

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION	)	
FOR PERMIT NO. 1-7128	)	ORDER GRANTING
IN THE NAME OF	)	PETITION TO INTERVENE
<u>IDAHO POWER COMPANY</u>	)	

On October 23, 1996, Idaho Power Company ("Idaho Power") filed Application 1-7128, seeking a permit to divert 7,850 cfs from the Snake River for power generation at the American Falls Power Plant. The application was protested by Egin Bench Canals Inc., East Teton Canal Company, New Lavaside Ditch Company, Fremont-Madison Irrigation District, Peoples Canal & Irrigation Company, Progressive Irrigation District, New Sweden Irrigation District, Idaho Rivers United, Burgess Canal Company, United States Bureau of Reclamation ("USBR"), and Idaho Groundwater Appropriators Inc.

The parties chose to delay the proceedings on the contested case until the claims filed by Idaho Power in the Snake River Basin Adjudication ("SRBA") were resolved. The Department conducted a pre-hearing conference for the contested case on March 14, 2019 and status conferences on June 18 and August 22, 2019 and on May 22 and July 30, 2020.

On May 22, 2020, the State of Idaho ("State"), represented by Michael Orr of the Idaho Office of the Attorney General, filed *State of Idaho's Petition to Intervene* ("Petition"). On May 29, 2020 Idaho Power filed *Idaho Power Company's Response to Petition to Intervene* ("Response").

Rule 352 of the Department's Rules of Procedure (IDAPA 37.01.01) states:

Petitions to intervene must be filed at least fourteen (14) days before the date set for formal hearing, or by the date of the prehearing conference, whichever is earlier, unless a different time is provided by order or notice. Petitions not timely filed must state a substantial reason for delay. The presiding officer may deny or conditionally grant petitions to intervene that are not timely filed for failure to state good cause for untimely filing, to prevent disruption, prejudice to existing parties or undue broadening of the issues, or for other reasons. Intervenors who do not file timely petitions are bound by orders and notices earlier entered as a condition of granting the untimely petition.

Rule 353 of the Department's Rules of Procedure (IDAPA 37.01.01) states:

If a timely-filed petition to intervene shows direct and substantial interest in any part of the subject matter of a proceeding and does not unduly broaden the issues, the presiding officer will grant intervention, subject to reasonable conditions,

unless the applicant's interest is adequately represented by existing parties. If it appears that an intervenor has no direct or substantial interest in the proceeding, the presiding officer may dismiss the intervenor from the proceeding.

The State's *Petition* was not timely because it was filed after the Department conducted a pre-hearing conference for the contested case. Because the *Petition* was not timely filed, the State must identify a substantial reason for the delay. The *Petition* states: "[T]he time period for filing protests to the Application closed seven years before the Nez Perce Agreement [a crucial settlement of tribal claims in the SRBA] was finalized. The State could not have anticipated the need to file an objection to the Application in order to ensure that it could not impair or interfere with the flow augmentation objectives of the Nez Perce Agreement." *Petition* at 8-9. The State has identified a substantial reason for delay.

The State has also demonstrated a direct and substantial interest in this contested case. After summarizing the State's involvement in the Nez Perce Agreement, the State identifies the relief sought in this case: "[T]he State requests that the permit for water right 1-7128 be conditioned so that in addition to effectively if not expressly subordinating the permit to 'subsequent upstream beneficial depletionary uses,' Idaho Code § 42-203B(6), that it is also effectively if not expressly subordinated to the Palisades Powerhead Permit, using language that does not have the effect of referencing, interpreting, or applying the Nez Perce Agreement." *Petition* at 5-7.

During the pre-hearing conference and subsequent status conferences, it has been established that one of the primary issues in this case is how the proposed permit should be administered in relation to Permit 1-10401, which is held by USBR and is used to satisfy the terms of the Nez Perce Agreement. As noted above, this issue is the same identified by the State as the basis for its proposed intervention in the case. Therefore, the State's intervention will not unduly broaden the issues of the case.

During the July 30, 2020 status conference, the protestants raised an additional issue which was not and could not have been identified as an issue in any of the original protests against the application. The protestants asked how the proposed permit would be administered under the conditions of recently decreed water rights for storage on the Snake River (referred to by the parties as "refill 1 rights"). One of the recently-decreed water rights discussed during the conference was water right 1-10621A. The SRBA Court issued a 2nd Amended Partial Decree for water right 1-10621A on February 28, 2020. The protestants could not have anticipated the question of administration between the proposed permit and water right 1-10621A when the protests were filed in the 1990s. Nor could the State have anticipated that the protestants would raise the issue during the recent status conference. Therefore, allowing the State to provide evidence and argument about this issue will not unduly broaden the issues of the contested case.

The presiding officer is issuing an Order Authorizing Discovery in conjunction with this order and the State will be bound by the deadlines set forth in that order. There is no evidence in the record suggesting that the State's participation in the matter will disrupt the contested case schedule or will cause prejudice to existing parties.

Idaho Power does not oppose the State's intervention in the case as long as the State's participation is limited to the primary issue described above: how the proposed permit should be administered in relation to Permit 1-10401 held by USBR. *Response* at 3. The new issue about how the proposed permit should be administered in relation to recently-decreed storage rights on the Snake River was first raised during the July 30, 2020 status conference and could not have been anticipated by the State in its *Petition* or Idaho Power in its *Response*. All parties, including the State, will be allowed to offer evidence and argument in relation to the newly-raised issue.

CONCLUSIONS OF LAW

The State has demonstrated a direct and substantial interest in the pending contested case. The State's intervention in this matter will not disrupt the pending contested case, will not cause prejudice to existing parties and will not unduly broaden this issues of the case. Therefore, the State's *Petition* should be granted.

ORDER

IT IS HEREBY ORDERED that the State's *Petition* is GRANTED. The State's participation in this matter is limited to the questions of administration between the proposed permit and Permit 1-10401 and between the proposed permit and the recently-decreed storage rights on the Snake River (referred to by the parties as "refill 1 rights"). Pursuant to Rule 710 (IDAPA 37.01.01), this order granting intervention is an Interlocutory Order.

Dated this 4th day of August, 2020.



James Cefalo
Hearing Officer

CERTIFICATE OF MAILING

I hereby certify that on the 4th day of August 2020, I mailed a true and correct copy of the foregoing ORDER GRANTING PETITION TO INTERVENE, with the United States Postal Service, postage prepaid and properly addressed to the person(s) listed below:

Documents Served: Order Granting Petition to Intervene

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