Wendy J. Earle, Esq. ISB #7821
WENDY EARLE, LAW LLC
120 E. Lake Street, Suite 205
Sandpoint, ID 83864
(509) 280-0741 Phone
(208) 597-3400 Phone
(208) 263-5169 Fax
wearle@idahowashingtonlawpractice.com

Counsel for Petitioner: Wendy J. Earle

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

In re the matter of:

WILD IDAHO RISING TIDE

(An Incorporated Idaho Non-Profit Organization)

Petitioner,

vs.

DAVID GROESCHL, in his official capacity as Director of the Idaho Department of Lands; CHRIS BROMLEY, in his official capacity as Hearing Officer appointed by the Idaho Department of Lands; and the IDAHO STATE BOARD OF LAND COMMISSIONERS,

Respondents.

BNSF Railway Company

Intervener.

Case No.: CV09-18-1084

PETITIONER'S CONSOLIDATED RESPONSE IN OBJECTION TO RESPONDENT'S AND INTERVENOR'S MOTIONS TO DISMISS AND PETITIONER'S MOTION TO STRIKE

(Appeal from Idaho Department of Lands Final Order for Encroachment Permit No. L-96-S-0096E)

Honorable John Judge

COMES NOW Wild Idaho Rising Tide ("WIRT"), an incorporated Idaho non-for-profit organization, by and through its attorney of record, Wendy J. Earle of WENDY EARLE LAW, LLC, and respectfully submits this Consolidated Response in Objection to Respondent's And Intervener's Motions to Dismiss and Motion to Strike. This Response and Motion to Strike is supported by the Declaration of Pat Rathman (attached). ("Rathman Decl."). Exhibit "A"; Declaration of Sue Keller ("Keller Decl."). Exhibit B; Declaration of Helen Yost ("Yost Decl.") . Exhibit C.; Declaration of Melissa Frolander Hawkins ("Hawkins Decl."). Exhibit D.

I. INTRODUCTION

Petitioner WIRT initiated this action by seeking review of the Final Order for BNSF Encroachment Permit (filed June 14, 2018) pursuant to Idaho Rule of Civil Procedure 84 and the Idaho Administrative Procedure Act I.C. §67-5201, *et seq*. granting BNSF a permit titled Encroachment Permit No. L-96-S-0096E ("Permit"). For purposes of efficiency, WIRT presents a consolidated Response to both Respondent's ("IDL") and Intervener's ("BNSF") Motions to Dismiss. As a threshold matter WIRT existed as an organized non for profit association with two or more associated members well before the organizations succession to a registered incorporated non for profit. *See,* Rathman Decl. , Keller Decl., Yost Decl. attached. Notably, Respondent IDL all but concedes that WIRT was at all times a non for profit "association" pursuant to I.C. § 30-27-102(5) prior to registration with the Secretary of State. Respondent's Memorandum in Support of Motion to Dismiss ("Resp's Memo") at 8 ¶1. Disingenuously, Intervener BNSF conveniently fails to acknowledge WIRT's existing non for profit associational status as defined by I.C. § 30-27-102(5) and, instead incorrectly insists that WIRT has always operated as a "collective" a word that is in fact sinuous with an organized association. *See*, Resp's Memo. Declarations filed herewith demonstrably contradict

such contentions. *See*, Exhibits A-D. For that reason alone, BNSF's argument in support of dismissal fails.

II. SUMMARY OF RELEVANT FACTS AND ARGUMENTS

For the past 8 years WIRT's unique organizational purpose has never wavered. *See*, Rathman Decl., Keller Decl., Yost Decl., attached. Upon registration with the Secretary of State as an "incorporated Idaho non-profit organization" the stated entity purposes remained identical. Keller Decl., Yost Decl., attached. For the past 8 years Helen Yost ("Yost") is and always has been recognized as the lead organizational director and association representative. *Id.* Her authority to make decisions on behalf of WIRT extends to WIRT's present entity status. Keller Decl. Core organizational purposes expounded by WIRT are confined to mitigation of climate change related environmental injuries, including from coal chunk and coal dust expulsions affecting waters of Lake Pend Oreille. *See*, Keller Decl., Yost Decl., attached Accordingly, opposition to "imminent" environmental injuries resulting from IDL's June, 21 2018 issuance of an encroachment permit to BNSF *see*, AR002092, falls well within WIRT's narrowly stated purpose which embraces coal transport related discharges and ensuing degradation to North Idaho bodies of water resulting directly from coal car railroad transportation. *Id.* Water quality impairment also affects native species such as Bull Trout. Yost Decl.

