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BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF LICENSING WATER
RIGHT PERMIT NO. 01-7011 IN THE
NAME OF TWIN FALLS CANAL
COMPANY AND NORTH SIDE CANAL
COMPANY

**JOINT REPLY TO OPPOSITION TO
PETITIONS TO INTERVENE**

Mud Lake Water Users, Independent Water Users, Jefferson Canal Company, Montevieu Canal Company, Producer's Canal Company, Fremont-Madison Irrigation District, and the

Aberdeen-Springfield Canal Company (collectively, the "Upper Snake Water Users"), acting for themselves and their individual members, and Aberdeen-American Falls Ground Water District, Bingham Ground Water District, and Bonneville-Jefferson Ground Water District (collectively, the "Ground Water Districts"), by and through counsel, submit this *Joint Reply to Opposition to Petitions to Intervene* (hereinafter, "*Joint Reply*"). This *Joint Reply* responds to arguments raised in the *Response In Opposition to Petitions to Intervene Filed by Ground Water Users and Other Irrigation Entities* (hereinafter, "*Canal Companies' Response*"), which was filed by Twin Falls Canal Company and North Side Canal Company (hereinafter "Canal Companies") through their counsel on January 30, 2009.

I. PROCEDURAL BACKGROUND.

The Upper Snake Water Users and the Ground Water Districts submit that paragraphs 1 through 17 of the Idaho Department of Water Resources' ("IDWR" or "Department") October 20, 2008 Final Order contains a much more comprehensive and accurate representation of the procedural background in this matter than is found at page 2 of *Canal Companies' Response*, and therefore this *Joint Reply* incorporates the same as if set forth fully herein.

To pick up where the Final Order's procedural background ends, the Department issued its Final Order on the licensing of Water Right Permit No. 01-7011 on October 20, 2008. The Canal Companies filed a *Protest and Petition for Hearing* on Nov. 4, 2008. On November 13, 2008, the Department served its *Order Designating Contested Case and Appointing Hearing Officer*, which specifically mentioned petitions for intervention by requiring a potential intervenor to accept Gerald F. Schroeder as the hearing officer in this matter. On December 2, 2008, the Ground Water Districts and Aberdeen-Springfield Canal Company petitioned to intervene. On December 4, 2008, the Upper Snake Water Users petitioned to intervene. On January 21, 2009, the hearing officer served a

scheduling order regarding the petitions to intervene, and a hearing is currently set for March 13, 2009 to address the petitions.¹ On January 30, 2009, the Canal Companies filed their *Canal Companies' Response*. This *Joint Reply* is in reply to the *Canal Companies' Response*.

While the Upper Snake Water Users and Ground Water Districts clearly set forth the interests they have in the licensing of Water Right No. 01-7011 in their respective petitions to intervene, the intervention has been opposed by the Canal Companies on two main grounds. First, the Canal Companies allege that the Upper Snake Water Users and Ground Water Districts do not meet the standards contained in the relevant IDAPA rules for intervention, and secondly, that the Upper Snake Water Users and Ground Water Districts do not have standing. Each of these arguments is addressed below.

III. ARGUMENT.

A. The Upper Snake Water Users, and the Ground Water Districts meet the standards for intervention contained at IDAPA 37.01.01.350 through 354.

1. Introduction.

The Upper Snake Water Users and Ground Water Districts seek to intervene under Rules 350 through 354 of the Rules of Procedure of the Idaho Department of Water Resources (IDAPA 37.01.01.350-354). These Rules provide that “[p]ersons not applicants or claimants or appellants, Canal Companies, complainants, protestants, or respondents to a proceeding who claim a direct and

