

BEFORE THE BOARD OF ENVIRONMENTAL QUALITY
STATE OF IDAHO

HECLA MINING COMPANY)

Petitioner,)

v.)

IDAHO DEPARTMENT OF)
ENVIRONMENTAL QUALITY,)

Respondent,)

IDAHO CONSERVATION LEAGUE,)

Proposed Intervenor.)
_____)

Docket No. 0102-03-13

ORDER ON PETITION
TO INTERVENE

RECEIVED

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Part I. Procedural history

On July 13, 2003, Hecla Mining Company ("Hecla") filed a Petition for a Contested Case Proceeding and Request for a Stay of Certain §401 Certification Conditions with the Idaho Board of Environmental Quality. On September 10, 2003, the Idaho Conservation League ("ICL"), an Idaho Non-Profit Conservation Organization with approximately 3000 resident members filed a Petition to Intervene, pursuant to Rules 58.01.23.350 and 58.01.23.351 of the Rules of Administrative Procedure Before the Board of Environmental Quality (IDEQ Rules). The petition to intervene, filed timely under IDEQ Rule 352.01, was supported by the affidavits of Justin Hayes, ICL Program Director, and Dr. John Osborn, an ICL member who has formerly served on the ICL board of directors. On September 17, 2003, Hecla filed an objection to ICL's Petition to Intervene and a supporting affidavit of Mike Dexter, the Mine Manager for

Lucky Friday Mine. ICL filed a Reply in Support of Petition to Intervene on October 6, 2003 with a second supporting affidavit by Justin Hayes. Respondent IDEQ has not submitted filings in response to ICL's petition for intervention.

Part II. Legal standard for intervention

Intervention in an administrative proceeding before the Board of Environmental Quality is not an express right, but is subject to the sound discretion of the Board. *See J.R. Simplot Co. v. Idaho Department of Environmental Quality*, Order on Intervention, Docket No. 0101-03-07 (August 12, 2003). In evaluating a petition to intervene, IDEQ Rules 350 through 354 apply. Persons who claim a "direct and substantial interest in the proceeding" may petition to intervene as a party to the litigation. IDAPA 58.01.23.350. The petition must "state the direct and substantial interest of the potential intervenor." IDAPA 58.01.23.351. If affirmative relief is sought, the petition must also "state the relief sought and the basis for granting it." IDAPA 58.01.23.351. To be successful, the petitioner for intervention must also establish that the intervention will not unduly broaden the issues and will not cause delay or prejudice to the parties. IDAPA 58.01.23.353.

Part III. Analysis

The legal arguments made by ICL to support its intervention petition rely heavily on recitation of its history litigating the Clean Water Act and other environmental issues on behalf of its membership in Idaho, Oregon and Washington. ICL's Petition and Reply in Support cite to a number of federal cases in which ICL was involved as the plaintiff in initiating litigation, and it cites one federal case where it successfully intervened, Idaho Mining Association v. Browner, 90 F.Supp.2d 1078 (D. Idaho 2000). In the Idaho

Mining case, it is significant to note that intervention was granted as of right under Federal Rule of Civil Procedure 24(a). While this is a well-reasoned opinion regarding interpretation of Fed. R. Civ. P. 24(a), it is not binding authority regarding procedural matters before the Idaho Board of Environmental Quality. The IDEQ Rules do not contain a provision for intervention of right which corresponds to Rule 24(a) in the Federal Rules of Civil Procedure. Intervention before the Board, in contrast, is at the discretion of the presiding officer.

Other authority cited by ICL has not been persuasive in establishing that ICL has a "direct and substantial" interest in the pending litigation. The first case, In the Matter of the Petition of Potlach Corporation, Case No. AVU-E-01-5, Order No. 28786 (July 2001), is distinguishable because the intervenors were industrial customers of another regulatory service provider who likely had a direct financial interest in the regulatory rate setting issues which were being addressed before the Public Utilities Commission.

