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michael.orr@ag.idaho.gov*Attorneys for the State of Idaho***BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES**

IN THE MATTER OF APPLICATION
FOR PERMIT NO. 1-7128 IN THE NAME
OF IDAHO POWER COMPANY

**STATE OF IDAHO'S PETITION
TO INTERVENE**

Fee: Exempt

The State of Idaho ("State"), by and through its attorneys of record, and pursuant to Rules 350—353 of the Idaho Department of Water Resources' Rules of Procedure, hereby submits this petition to intervene in the proceedings in the above-captioned matter. The State has a direct and substantial interest in the subject matter of these proceedings because the State is a party to the "Nez Perce Agreement" of 2004, and this proceeding has raised a question of subordination that is materially related to the flow augmentation component of the Nez Perce Agreement. The State's interests are not adequately represented by any of the existing parties, and granting this petition would not broaden the issues or delay this proceeding. Moreover there is good cause for the delay in the filing of this petition because the protest period closed approximately seven years before the Nez Perce Agreement was finalized, and the State did not become aware until

recently that processing of this application had resumed, after it had been pending for approximately twelve years. These points are discussed in detail below.

BACKGROUND

Idaho Power Company ("IPC") filed application no. 1-7128 ("Application") along with several SRBA claims on October 23, 1996.¹ All of these filings sought natural flow water rights for power purposes at American Falls Dam.² Protests to the Application were filed in 1997, but apparently no other action was taken on the Application until last year, when the Department issued a notice of a pre-hearing conference. The State was not a protestant and therefore did not receive the notice.

The State had been a party, however, to the subcases for the SRBA claims IPC filed along with the Application, and participated in the litigation and negotiations that ultimately resolved IPC's claims and the objections to them. The parties to these subcases, including the State, filed SF-5s in 2010 that led to issuance of partial decrees in IPC's name for several natural flow water rights at American Falls.³ The SF-5s and partial decrees included a subordination condition that effectively subordinated IPC's water rights to all junior and future water rights, including water rights for power purposes.

¹ Letter Accompanying Application (Oct. 23, 1996). This letter is among the documents for water right no. 1-7128 on the Department's website. (<https://idwr.idaho.gov/apps/ExtSearch/RelatedDocs.asp?Basin=1&Sequence=7128&SplitSuffix=&>).

² IPC also filed separate claims for storage rights for power purposes at American Falls Dam.

³ Water right nos. 1-2017, 1-2046, 1-10382, 1-10383, 1-10531, and 1-10532. Water right 1-10384 was decreed disallowed, also pursuant to an SF-5. IPC's storage claims were resolved separately.

The “Mediator’s Term Sheet,” which came to be known as the “Nez Perce Agreement,” was finalized in 2004,⁴ and the State was a key participant in the negotiations that led to the agreement. Among other things, the Nez Perce Agreement states that in some circumstances, “Palisades Reservoir powerhead water may be used by the United States to attain 427,000 acre-feet for flow augmentation.” *Mediator’s Term Sheet* at 20 (Art. III, ¶ C.7.a.).⁵

The United States holds a permit for “power storage (powerhead)” and “power from storage” at Palisades Reservoir. *See Permit 1-10401* (“Palisades Powerhead Permit”). The Palisades Powerhead Permit includes a condition stating as follows: “Powerhead water in Palisades Reservoir may be used for power generation so long as the water may also be required for flow augmentation under the Nez Perce Settlement Agreement known as the ‘Mediator’s Term Sheet’ of April 20, 2004 and under the terms thereof.” *Id.* at Condition 7. The priority date of the Palisades Powerhead Permit is June 6, 2002. Thus, the Application, if approved, will be senior to the Palisades Powerhead Permit.

Earlier this year, and apparently at the request of the parties to this proceeding, the Department prepared a draft form of permit for the Application. The draft permit included a number of standard conditions, including a condition that subordinated the permit to all junior and future water rights “other than hydropower” water rights. Thus, if approved with the subordination condition in the draft permit, the Application would not be subordinated to the Palisades Powerhead Permit, and potentially could be used to seek curtailment of the Palisades

⁴ <https://idwr.idaho.gov/files/iwrb/2004/20040420-Nez-Perce-Agreement-Mediators-Term-Sheet.pdf>.

⁵ *Id.* The Nez Perce Agreement also contains several other references to “powerhead” space in federal reservoirs.

Powerhead Permit. Such curtailment could impair or interfere with efforts to meet the flow augmentation objectives of the Nez Perce Agreement.

These matters were brought to the State's attention earlier this year, and the State has discussed these matters with several parties to this proceeding. Based on these discussions, the State understands there to be general agreement among the parties that the Application should be subordinated to "subsequent upstream beneficial depletionary uses," Idaho Code § 42-203B(6), and also conditioned so as to avoid the potential for impairing or interfering with efforts to meet the flow augmentation objectives of the Nez Perce Agreement. The State also understands there to be disagreement, however, as to how to achieve this objective, including potentially significant disagreement over the specific language of a subordination condition.