In recognition of the same, Yost timely file and served a Notice of Appeal of Final Order ("Notice of Appeal") on July, 20 2018 in a *pro se* capacity. As the sole longtime (8 years) WIRT organizational director and representative she had full authority to file the appeal. Specifically, in relevant part the Notice of Appeal states that it was filed by "Helen Yost on behalf of Wild Idaho Rising Tide" and references Idaho Code § 58-1306 (c) as is proper. *See*, Notice of Appeal at 1. The

Notice of Appeal as filed, further confirms that Yost "hand delivered" it to the Bonner County clerk of the District Court for First Judicial District. *Id.* at 12.

Judge Buchanan, the original appointed District Court Judge on this matter, then issued an Order Striking Notice of Appeal and Notice of Proposed Dismissal ("Notice of Dismissal") based on certain deficiencies. Notably, the Notice of Dismissal expressly provided that the "case" - meaning the Notice of Appeal filed by Yost on behalf of WIRT - was to remain open subject to certain provisions. Id. at 3.

Judge Buchanan recognized WIRT's right to have its "day in court". In expressly granting Yost on behalf of WIRT an extension to file an "Amended Notice of Appeal" or a "Petition for Judicial Review", Judge Buchanan preserved WIRT's right to pursue the present action. *Id.* at 3. Likewise, Judge Buchanan properly exercised judicial discretion in granting Yost's subsequent and timely request for an extension which was necessitated by WIRT's inability to locate counsel despite diligent efforts which, eventually led to WIRT's retaining the undersigned counsel's services.

Eventually, WIRT complied with Judge Buchanan's stated conditions. Accordingly, the original "case" remained open. Relevant allegations from the original Notice of Appeal were later incorporated by reference in to the Amended Notice of Appeal and/or Petition for Judicial Review ("Petition") which was filed by the undersigned counsel on September 4, 2018. Because Judge Buchanan never dismissed the "case" the later in time Petition clearly relates back to the time of the original Notice of Appeal filing and does in fact meet the applicable filing deadlines articulated in IRCP Rule 84(n). Any argument to the contrary must be disregarded.

In its Memo, BNSF implicitly contradicts Judge Buchanan's decision but fails to cite to any court rule which, would mandate conversion of Judge Buchanan's "notice" to an "order" for purposes of dismissing the case outright on jurisdictional grounds. BNSF offers a mere conjecture that Judge

Buchanan should not have kept the "case" open and in doing so contradicts the assigned Judge's determination.

True and correct sworn Declarations offered in support of WIRT and attached herewith evidence that WIRT has, 1.) Been an active organization in existence for at least 8 years, and 2.) Yost has been recognized as WIRT's organizational director and association representative for the entire duration of WIRT's existence and, 3.) Yost indeed had authority to seek judicial review on behalf of WIRT in the role of a long standing director for a nonprofit organization whether, by virtue of entity status conferred by Idaho's non for profit association statute or by later in time incorporation as a successor entity. Yost's authority to act on behalf of WIRT existed when she "physically filed" and served the original Notice of Appeal on July 21, 2018. Notice of Appeal at 18. Thus, the original claims made by Yost on behalf of WIRT as asserted in the initial Notice of Appeal as incorporated by reference in WIRT's subsequent Amended Notice of Appeal/ Petition for Judicial Review filed on September 4, 2018 still remain in full force and effect.

Subsequently, on September 17, 2018 WIRT filed a Motion to Disqualify Judge Buchanan and the case was then reassigned to Judge John Judge. However, this does not change the effect of Judge Buchanan's original Notice of Dismissal keeping the "case" open conditioned on WIRT retaining counsel which, it eventually did. Judge John Judge then issued an Order granting BNSF's motion to intervene on November 8, 2018. WIRT's Opening Brief based on expedited review of an underlying record well in excess of 2000 pages along with appended exhibits was timely filed on December 13, 2018.