Conversely, the extent of the financial interest of the intervenors in the present case is not clearly defined. As such, it does not rise to a level of being "direct and substantial." For instance, affiant Justin Hayes claims in ¶10 of his affidavit that he is a shareholder in Hecla Mining Company and that he:

...has an interest in taking steps to reduce the pollution that it releases into the environment as a result of mining. My financial interests are best served by Hecla's speedy compliance with permit conditions and laws governing pollution, for it is through such compliance that Hecla will differentiate itself and its product from other mining companies and my investment will be enhanced. See *Justin Hayes Affidavit*, ¶10.

In ¶11, Affiant Hayes equates his long term financial interests as a "stakeholder" in Hecla Mining with the long term financial interests of Hecla Mining. However, Mr. Hayes never reveals the amount of investment that he has in Hecla Mining to support his

assertion. It is unknown whether he owns one share of stock or whether he owns hundreds of shares. This has a bearing on whether his interest is "substantial." Inasmuch as the extent of his financial interest is unknown, the standard of showing a "direct and substantial interest" has not been met by his sworn statement.

The second case, McLeod USA Telecommunications Services, Inc. v. U.S. West Communications, Inc., Case No. USW-T-97-5, Order No. 27019 (June 1997), is distinguished because the issue of "direct and substantial interest" is not disputed by the opposing party, U.S. West. Rather, the opposition is based on the fact that the issues before the Commission would be unduly broadened by relitigating issues previously considered by the parties. In that case, intervention was granted since it was established that previous issues would not be relitigated, hence issues would not be unduly broadened.

While ICL asserts in its Reply in Support that its participation will not broaden the issues or cause unreasonable delay, none of the affidavits submitted by ICL address its assertion. Affiant Justin Hayes never mentions these issues, not in his first or second affidavit and neither does Dr. John Osborn in his affidavit.

The controlling precedent for intervention before the Board of Environmental Quality is J.R. Simplot Co. v. Idaho Department of Environmental Quality, Order on Intervention, Docket No. 0101-03-07 (August 12, 2003). In that case, the Board stated that an intervenor's proof of "direct and substantial interest" must be more than a "generalized interest in the proceedings." To support a claim of direct and substantial interest,

the allegations made in support of the claim must be factually supported and specific to the party making the claim. The would-be intervenor must

articulate the unique way in which he or she will be affected by the disposition of the case. Generalized grievances or concerns shared by all citizens do not suffice. To hold otherwise would invite participation in contested cases from persons with only mere concern or tangential interest in the contested matter. Id. at p.4.

The affidavits supporting ICL's intervention petition do not rise to the level of "direct and substantial interest" under the Board's analysis in the J.R. Simplot Co. case. Dr. Osborn's affidavit is focused primarily on his concerns about water quality and his lack of desire to fish in certain areas. Such statements reflect "generalized grievances or concerns" which may be shared by many citizens, and fall short of any articulation of a "unique way" in which he will be affected by the disposition of this case. The same is true of Justin Hayes affidavit. Mr. Hayes' concerns also fall into the category of "generalized grievances" and he has failed to articulate the unique way in which he will be affected by the disposition of the case.

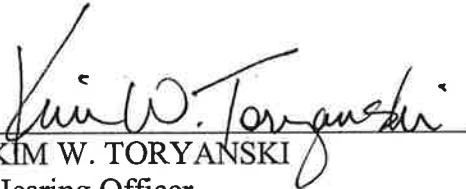
Additionally, ICL has failed to establish that intervention will not unduly broaden the issues raised in the contested case petition and that intervention will not cause delay or prejudice to the parties. These issues are not addressed at all in either Dr. Osborn's affidavit or Justin Hayes' affidavit.

Based on the foregoing analysis, IT IS HEREBY ORDERED that the Petition to Intervene filed on behalf of the Idaho Conservation League is denied.

Any party may petition the Board to review this order. Petitions for review shall be filed within fourteen (14) days after the service date of this Order. Responses shall be

filed within (14) days after service of the petition for review.

DATED this 14th day of January, 2004.


KIM W. TORYANSKI
Hearing Officer