¹ It should be noted that one of the claims made by Canal Companies in the procedural history is not supported by the current administrative record on this matter. The Canal Companies allege that “[t]he comments of the parties seeking intervention were received, considered, and incorporated in the subordination condition by the Department, . . .” (*Canal Companies' Response* at 2). However, in his Final Order, the Director specifically stated in Paragraph 1 of his Conclusions of Law that “[a]lthough the comments submitted are included in the agency record, they were not considered by the Director. . . . the form of the subordination condition in the license for water right no. 01-7011 is controlled by and is based solely on provisions of state law and the Idaho State Water Plan.” (Final Order at 7 (Conclusions of Law ¶1)). Thus, the Canal Companies’ allegation is not accurate, as the comments provided were not considered by the Director.

substantial interest in the proceeding may petition for an order from the presiding officer granting intervention to become a party, if a formal hearing is required by statute to be held in the proceeding.”² The petition must be filed “at least fourteen (14) days before the date set for the formal hearing, or by the date of the prehearing conference, whichever is earlier, unless a different time is provided by order or notice.”³ A timely-filed petition to intervene shall be granted if the petition “shows direct and substantial interest in any part of the subject matter of a proceeding and does not unduly broaden the issues, ... unless the applicant's interest is adequately represented by existing parties.”⁴

There does not appear to be any case in Idaho that directly review the Department’s intervention rules set forth in the above paragraph. However, the language in three of the four standards contained therein are analogous to the standards under Idaho Rule of Civil Procedure 24(a)(2) and Federal Rule of Civil Procedure 24(a)(2)⁵ for intervention of right. This is evident from the following table comparing the language from the IDAPA rules with the language from I.R.C.P. 24(a):

2 IDAPA 37.01.01.350.

3 *Id.* at 37.01.01.352.

4 *Id.* at 37.01.01.353.

5 The language from both the Idaho Rule and Federal Rule are identical, except under Rule 24(a)(1), where the Idaho rule substitutes “state of Idaho” for “United States” under the Federal rule. Notably, subpart (1) of the intervention of rule right is not applicable in this matter. The relevant portion is subpart (2), and other both rules, the language is identical.

Requirement No.	I.R.C.P. and F.R.C.P. 24(a)(2)	IDAPA 37.01.01.350 through 354
1	"Upon timely application . . ."	"Petitions to intervene must be filed at least fourteen (14) days before the date set for formal hearing, unless a different time is provided by order or notice." Rule 352 "If a timely-filed petition to intervene . . ." Rule 353
2	"When the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede applicant's ability to protect that interest, . . ."	"The petition . . . must state the direct and substantial interest of the potential intervenor in the proceeding." Rule 351 "If a timely filed petition to intervene shows direct and substantial interest in any part of the subject matter of a proceeding . . ." Rule 353.
3	"unless the applicant's interest is adequately represented by other parties."	". . . unless the applicant's interest is adequately represented by existing parties." Rule 353
4		Intervention "does not unduly broaden the issues, . . ." Rule 353

As with the Idaho and Federal Rules of Procedure, the plain language of the IDAPA rules indicates that the determination of whether or not parties may intervene is within the sound discretion of the hearing officer. As set forth in *American Falls Reservoir District No. 2 v. Idaho Department of Water Resources*:⁶ "[I]ntervention as of right has been considered to be a mixed question of law and fact involving the discretion of a trial judge."⁷ While there is no Idaho case that

⁶ 143 Idaho 862, 154 P.3d 433 (2007).

⁷ *Id.* at 882, 154 P.3d at 453.

directly reviews the IDAPA rules cited above, we presume that the hearing officer in this matter has discretion on this issue, and if challenged on appeal, will be afforded the same discretion on appeal.

As set forth below, the Upper Snake Water Users and Ground Water Districts do meet the intervention standards found under the relevant IDAPA rules.

2. There is no dispute that the Upper Snake Water Users' and Ground Water Districts' petitions were timely filed.

As set forth above, the first requirement that must be met in order for the Upper Snake Water Users and Ground Water Districts to intervene is that the petition must be timely filed. The Canal Companies have not alleged untimeliness, and there appears to be no sound basis for such a claim. The petitions to intervene that were filed by the Upper Snake Water Users and Ground Water Districts more than two months ago are well within the time allowed under Rule 352 and therefore, meet the first requirement for intervention.