During the course of this proceeding, not only has BNSF now chosen to contradict the validity of a sitting First Judicial District Judge's decision to grant WIRT leave to file an Amended Notice of Appeal but, by prior in time request to the Court for special consideration, BNSF has

likewise chosen to contradict the Briefing Schedule Order issued by the presiding Judge. To wit, on November 6, 2018 this Court with counsel for all parties present conducted a Scheduling Conference ("Conference"). *See*, Petitioner's Response in Objection to BNSF's Request For an "Expedited" Status Conference and Motion to Strike *citing* Earle Decl. Ex. A. At the Scheduling Conference the Court denied BNSF's first request to file dispositive motions and determined that the parties should instead proceed directly to briefing on the merits. *Id., see also* Order Setting Briefing Schedule and Scheduling Oral Argument (filed November 8, 2018).

WIRT fully complied with the court ordered briefing schedule and did not seek to contradict it. Petitioner's Opening Brief on Judicial Review was timely filed and served on December 13, 2018. Conversely, in express contradiction of an existing court Order, five *days after WIRT filed its brief on the merits* BNSF then saw fit to file an expedited request for a status conference seeking leave to file an *ex post facto* dispositive motion. A status conference ensued. Over strenuous objection made on the record by counsel for WIRT, both BNSF and IDL were ultimately granted leave to file dispositive motions even though WIRT's lengthy Opening Brief had already been filed and served.

By choosing to file dispositive motions *after the merits were briefed and in contradiction of a prior in time Court Scheduling Order* both BNSF and IDL are now endorsing a litigation policy that if given judicial imprimatur will likely, have a chilling effect on future non for profit litigants seeking judicial review. It is no secret to any of the parties herein or to the Court that WIRT is a small non for profit environmental organization[1]. By contrast, BNSF is a hugely profitable national railroad railway carrier and IDL is represented by the Idaho Attorney General's office, a well-funded state agency. As a matter of policy, such *ex post facto* attempts by parties who stand in a better position in terms of

[1] Having previously represented other non for profit environmental organizations undersigned counsel can confirm that access to litigation funding can be a challenge.

access to justice, merely for purposes of gaining a litigation advantage, serves only to discourage participation in the judicial process by less well-endowed prospective litigants. Granting dismissal based off of a procedurally questionable request, should be frowned on for policy purposes alone.

III. LEGAL ARGUMENT

A. Articulated Standards Supporting an 12 (b) (6) Motion to Dismiss Are Stringent.

Standards embraced by Idaho Courts in considering Rule 12)(b) (6) motions to dismiss are that, (1) the complaint is to be construed in the light most favorable to the plaintiff, (2) its allegations are to be taken as true, and (3) all reasonable inferences that can be drawn from the pleading are drawn in favor of the pleader.

In ruling on a Rule 12 (b) (6) motion to dismiss for failure to state a claim, the complaint must be viewed in the light most favorable to the Plaintiff. *Gardner v. Hollifield*, 96 Idaho 609,610-611 (1975), *relying on Stewart v. Arrington Constr. Co*., 92 Idaho 526, 530-531 (1968). The complaint must be given the benefit of every reasonable "intendment," and "every doubt must be resolved in the plaintiff s favor. *Id.* at 61. A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his or her claim that would entitle the plaintiff to relief. *Id.; accord, Wackerli v. Martindale*, 2 Idaho 400 (1960). A complaint is only subject to dismissal under rule 12(b)(6) if an affirmative defense appears on the face of the complaint itself. *Stewart*, 920 ldaho at 530. "The issue is not whether the plaintiff will ultimately prevail, but whether the party is entitled to offer evidence to support the claims." *Orthman v. Idaho Power Co.*, 126 Idaho 960, 961 (1995). Dismissal for failure to state a claim should not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Paslay v. A&B Irrigation District*, 162 Idaho 866 (2017) *referencing* Idaho R. Civ. P. 12(b)(6). *Pinnacle Armor, Inc. v. U.S.*, 648 F.3d 708, 721 (9th Cir. 2011) provides yet

further guidance, (to survive Rule 12(b)(6) motion, plaintiff does not need to demonstrate its claim, but only must allege sufficient factual matter to state plausible claims).