ARGUMENT

1. Intervention Standards

Rule 350 of the Department's Rules of Procedure authorizes petitions to intervene in proceedings before the Department. IDAPA 37.01.01.350. A petition to intervene must state "the direct and substantial interest of the potential intervenor in the proceeding," and if affirmative relief is sought, "must state the relief sought and the basis for granting it," IDAPA 37.01.01.351. A petition to intervene that is not filed within the time limit prescribed by Rule 352 "must state a substantial reason for the delay." IDAPA 37.01.01.352. The decision of whether to grant such a petition to intervene is committed to the discretion of the presiding officer. IDAPA 37.01.01.352-353. In considering a petition to intervene, the presiding officer may consider whether granting the petition would prejudice the existing parties, delay the proceedings or unduly broaden the issues, and whether the petitioner's interest is adequately represented by the existing parties. *Id.*

2. The State has a Direct and Substantial Interest in this Proceeding.

The State was a key participant in the lengthy and complex negotiations regarding the Nez Perce Tribes' many water right claims in the SRBA. These negotiations culminated in the Nez Perce Agreement of 2004, which was an amicable settlement of all the Tribe's SRBA claims. Flow augmentation was an important issue in the settlement negotiations, and flow augmentation is a significant component of the Nez Perce Agreement.⁶

The Nez Perce Agreement contemplates that, in some circumstances, flow augmentation water will be provided from powerhead space in federal reservoirs. *Mediator's Term Sheet* at 19-20, 22. The agreement specifically contemplates that, when certain conditions are met, water will be released from powerhead space in Palisades Reservoir for flow augmentation. *Id.* at 20. The Palisades Powerhead Permit provides the authorization necessary under Idaho law for flow augmentation releases from Palisades Reservoir powerhead space as contemplated by the Nez Perce Agreement. *See Permit 01-10401* (Condition 7).

If not subordinated to the Palisades Powerhead Permit, water right 1-7128 will have the potential to impair or interfere with efforts to meet the flow augmentation objectives of the Nez Perce Agreement. The Application was filed with the Department on October 23, 1996, and the resulting permit will presumably will have that same priority date, which is senior to the Palisades Powerhead Permit. If the permit for water right 1-7128 is not subordinated to the Palisades Powerhead Permit, therefore, water right 1-7128 could potentially be used as a basis

⁶ <https://idwr.idaho.gov/files/iwrb/2004/20040515-Nez-Perce-Agreement-Press-Release.pdf>; <https://idwr.idaho.gov/files/iwrb/2004/20040420-Nez-Perce-Agreement-Mediators-Term-Sheet.pdf>; <https://idwr.idaho.gov/files/iwrb/2004/20040515-Nez-Perce-Agreement-Summary.pdf>; <https://idwr.idaho.gov/files/iwrb/2004/20040515-Nez-Perce-Agreement-Fact-Sheet.pdf>.

for curtailing the Palisades Powerhead Permit. In some circumstances, this could impair or interfere with efforts to meet the flow augmentation objectives of the Nez Perce Agreement.

The State, as a party to the Nez Perce Agreement, has a direct and substantial interest in ensuring that water right 1-7128 does not impair or interfere with efforts to meet the flow augmentation objectives of the Nez Perce Agreement. The standard subordination condition in the draft permit prepared by the Department is not sufficient for this purpose, however, because the standard subordination condition would not subordinate water right 1-7128 to the Palisades Powerhead Permit. The State therefore has a direct and substantial interest in opposing the standard subordination condition to the extent it would not subordinate water right 1-7128 to the Palisades Powerhead Permit, and should be allowed to intervene for this purpose.

Moreover, while it appears that the existing parties to this proceeding may already have agreed in principle that water right 1-7128 should not be allowed to impair or interfere with the Palisades Powerhead Permit, it also appears that they have not been able to agree to the specific subordination language. It is possible that one or more of the existing parties will seek to resolve this disagreement by proposing a settlement or condition that interprets or applies the Nez Perce Agreement.

The State, as a party to the Nez Perce Agreement, has a direct and substantial interest in any attempt to interpret or apply the Nez Perce Agreement. While the State does not seek to put the Nez Perce Agreement at issue in this proceeding and does not presently anticipate that any of the existing parties will do so, the State should be allowed to intervene so the State will be able to respond in the event one or more of the existing parties submits a settlement proposal or argument that involves an interpretation or application of the Nez Perce Agreement. Any question of the interpretation or application of the Nez Perce Agreement should not be

addressed, even for the limited purpose of conditioning water right 1-7128,⁷ without providing an opportunity for the State to participate.

3. The State seeks limited “Affirmative Relief.”

The State seeks “affirmative relief,” IDAPA 37.01.01.351, only in that the 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. The State does not favor or support any particular language for this purpose. It is the State’s understanding, rather, that the existing parties (and perhaps the Department) are considering several different proposals that would expressly or implicitly subordinate water right 1-7128 to the Palisades Powerhead Permit without referencing, interpreting, or applying the Nez Perce Agreement. Any such proposal would be acceptable to the State.