3. The Upper Snake Water Users and Ground Water Districts do have a direct and substantial interest in the licensing of Water Right No. 01-7011 because the language of the subordination condition proposed by the Canal Companies could be used to (1) prohibit ground water recharge efforts under junior-priority ground water recharge rights, and (2) as a result of such prohibition, decrease the supply of water available to the Upper Snake Water Users and Ground Water Users potentially resulting in curtailment of their water rights.

The Canal Companies allege that the interests set forth by Upper Snake Water Users and Ground Water Districts "are not personal to these parties, but rather apply to all junior water rights holders upstream from Milner Dam."⁸ We can think of no other threat more personal than curtailment of water use, which is state action prohibiting the use of individual real property rights of the individual members of Upper Snake Water Users and Ground Water Districts. Indeed, the very fact that the Canal Companies have appealed the subordination condition as to ground water recharge

⁸ *Canal Companies' Response* at 4.

reveals their intended target—ground water users and recharge advocates. If the water right is not intended to be wielded by the Canal Companies for curtailment, there would be no need to appeal the condition. Therefore, the direct and substantial interest of the Upper Snake Water Users and Ground Water Districts have is that the Canal Companies can use Water Right No. 01-7011 to harm the Upper Snake Water Users and Ground Water Districts.

While there is no Idaho case directly on point as to what constitutes a direct and substantial interest under the Department's rules for intervention, the Department may look for guidance to the standards for intervention contained Idaho and Federal Rule of Civil Procedure 24(a)(2). The case of *Sierra Club v. Glickman*,⁹ a federal case from the Fifth Circuit, is especially instructive because it involved facts and issues that are similar to those before the hearing officer in this case, and because the arguments raised by the Sierra Club are similar to those made by the Canal Companies.

In *Sierra Club*, the American Farm Bureau Federation ("AFBF"), as representatives of farmers pumping from the Edwards Aquifer in Texas, sought to intervene in a lawsuit filed by the Sierra Club against the United States Department of Agriculture ("USDA").¹⁰ The Sierra Club alleged "that numerous of [USDA's] activities, including the subsidization of and failure to establish conservation programs for farmers in central and western Texas, have led to over-pumping of the Edwards Aquifer."¹¹ The Sierra Club further complained that the alleged over-pumping "threatened endangered species and caused water pollution, in violation of numerous federal laws."¹²

⁹ 82 F.3d 106 (1996).

¹⁰ *Id.* at 108.

¹¹ *Id.*

¹² *Id.*

The AFBF, as the representative of farmers pumping from the Edwards Aquifer, and the State of Texas, moved to intervene as a matter of right, or alternatively, to intervene permissively. The district court denied the motions. On appeal, the Fifth Circuit reversed. In reversing the district court, the Fifth Circuit discussed (1) whether AFBF's members had a sufficient interest in the proceeding, (2) whether AFBF's members would be impaired by non-intervention, and (3) whether the USDA would adequately represent the AFBF's members' interests.

On the issue of whether AFBF's members had a sufficient interest to intervene, the Fifth Circuit bluntly stated that "[t]he Sierra Club's complaint targets the farmers' pumping"¹³ and that "the suit intends to have a direct impact on the AFBF's members who pump irrigation water from the [Edwards] Aquifer; the proffered violations and remedy confer on AFBF's members a sufficient interest to intervene."¹⁴

Similar to the *Sierra Club* case, the Canal Companies in this matter have appealed the language of the subordination condition because, as currently written, it will prevent the Canal Companies from making a delivery call against junior-priority recharge rights and, accordingly, will decrease their ability to curtail ground water rights who will benefit from such recharge. While the Canal Companies have argued that their issue is only with IDWR, the actual parties affected are water users such as those represented by the Upper Snake Water Users and Ground Water Districts.