"A party waives any defense listed in subsection (b) (2), (4) and (5) by failing to assert it by motion before filing a responsive pleading or filing any other motion. Rule 12 (h) (1). A party has a limited time to file a motion to dismiss. Conveniently, BNSF failed to request a hearing on its request to file a motion to dismiss as is required by the Idaho Appellate Rules. BSNF failed to, but could have requested leave to file a Rule 12 (b) (6) motion to dismiss after the Court's November, 10, 2018 entry of Scheduling Order but prior to WIRT's December 13, 2018 filing of its Opening Brief. Instead, it requested an "Expedited Status Hearing" thus avoiding filing an intervening motion.

In this case WIRT is the "pleader". WIRT's issues presented for review are put forth in summary fashion in its' Amended Notice of Appeal/ Petition for Judicial Review. For purposes of BNSF's Rule 12 (b) (6) argument, the Petition is tantamount to a Complaint. This Court is aware that in Idaho a "complaint" and a "petition" are viewed as one and the same. *Accord*, Idaho Appellate Rules (I.A.R.), Rule 2 (b) (4) "Petition" shall include "complaint" or "application." Regardless of whether the title is "complaint" or a "petition" the pleading is meant to merely place the opposing party (s) on notice of the alleged by means of short and plain statement. Thus, in bringing a motion to dismiss pursuant to Rule 12 (b) (6) BNSF is limited to arguments based on the issues presented in the Petition and cannot go beyond that by reference to other pleadings or outside sources.

1.) Motion to Strike All References to WIRT's Opening Brief on the Merits and the Agency Record.

A party raising a 12 (b) (6) defense must comply with the statutory requirements which precludes by necessity any reference to any type of ensuing brief arguing the merits of the case or the underlying record – in other words BNSF gets one bit of the apple based solely on the averments on the complaint or petitions. Consideration of any pleadings other than the Petition along with any

evidence in the record, as referenced by both BNSF and IDL in their respective memorandums is prohibited.

"[A] trial court, in considering a Rule 12(b) (6) motion to dismiss, has no right to hear evidence; and since judicial notice is merely a substitute for the conventional method of taking evidence to establish facts, the court has no right to take judicial notice of anything, with the possible exception of facts of common knowledge which controvert averments of the complaint." *Paslay*, 162 Idaho 866 (2017).

Here, both intervener BNSF and respondent IDL disingenuously attempt to take two bites, rather than one bite of the apple. They opportunistically reference the Opening Brief and the underlying agency record rather than solely the Petition as is proper under ordinary procedural circumstances limiting 12 (b) (6) objections to the initial pleading. All improper references are immaterial, must be stricken and cannot be considered.

2.) Even if the Court Determines that Dismissal of WIRT's Case is Warranted Other Options Exist in Terms of Testing the Merits of the Case.

Viewing the Petition for Judicial Review, the initiating pleading, in the light most favorable to the Plaintiff/Petitioner, BNSF's Motion to Dismiss should be denied in its entirety. However, should the Court see fit to consider an Order dismissing WIRT from this case, the Court can still consider other options. A court that thinks it convenient to test the merits of the plaintiff's case by means of a preliminary motion can convert a Rule 12 (b) (6) motion to dismiss to a Rule 56 summary judgment motion. *Paslay*, 162 Idaho 866 (2017). This provides for the opportunity to conduct discovery which would allow the Court and the parties to consider matters outside the initial pleading.

Alternatively, if dismissal is ordered, the Court may still grant WIRT the option to amend its Petition for Judicial Review so that WIRT can further clarify its injuries. *Chace v. M & T Mortg.*

Corp., 2010 WL 1816161 (D. Idaho 2010) ("The Ninth Circuit has held that, where a court finds dismissal under Rule 12(b) (6) is warranted, the court 'should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts.'"), *quoting Lopez v. Smith*, 203 F.3d 1122 (9th Cir. 2000).