4. Granting this Petition would not expand the issues or cause prejudice or delay.

Granting this petition would not prejudice the existing parties, unduly broaden the issues, or cause delay for the reasons discussed above. The question of subordinating water right 1-7128 to the Palisades Powerhead Permit is already an issue in this proceeding. Further, it appears that the existing parties agree in principle that water right 1-7128 should be subordinated to the Palisades Powerhead Permit, even if they have not reached agreement as to the specific language of a subordination condition. Moreover, the State will not object to a settlement that

⁷ Any condition in water right 1-7128 that expressly or implicitly interprets the Nez Perce Agreement would likely be cited or relied upon in any future proceeding where the Nez Perce Agreement is at issue.

subordinates water right 1-7128 to subsequent upstream beneficial depletionary uses, and also to the Palisades Powerhead Permit, without referencing, interpreting, or applying the Nez Perce Agreement. If no settlement is reached and this matter proceeds to hearing, the State's participation will be limited to two issues: (1) subordination of water right 1-7128 to subsequent upstream beneficial depletionary uses and also to the Palisades Powerhead Permit; and (2) any question of the interpretation or application of the Nez Perce Agreement.

Further, the State's interest is not adequately represented by the existing parties because the Nez Perce Agreement was an amicable settlement of disputed water right claims that was negotiated by and for a number of different parties having different interests. The State's direct and substantial interest in the Nez Perce Agreement, as one of the key parties to the negotiations and the agreement itself, is unique and distinguishable from whatever interests the existing parties may have in the Nez Perce Agreement.

The fact that the existing parties appear to agree in principle that water right 1-7128 should be subordinated to the Palisades Powerhead Permit does not mean the State's interest is adequately represented. Presumably the State's active participation will be minimal so long as the existing parties continue to agree that water right 1-7128 should be subordinated to the Palisades Powerhead Permit, and are able to reach a subordination settlement that does not reference, interpret, or apply the Nez Perce Agreement. However, unless and until such a settlement is reached it cannot be assumed that any existing party adequately represents the State's direct and substantial interest in this proceeding.

5. Substantial reason and good cause for the delay in filing this Petition.

There is substantial reason and good cause for the State's delay in filing a petition to intervene in this proceeding. The time period for filing protests to the Application closed seven

years before the Nez Perce Agreement 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.⁸

Moreover, it appears to no action was taken on the Application for approximately twelve years after it was filed, and when the Department resumed processing the Application in 2019, the State did not receive notice of the resumed proceedings. After the State was informally notified of the resumed proceedings earlier this year by one of the existing parties, the State diligently investigated the matter, and discussed the status of the application and the potential issues with some of the existing parties.

These circumstances demonstrate that there is substantial reason for the delay in the filing of this petition. These circumstances also provide good cause for excusing the delay in filing. IDAPA 37.01.01.352-353.

CONCLUSION

The State has a direct and substantial interest in this proceeding that is not adequately represented by the existing parties, and granting the petition will not prejudice the parties, delay the proceeding, or unduly expand the issues. There is substantial reason and good cause for the

⁸ While the application for the Palisades Powerhead Permit was filed two years before the Nez Perce Agreement was finalized, the original application did not refer to “powerhead” or “flow augmentation.” The only purposes of use identified were power storage, power from storage, irrigation storage, and irrigation from storage. The incidental “fish and wildlife” benefits identified were only those “at the reservoir” itself. It appears that only in mid-2005, that is, the year after the Nez Perce Agreement was finalized, was the application amended to recognize that powerhead water could be released for flow augmentation purposes pursuant to the Nez Perce Agreement. See *Withdrawal of Protest, Application 1-10401* (Jun. 7, 2005) (This document is in the Department’s online docket for water right 1-10401.) (<https://idwr.idaho.gov/apps/ExtSearch/RelatedDocs.asp?Basin=1&Sequence=10401&SplitSuffiX=>).

delay in the filing of this petition. The State therefore respectfully requests that this petition be granted so that the State can participate as a party to this proceeding.

RESPECTFULLY SUBMITTED this 22nd day of May, 2020.

LAWRENCE G. WASDEN
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DARRELL G. EARLY
Deputy Attorney General
Chief, Natural Resources Division

/s/ Michael C. Orr

MICHAEL C. ORR
Deputy Attorney General
Natural Resources Division

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 22nd day of May 2020, I caused the foregoing *State of Idaho's Petition to Intervene* to be filed with the Idaho Department of Water Resources, and true and correct copies to be served on the following parties, by the methods indicated:

James Cefalo Idaho Department of Water Resources Eastern Regional Office 900 N. Skyline Dr., Ste. A Idaho Falls, ID 83402-1718	<input checked="" type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input checked="" type="checkbox"/> Facsimile: 208-525-7177 <input checked="" type="checkbox"/> E-Mail: james.cefalo@idwr.idaho.gov
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/s/ Michael C. Orr

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