows:

Any person or entity with legal standing to challenge an action or inaction of the Department, including but not limited to permit holders and applicants for permits challenging Department permitting actions. IDAPA 58.01.23.010.01. (Emphasis added.)

The Idaho Supreme Court has ruled on who is an aggrieved person in the context of the State Administrative Procedure Act. Idaho Code §§67-5270(2) and (3) both refer to judicial review by "a person aggrieved" by a final agency action or order. In the case of In Re: Fernan Lake Village, 80 Idaho 412, 331 P.2d 278 (1958), the Idaho Supreme Court ruled the term "person aggrieved" did not include a city which could not show a direct tangible interest in

a matter. The Court determined an aggrieved person is one who is directly and injuriously affected by the decision and stated:

"Broadly speaking, a party or person is aggrieved by a decision when, and only when, it operates directly and injuriously upon his personal, pecuniary, or property rights.

* * * * *

"The mere fact that a person may be hurt in his feelings, or be disappointed over a certain result, or be subjected to inconvenience, annoyance or discomfort, or even expense, does not constitute him a party 'aggrieved,' since he must be aggrieved in a legal sense. To render a party aggrieved by an order, so as to entitle him to appeal therefrom, the right invaded must be immediate, not merely some possible, remote consequence, or mere possibility arising from some unknown and future contingency; although it has been held that an immediate pecuniary damage is not always prerequisite to the right of appeal." 80 Idaho at 415.

A similar result was reached in the case of Boundary Backpackers v. Boundary County, 128 Idaho 371, 913 P.2d 1141 (1996). In that case, three non-profit membership groups filed an action to declare an ordinance unconstitutional. The Court relied upon the Idaho Supreme Court case of Miles v. Idaho Power Company, 116 Idaho 635, 778 P.2d 757 (1989), regarding rules for determining standing. A determination of standing must focus on the party seeking relief, and not the issues the party wishes to adjudicate. The litigants must allege or demonstrate an injury in fact and a citizen may not challenge a governmental action where the injury is one suffered

alike by all citizens of the jurisdiction. See also, Selkirk-Priest Basin Ass'n v. State, 128 Idaho 831, 919 P.2d 1032 (1996).

Petitioners argue they have "organizational standing" or "associational standing" to represent their members.

In Glengary-Gamlin Protective Ass'n v. Bird, 106 Idaho 84, 675 P.2d 344 (Ct.App. 1984), a case of first impression in Idaho, the Court of Appeals considered the question of organizational standing. In that case, the applicable statute was the Local Planning Act which allowed an "affected person" to be heard on a permit application. The statute defined "affected person" as "one having an interest in real property which may be adversely affected by the issuance or denial" of the permit. 106 Idaho at 87. In that case, it was determined the association had organizational standing because it had been created specifically by landowners directly affected by a proposed aircraft service. The Court of Appeals cited two United States Supreme Court cases which held that, even in the absence of injury to itself, an association may have standing to represent members who are injured. The Court of Appeals quoted from a United States Supreme Court case which held:

[W]e have recognized that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit. 106 Idaho at 87-88.

The association must show it has suffered harm or that one or more of its members are injured. This proof requires particularized allegations of fact. In the Glengary-Gamlin case, the association members lived in the vicinity of the proposed aircraft service and would be directly affected if the permit was granted. As noted, the association must establish that its members have standing to sue in their own right.

In Bear Lake Education Association v. Board of Trustees of Bear Lake School District, 116 Idaho 443, 776 P.2d 452 (S.Ct. 1989), the Idaho Supreme Court addressed associational standing, citing the U.S. Supreme Court case of Warth v. Seldin, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d. 343 (1975). The Idaho Supreme Court ruled standing is that aspect of justiciability which focuses on the party seeking a forum, not on the issue which the party wants adjudicated. The applicable inquiry is whether the plaintiff has alleged a personal stake in the outcome of the controversy which would warrant invoking the court's jurisdiction and which would justify exercise of the court's remedial powers on his behalf. In the Bear Lake case, a local education association brought an action on behalf of its members. The Idaho Supreme Court stated:

In Idaho, the elements of associational standing are derived from the United States Supreme Court's analysis of this issue. Glengary-Gamlin Protective Ass'n. v. Bird, 106 Idaho 84, 675 P.2d 344 (Ct.App. 1984). 116 Idaho at 449.

The Idaho Supreme Court quoted the landmark case of Warth v. Seldin for the proposition that an association may have standing to seek judicial review as a representative of its members. However, the association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action. If such injury to members can be established and if the relief sought does not make the individual participation of injured parties indispensable to proper resolution of the case, the association may be an appropriate representative. In the Bear Lake case, associational standing was upheld because the association negotiated the contract which was being enforced and the contract specifically provided any disagreement regarding interpretation or application could be presented by the association as a grievance.

Various Idaho Supreme Court cases, including a case as recently as March 26, 2002, have addressed the issue of individual standing.

In the case of Young v. City of Ketchum, 02.7 ISCR 328 (S.Ct. March 26, 2002), the Idaho Supreme Court considered a case in which various property owners attempted to challenge a professional services contract between the city and the Chamber of Commerce which was funded by proceeds from a local option tax. The Court determined the property owners lacked standing to invoke the court's jurisdiction. The Idaho Supreme Court reiterated the long

standing rule that a person wishing to invoke a court's jurisdiction must have standing which focuses on the party seeking relief and not on the issues the party wishes to have adjudicated.