B. 12 (b) (6) and 12 (b) (1) Motions to Dismiss for Failure to Demonstrate Statutory Standing and Article III Standing Receive Different Treatment regardless, WIRT Has Standing.

BNSF brings its motion to dismiss pursuant to Idaho Rules of Civil Procedure (IRCP) Rule 12 (b) (6) based on standing deficiencies. Conversely, IDL brings it motion pursuant to IRCP Rule 12 (b) (1) as it applies to standing deficiencies. Idaho Courts have yet to clarify this distinction as it applies to motions to dismiss based on alleged "standing" deficiencies. However, a recent Ninth Circuit court decision, Maya *v. Centex Corp*., has articulated the grounds for dismissal:

> "A lack of statutory standing is grounds for dismissal under Rule 12(b) (6) but it is error for the district court to apply a Rule 12(b) (6) standard when the issue was a lack of Article III standing. The proper standard to apply in the latter case is a Rule 12(b) (1) standard. "

Maya v. Centex Corp., 658 F.3d 1060, 1067 (9th Cir. 2011).

1.) WIRT is an Organization with Statutory Standing to Seek Judicial Review Thus, 12(b) (6) Dismissal is Not Warranted.

In an effort to disavow WIRT's status as an organization with statutory standing pursuant to I.C. §58-1306(c), BNSF puts forward an unfounded theory based on allegations of an alleged "entity switch" distinction. To be clear, WIRT is and has always been an "organization". *See*, Rathman Decl., Keller Decl., Yost Decl., attached. Since 2011 WIRT has easily met the test for non for profit association status and, by filing with Idaho's Secretary of State it has now attained successor non for profit organizational status. *Id.* Any attempt to disqualify WIRT on this theory has been amply discussed in Parts I and II, *supra* and persuasively refuted. BNSF's and IDL's contention that WIRT is merely a "collective" is likewise a non-starter. This is purely a form over substance argument based

on semantics and should not factor in to the Court's ultimate decision. *See,* Yost Decl. Regardless, IDAPA 20.03.04 (15) specifically references "other entities" which arguably embraces organized collectives. Yost had representative authority to appear on WIRT's behalf at the May 23, 2018 public hearing and give testimony. *See*, Keller Decl., Yost Decl., attached.

IDAPA 20. 01.01 codifies the *Rules of Practice and Procedure before the State Board of Land Commissioners* ("Practice Rules"). In relevant part the Practice Rules address "Persons" who are not "Parties":

> "Persons not parties and not called by a party to testify at hearing are called "Public Witnesses"…. Subject to Rules 557 and 559, Public Witnesses have a right to introduce evidence at hearing by their written or oral statements. Practice Rule 335.

Moreover, pursuant to Practice Rule 790 the word 'party' and 'person' is used interchangeably:

> "Pursuant to Section 67-5270, Idaho Code, any party aggrieved by a final order of an agency in a contested case may appeal to district court. Pursuant to Section 67-5271, Idaho Code, a person is not entitled to judicial review of an agency action in district court until that person has exhausted all administrative remedies…" *Id.*

In addition, WIRT is a person pursuant to the I.C. § 67-5201(15) definition: "Person" means any individual, partnership, corporation, association, governmental subdivision or agency, or public or private organization or *entity of any character.* In support of this Response WIRT board member Sue Keller states: "I have personal knowledge that the organization known as WIRT has been existence in Northern Idaho and continuously active for the past eight (8) years." Keller Decl. ¶ 4. And, declarant Rathman states:

> "Based on personal observations over the past 8 years, WIRT consists of and has always consisted of, an organized group of members whose collective purpose consists of actively protecting and preserving the quality of natural regional environmental resources." Rathman Decl. ¶ 2.

Rathman further confirms that "[s] ince the organization's inception Helen Yost has acted in an ongoing capacity as WIRT's organizational director and spokesperson." Id. ¶ 3. *Accord,* Yost Decl.