The Canal Companies argue that "most of the parties seeking intervention hold no water rights at all, and only one of the parties seeking intervention, the Aberdeen-Springfield Canal Company, holds a water right that purports to allow the party to conduct recharge for irrigation."¹⁵

¹³ *Id.* at 109.

¹⁴ *Id.*

¹⁵ *Canal Companies' Response* at 7.

However, this is not accurate. Mud Lake Water Users posses Permit No. 31-7650, which Canal Companies specifically discuss in their Response. Permit No. 31-7650 is awaiting the issuance of a license, but is junior in priority to the Canal Comapnies' hydropower right at Milner Dam (Water Right No. 01-7011). Without the subordination condition as written, this permit would be subject to curtailment in the event that the Canal Companies entire hydropower right of 5,714.7 cfs is not being satisfied. This clearly has a direct and substantial effect on Mud Lake Water Users' Permit No. 31-7650, and is sufficient to warrant an order granting intervention.

As to Permit No. 31-7650, the Canal Companies state that "[n]otably, Camas Creek¹⁶ is not a surface water tributary to the Snake River therefore the Canal Companies' water right will have no effect on the recharge permit held by the Mud Lake Water Users."¹⁷ However, Camas Creek is located within the Eastern Snake Plain Aquifer, and under the Department's conjunctive management rules, is considered to be an area of common ground water supply, which, as the hearing officer is well aware, provides tributary water to springs located near American Falls Reservoir, which provide water to Canal Companies under their water rights.¹⁸ There is no guarantee that the Canal Companies' assertion in a brief is binding enough on the parties to ensure that Permit No. 31-7650 will not be affected by the subordination language of their hydropower right. To the extent the Canal Companies' wish to engage is settlement negotiations along those lines, Mud Lake Water Users would be happy to do so, but to date, no such discussions have been had. Without such an agreement, it is clear that Permit No. 31-7650 will be subject to the subordination language, and

16 Camas Creek is the source from which Permit No. 31-7650 is authorized to divert from.

17 *Canal Companies' Response* at 5.

18 See IDAPA 37.03.11.050. As the hearing officer on the Surface Water Coalition Call and the Spring Users Call, we are confident the hearing officer is keenly aware of the ground water and surface water interaction of the ESPA, and see no need to restate or reiterate these issues.

is one of the targets of the Canal Companies' challenge to the subordination language in their hydropower license. As a target of the Canal Companies, Mud Lake Water Users clearly has a direct and substantial interest in these proceedings, and intervention should be granted.

Fremont-Madison Irrigation District ("Fremont-Madison") and Aberdeen-Springfield Canal Company ("Aberdeen-Springfield") likewise have a direct and substantial interest in the subordination condition of the Milner hydropower license. As proponents of ground water recharge, and participants in ground water recharge, Fremont-Madison and Aberdeen-Springfield seek to ensure that efforts to recharge are not prohibited by the subordination language in the hydropower license.

Fremont-Madison possesses surface and ground water rights that could also be affected by the subordination language. In addition, both Fremont-Madison and Aberdeen-Springfield have electors and members who are also ground water users who wish to protect the ability of water users to undertake artificial recharge because these users will benefit from that recharge. These ground water users are also targets of the Canal Companies in this matter. If ground water recharge is impaired, these users will be directly impacted. Therefore, Fremont-Madison and Aberdeen-Springfield and their members have a direct and substantial interest in this matter.