The Court stated a litigant must allege or demonstrate an injury in fact and a substantial likelihood that the requested relief will prevent or redress the claimed injury. There must be a showing of a distinct palpable injury and a fairly traceable causal connection between the claimed injury and the challenged conduct. Further, the Court noted, even if one can establish injury in fact, standing may be denied when the asserted harm is a generalized grievance shared by all or a large class of citizens. 02.7 ISCR 329. A concerned citizen seeking to ensure the government abides by the law does not have standing. 02.7 ISCR at 330, citing Student Loan Fund v. Payette County, 125 Idaho 824, 875 P.2d 236 (Ct.App. 1994).

In the Young case, the Court further quoted from Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), in which the United States Supreme Court stated:

"When the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but is ordinarily 'substantially more difficult' to establish." 02.7 ISCR at 330.

The Idaho Supreme Court concluded:

This Court has consistently found a lack of standing in cases in which the plaintiffs were on the same ground as citizens generally. 02.7 ISCR at 330.

Citing, Selkirk-Priest Basin Association, Inc. v. State of Idaho, 128 Idaho 831, 919 P.2d 1032 (1995); Idaho Schools for Equal Educational Opportunity v. Evans, 123 Idaho 573, 850 P.2d 724 (1993); Bobb v. City of Sandpoint, 110 Idaho 488, 716 P.2d 1260 (1986); Greer v. Lewiston Golf and Country Club, Inc., 81 Idaho 393, 342 P.2d 719 (1959).

In a case very similar to the current matter, the Idaho Supreme Court determined that an environmental group did not have standing as "an aggrieved party under the APA." Selkirk-Priest Basin Association, Inc. v. State of Idaho, 128 Idaho 831, 919 P.2d 1032 (S.Ct. 1996). The SPBA is a non-profit organization whose members work in and used the Priest Lake area for recreational and aesthetic enjoyment. The Association appeared before the Land Board challenging compliance of the timber sale with environmental laws. The proposed timber sale was approved over SPBA's protest and SPBA sought to appeal as an "aggrieved party" under the APA. The Idaho Supreme Court stated:

. . . rather, in this case we are asked to determine whether the alleged injury to SPBA's members' recreational and aesthetic use of land confers upon them standing to challenge the administration of the endowment trust plans. 128 Idaho at 833.

The Idaho Supreme Court ruled that SPBA had not demonstrated a distinct and palpable injury so as to confer standing. The Court ruled that SPBA's affidavits did not establish an injury personal to any of its members that is not equally felt by all the citizens of the county or state.

A similar result was reached in the case of Boundary Backpackers v. Boundary County, 128 Idaho 371, 913 P.2d 1141, (S.Ct. 1996). In that case, a non-profit organization attempted to challenge a county ordinance. The non-profit organization submitted multiple affidavits from members and the court determined that only one of the individuals had standing because the affidavits did not demonstrate an injury in fact or a substantial likelihood that the judicial relief requested would prevent or redress the claimed injury. The only affidavit which established standing for one individual was that of a commercial guide who stated the ordinance would impact a substantial portion of his livelihood. Standing was denied to the organization and all other individuals who did not establish injury that is not suffered alike by all citizens of the county.

Petitioners cite various federal cases involving statutorily authorized citizen suits under the Clean Water Act to support their argument they have standing. None of those cases involve an attempted appeal of an action of an administrative agency. However, this proceeding is a state administrative proceeding, governed by

Idaho state law, statute and administrative procedures.

The Hearing Officer concludes that state case law controls the standing issue in this case. As stated in the Young case, Idaho appellate courts have "consistently found a lack of standing in cases in which the plaintiffs were on the same ground as citizens generally." 02.7 ISCR at 330.

In this case, the affidavits submitted by Petitioners fail to establish an injury in fact or a fairly traceable causal connection between any claimed injury and the challenged conduct. The affidavits do not establish an injury personal to any of its members that is not equally felt by all the citizens of the state. While the affidavits generally alleged there were members who were outfitters, no affidavits of outfitters were filed to establish they operated in the area of C.J. Strike and how their business might be injured. Since Petitioners have failed to establish that any of its members have individual standing, Petitioners cannot have organizational standing.

Based upon the foregoing, the Hearing Officer concludes Petitioners lack standing to appeal DEQ's decision to issue a 401 Certification to Idaho Power for the C.J. Strike Project. This conclusion is supported by the decision of the Idaho Board of Health and Welfare in DEQ case of Rebound v. Idaho Department of Health and Welfare, decided February 28, 2000.

RECOMMENDED ORDER

Based upon the foregoing, the Hearing Officer recommends that the Board of Environmental Quality DENY the Motion to Strike filed by Idaho Power Company. The Hearing Officer further recommends that the Board of Environmental Quality GRANT the Motion for Summary Judgment filed by Idaho Power Company and dismiss the pending Petition. Based upon this recommended ruling, it is not necessary to rule on the Motions for Summary Judgment filed by Petitioners and the Department of Environmental Quality.

DATED This 14 day of June, 2002.

JEAN R. URANGA

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Hearing Officer

CERTIFICATE OF MAILING

I HEREBY CERTIFY That on this 14 day of June, 2002, I served true and correct copies of the foregoing RECOMMENDED ORDER ON MOTIONS FOR SUMMARY JUDGMENTS by depositing copies thereof in the United States mail, postage prepaid, in envelopes addressed to:

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