Conclusively, on May 23, 2018, 1.) WIRT was a "person" within the definition of I.C. § 67-5201 (15) and, 2.) Yost had authority to appear and testify at the hearing as a "Public Witness" on behalf of WIRT pursuant to Practice Rule 355 and, 3.) Practice Rule 790 uses party and person interchangeably thus, defeating the argument that WIRT is not an "aggrieved party" with statutory standing to request judicial review under the Lake Protection Act and the Idaho Administrative Procedures Act. In relevant part I.C. §58-1306(c) states that an "aggrieved party" may oppose a final Order. The Idaho legislature could have but failed to clarify within the confines of the relevant statutory I.C. § 58-13076 (c) sub-section that an "aggrieved party" seeking judicial review must fall within the definition of a "person" pursuant to IDAPA 20.03.04.010.26. Given the foregoing analysis, WIRT must be considered an "aggrieved party" with statutory standing.

WIRT does not dispute that IDL permitting decisions are a "contested action" however the argument put forth by BNSF in that regard WIRT is entitled to be admitted to the present contested case. Even if BNSF's argument that the applicable statute granting a right to review on permitting decisions obviates WIRT's statutory standing is affirmed, the case it cites in support of that argument *Laughy v. Idaho Dep't of Transp*., 149 Idaho 867 (2010) does not necessarily apply to the present request for review. *Laughy* arose out of an effort to oppose the grant of a permit under a wholly different statute. *Id.* at 898-869.

The controlling statute in this instance is the Lake Protection Act (LPA). Pursuant to the LPA "[a] agency action shall be affirmed unless substantial rights of the appellant have been prejudiced." *Brett v. Eleventh Street Dockowner's Association, Inc.*, 141 Idaho 517 at 521. (2005) *citing* Idaho Code § 67–5279. WIRT's "substantial rights" as articulated by core organizational purposes, *see*

Keller Decl., Yost Decl., have in fact been prejudiced by Respondents' handling of the encroachment permit application, and Respondents' decision to issue an encroachment permit to BNSF. In its Opening Brief WIRT clarifies its unique organizational purpose specifically in relationship to the "substantial rights" that have been prejudiced by IDL's grant of an encroachment permit:

"WIRT members combat effects of carbon emissions from fossil fuels, protect the water quality of navigable lakes and associated fish and wildlife habitat, and preserve air quality. Opening Brief at 8.

Moreover, "Several WIRT members are registered on the rolls of the Confederated Salish band of tribes and are thus, subject to an 1859 Steven's Treaty granting reserved fishing rights in Lake Pend Oreille which provides habitat for threatened Bull Trout." *Id*. at 9 *and* Hawkins Decl.

Finally, "WIRT members daily monitor the passage of BNSF coal transports on the local railway track. Concerns exist about train derailment and coal pollution dangers affecting the waters of Lake Pend Oreille especially, where transportation of fossil fuels and hazardous waste is involved." Id. at 9 *and* Yost Decl., attached.

These and other organizational rights articulated in pleadings filed in the Court record, fall well within the zone of protection contemplated by the LPA and the public trust doctrine. The Court should uphold WIRT's request for review.

This Court should note that Rule 12 (b) (1) does **not** embrace statutory standing. *Maya v. Centex Corp*, supra. Thus, any arguments made by IDL based on statutory standing requirements must be stricken because they are not material to IDL's stated basis for its motion.

2.) WIRT is an Organization Representing Members and Has Article III Standing to Request Judicial Review on Behalf of Both the Organization and its Members, Individually.

For purposes of Article III Standing, WIRT has already established in preceding discussions that it an organization. Its member's interests have a direct nexus to "distinct" and "palpable" injuries in fact resulting directly from IDL's grant of an encroachment permit to BNSF. In discussing Article III standing Idaho Courts have clarified that "Standing may be predicated upon a threatened harm as well as a past injury." *Harris v. Cassia Cnty*., 106 Idaho 513, 516 (1984).

The official agency record leaves little doubt, that BNSF's extensive infrastructure project will impact water quality and will create turbulence affecting native Bull Trout. These are discrete values that WIRT seeks to protect. See, Keller Decl., Yost Decl., and Hawkins Decl., attached.