The members of the Ground Water Districts, also have substantial interests in the licensing of Water Permit No. 01-7011. These ground water users critically depend upon recharge to maintain health of the ESPA and they are also targets of the Canal Companies. While the Canal Companies have argued that their issue is with IDWR only, the actual parties affected include individuals who make up the Ground Water Districts. These are individuals that face curtailment in the current administrative action undertaken by the Surface Water Coalition—two members of which are the Canal Companies. The hearing officer in this matter, having also been the hearing officer in the

other administrative cases involving the Surface Water Coalition, no doubt is familiar with the intent of these groups to curtail ground water users that divert from the ESPA, despite the severe economic consequences of such curtailment. The Ground Water Districts have a direct and substantial interest in the subordination language because if ground water recharge is impaired, it will decrease the amount of water available in the ESPA, which could result in curtailment of individual ground water rights or substantially harm the Ground Water Districts' ability to avoid curtailment through mitigation activities that depend on recharge.

Further, as noted in the Upper Snake Water Users *Petition to Intervene*, ground water recharge is a critical component of the Comprehensive Aquifer Management Plan ("CAMP"), which seeks to implement an average of 80,000 acre-feet for five years.¹⁹ Managed recharge is a crucial component of the CAMP, and the removal of the subordination condition as requested by Canal Companies would fatally impact recharge efforts on the ESPA.

Overall, the Upper Snake Water Users and the Ground Water Districts represent numerous irrigators, municipalities, and commercial and industrial entities operating within the State of Idaho. They are all owners of water rights or have members who are owners of water rights that divert from sources that are tributary to reaches of the Snake River upstream from Milner Dam. Their water rights have priority dates both senior and junior in priority to the hydropower water right that is the subject of this proceeding (March 30, 1977). They therefore have a substantial interest in future water use and development upstream from Milner Dam, particularly for recharge purposes.

The Canal Companies argue that the Upper Snake Water Users and the Ground Water Districts have "assert[ed] nothing more than a generalized concern . . .," that concern about potential

¹⁹ See Upper Snake Water Users' *Petition to Intervene* at 4.

water right administration is not direct and substantial, and that those seeking intervention “will be in no different position than any other junior water right holder.”²⁰ However, this analysis focuses on the number of individuals potentially affected, not on the actual affect to each individual. In essence, the Canal Companies argue that the larger the potential number of affected individuals, the less “direct and substantial” their interests. We disagree.

The effect of curtailment is the same for an individual or entity, no matter who else is grouped in. The Canal Companies have cited to no case law that would support this sliding scale approach of gauging how substantial the interests of parties seeking intervention are in relation to the number of potential victims. Notably, the Fifth Circuit in *Sierra Club* did not discuss the number of individuals making up AFBF, which were presumably numerous. The court instead focused on the individual injury each farmer could face, and we invite the hearing officer to follow the same logic here.

It is particularly crucial that the Upper Snake Water Users and the Ground Water Districts be permitted to intervene in this matter now because they will be bound by the outcome. In the *Sierra Club* case discussed above, the Fifth Circuit reversed the district court which held that AFBF’s members would not be impaired by non-intervention “because they will not be bound by the outcome of the Sierra Club’s lawsuit.”²¹ In reversing the district court, the Fifth Circuit held that “a ruling in the Sierra Club’s favor could be relied upon as a precedent in suits against individual farmers over their pumping from the [Edwards] Aquifer. Thus, the Sierra Club’s suit may, as a practical matter, impair or impede the AFBF members’ interests.”²²

²⁰ *Canal Companies’ Response* at 7.

²¹ 82 F.3d at 109.

²² *Id.*

Just like AFBF and its individual members, the Upper Snake Water Users and the Ground Water Districts and their individual members will be bound by the precedent established in the licensing of the Canal Companies' hydropower right at Milner, and the results of this matter will, as a practical matter, impair their interests because once the condition is included, it cannot later be challenged. Now is the right time for these parties to intervene.

4. The interests of the Upper Snake Water Users and the Ground Water Districts and their individual members are not adequately represented by the existing parties currently involved in the Milner licensing, which parties currently consist only of the Canal Companies and the Idaho Department of Water Resources.