An association has standing in an individual capacity when it asserts its own rights as an organization. Idaho recognizes organizational and association standing. *See, Selkirk-Priest Basin Ass'n, Inc. v. State ex rel. Andrus*, 127 Idaho 239 (1995). Despite BNSF's assertions to the contrary , a close reading of *Selkirk-Priest Basin Ass'n* indicates that it was decided on very narrow grounds. Essentially, the Court ruled that the environmental groups lacked standing necessary to challenge administration of school endowment lands trust assets, because the direct beneficiaries of trust where schools, not environmental the groups. I*d.* While the groups did allege that their members had standing to protect aesthetic and recreational values it is not clear that the Selkirk Court expressly failed to recognize those values as grounds for asserting constitutional standing. *Id.* WIRT has also identified aesthetic and recreational injuries (values expressly protected by the LPA), in its Opening Brief.

Likewise, a group has standing in a representative capacity when it represents the rights of its members. In recognizing representative standing *Selkirk* cites to U. S. Supreme Court cases for that proposition that, "[e]ven in the absence of injury to itself, an association may have standing solely as

the representative of its members. *National Motor Freight Assn v. United States*, 372 U.S. 246 (1963) *also, Sierra Club v. Morton*, 405 U.S. 727, 734–41.

The leading case articulating the standing *requirements for groups that sue in a representative capacity is Hunt* v. Washington Apple Advertising Css'n , 432 U.S. 333 (1977). The *Apple* Court identified factors attributable to recognition of an association with representative standing:

> (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.

Id. at 343; *see also, Friends of the Earth v. Laidlaw Envt'l Services*, 528 U.S. 167, 181 (2000) (association successfully demonstrates standing of members through declarations).

Applying the above case standards to the present case, declarations provided by WIRT members evidence that they do have individual member standing to sue.

> " In this BNSF permitting matter, I in the capacity of a WIRT member and representative voiced a discrete opposition to the limited IDL open comment period which precluded opportunity for a full environmental impact statement (EIS). Official Agency Record (AR) 000291 (Letter from Sue Koller, 124 Benjamin Lane, Cocolalla, Idaho 83813. If allowed to engage in the EIS comment process I would object to coal train discharges as they directly impact lake water quality. My concerns about associated discharge impacts on the lake water environment are individualized and apart from those of the general Bonner County population. Keller Decl. ¶10. Ex. B.

The interests that WIRT protects are "distinct" to WIRT members and "palpable".

> "WIRT indeed has a specific mission apart from that of the general Bonner County population. WIRT is opposed, to the effect that coal particulates (a known fossil fuel) and coal spillage have on direct impact on water quality thus creating water degradation. This includes charged coal, coal chunks, coal dust, metabolites or related byproducts of coal which members of WIRT have found in increasing amounts along BNSF's present train track system directly adjacent to and over Lake Pend Oreille. These discharges will only increase exponentially with increased impact to

> waters that have both regional and national importance. Keller Decl. ¶10 *referencing* Opening Brief at 19, Yost Decl.

Finally, because WIRT has representative standing as an organized entity it can sue absent individual participation. Rathman Decl. ¶2, Keller Decl., Yost Decl. WIRT has in fact demonstrated "palpable" and "distinct injuries in fact and has standing to seek redress by mean of its Petition for Judicial Review as supported by arguments presented in its Opening Brief and the attached Declarations in support of WIRT's Response.

C. IRCP Rule 84(d) is Ambiguous and Service on the Named Parties Was Proper.

Service of process effectuated on the named parties on the date indicated in the Certificate of Service portion of WIRT's Petition filed on September 4, 2018 was proper. IRCP 84(d) fails to specifically define "parties" as "aggrieved" parties at the agency hearing level rather than solely named IDL and Idaho State official. IRCP 84(d) is thus open to interpretation in terms of service requirements as it does not clearly reference I.C. §67-5270 as asserted by counsel for IDL. See, Resp's Memo at 10. The failure to adequately define "parties" caused undersigned counsel for WIRT to limit service to the parties referenced in the above pleading caption.

The court record in this matter demonstrates that IDL failed to but could have, raised a Rule 12 (b) (1) objection opposing alleged service deficiencies all the way back to the original Notice of Appeal filed by Yost. Instead, on September 20, 2018 IDL filed a Notice of Lodging of Transcripts and The Record ("Notice"). The certificate of service on the IDL Notice indicated that it was providing service to WIRT's counsel of record and providing a mere "Courtesy Copy" to certain articulated parties not named as parties in WIRT's Petition for Judicial Review. The foregoing courtesy copy reference, along with the failure to define "aggrieved" parties in IRCP 84 (d) reasonably begs the question whether only named parties to a judicial appeal are to receive actual service pursuant to IRCP 5 (e) (1) or instead mere "notice".

By means of courtesy copies giving notice of lodging of transcripts and an agency record by IDL, the parties to the underlying administrative action including intervener BNSF, received reasonably contemporaneous notice (within approximately 15 days) that a request for judicial review of the agency record had been filed. At minimum, service of the Petition was substantially compliant. Further, as discussed in Part II, *supra*, Yost did "physically" deliver the original pleading that initiated this request for review to the clerk of the Bonner County Court.

It is unfair to prejudice WIRT at this point in the proceeding, especially after considerable resources have been allocated to the Opening Brief, based on an alleged service defect implicating only parties to the underlying administrative proceeding rather than named parties. Especially, in light of IDL's and BNSF's failure to raise the alleged service defects when given the opportunity to do so at the November 6, 2018 Scheduling Hearing or, by raise the same objections by later in time motion prior to WIRT filing its Opening Brief.

D. Non-Opposition to Dismissal of Hearing Officer Chris Bromely.

While WIRT takes the position that the underlying Preliminary Order has material bearing on the Final Order – the Preliminary Order is cited multiple times in WIRT's Opening Brief - WIRT does not oppose dismissal of Mr. Bromely as a party should the Court so see fit.

IV.CONCLUSION

Given that WIRT has already incurred considerable cost expenditures as well as time expenditures associated with briefing the merits of their arguments in support of judicial review pursuant to a valid court order, policy considerations contravene dismissal of WIRT's Petition. As articulated in Idaho case law the standard for dismissal under IRCP Rule 12(b) (6) is high and all facts are to be construed in favor of the Plaintiff (in this case the Petitioner). Dismissal based on 12 (b)(6) is

not warranted especially if WIRT's request to strike all references outside its original Petition is granted. Even, if the Court deems that dismissal is warranted it should nonetheless consider other available procedural options which will allow it to test the merits of WIRT's claims.

IRCP Rule 12 (b) (1) applies to Article III jurisdictional standing and not statutory standing as implied by BNSF. Thus, BNSF is precluded from arguing issues touching on Article III standing and these arguments must be stricken. Likewise, 12 (b) (1) arguments put forward by IDL touching on statutory standing should be precluded.

The record herein, along with Declarations provided by WIRT members with knowledge, submitted in support of this Response, evidence that WIRT is an organizational entity and has met its burden of showing both statutory and Article III standing based on injuries in fact. WIRT did provide a certificate of service in its original Notice of Appeal and it did physically hand it to the clerk of the court. WIRT's subsequent service of its Amended Appeal/ Petition for Judicial Review was proper pursuant to IRCP 5 (e) (1) especially in light of ambiguous language presented by IRCP 84 (d) . It was also proper in light of the First Judicial District's Order requiring e-filing. Finally, BNSF has not suffered prejudice due to lack of notice as it has long since intervened in this matter.

DATED this 30th of December, 2019.

Respectfully submitted,

WENDY EARLE, LAW LLC

By: /s/Wendy J. Earle
Original on file with Wendy Earle, Law LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 30th day of January 2019 I caused to be served a true and correct copy of the foregoing Petitioner's Consolidated Response in Objection to Respondent's And Intervener's Motions to Dismiss and Petitioner's Motion to Strike by means of electronic iCourt to the following parties:

Angela Shaer Kaufmann, Deputy AG — angela.kaufman@ag.idaho.gov
Joy M. Vega, Deputy AG — joy.vega@ag.idaho.gov
700 W. State Street, 2nd Floor
P.O. Box 83720
Boise, ID 83720-0010

Attorneys for Respondents

Stephen Thomas — sthomas@hawleytroxell.com
Cathy R. Silak — csilak@hawleytroxell.com
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 100
P.O. Box 1617
Boise, ID 83701-1617

Attorneys for Interveners

/s/ *Wendy J. Earle*
Wendy J. Earle