The third requirement for intervention under the Department's Rules is that those seeking intervention must not be adequately represented by other parties to the action.²³ The Canal Companies argue that "the State's representation in the administrative proceedings will adequately protect any interest the parties seeking intervention claim." Further, the Canal Companies argue that "[t]he Department's position and that of the parties seeking intervention do not conflict and appear to overlap entirely."²⁴

In the *Sierra Club* case discussed above, this same argument was advanced by the Sierra Club. Specifically, the Sierra Club argued that the USDA would adequately represent the AFBF members' interests. The Fifth Circuit rejected this argument, holding that "[t]he government must represent the broad public interest, not just the economic concerns of [one] industry."²⁵ The Fifth

²³ It perhaps goes without saying that the Canal Companies do not represent the interests of the Upper Snake Water Users and the Ground Water Districts. The focus of this section will rest upon the Canal Companies' assertion that the State will adequately represent the Upper Snake Water Users and the Ground Water Districts.

²⁴ *Id.* at 11.

²⁵ 82 F.3d at 110 (quoting *Sierra Club v. Espy*, 18 F.3d 1202 (5th Cir. 1994))(alterations in original).

Circuit further held that “[f]or this reason alone, the interests of AFBF members will not necessarily coincide, even though, at this point, they share common ground.”²⁶

The same rationale employed by the Fifth Circuit is applicable in this matter. The Idaho Department of Water Resources is a state administrative agency which represents the public as a whole. The Department is not a stakeholder; it does not own water rights. To presume that IDWR only represents water users such as the Upper Snake Water Users and the Ground Water Districts and their individual members ignores the fact that they represent the broad public interest, not individual groups.

Even though this is a contested matter, there is still the possibility that the Canal Companies and the Department will enter into settlement negotiations. If so, the proposals discussed may be acceptable to those parties, but may not be acceptable to the Upper Snake Water Users and the Ground Water Districts and their individual members. The only way to ensure that these entities are protected is to give them a seat at the table, and allow them to intervene.

In sum, even if IDWR and the members of the Upper Snake Water Users, and the Ground Water Districts, share common ground, their interests “will not necessarily coincide.”²⁷ For this reason alone, the hearing officer should permit Upper Snake Water Users and the Ground Water Districts, on behalf of their individual members, to intervene.²⁸

5. Allowing the Upper Snake Water Users and the Ground Water Districts to intervene will not unduly broaden the issues.

²⁶ *Id.* at 110.

²⁷ *Id.*

²⁸ The Fifth Circuit in the Sierra Club case also allowed the State of Texas to intervene, which had previously been denied by the district court.

The fourth requirement under the Department's rules for intervention is that the intervenors cannot unduly broaden the issues before the hearing officer. The Canal Companies allege that if the Upper Snake Water Users and the Ground Water Districts are allowed to intervene, there is "substantial danger" that these groups will unduly broaden the issues.²⁹ Thereafter, the Canal Companies argue that most of the parties seeking intervention are already participants in SRBA Subcase No. 00-92023 involving the Idaho Power Company,³⁰ and that it is "substantially likely" that the intervenors will "conflate the matter . . . in this administrative action with the issues before the SRBA court." The Canal Companies further allege that "such action would amount to 'forum shopping' and would unduly broaden the scope of this water right appeal . . ."³¹ This argument is unfounded.

The Upper Snake Water Users and the Ground Water Districts have clearly asserted the issue they seek to address in this matter, which is the subordination language that has been included in the Milner hydropower license which reflects the policies of Idaho's State Water Plan. We are unsure how Subcase No. 00-92023 and its relevant issues could be "conflated" in this matter, or how "forum shopping" is involved in any way. The matter is properly before the Department, and the Upper Snake Water Users and the Ground Water Districts have no intention of removing this matter to another forum, and indeed, cannot conceive of a mechanism for doing so at the present time.

Further, as to the issues currently before the hearing officer, those issues have been framed by the Canal Companies' protest, and it is that protest that the Upper Snake Water Users and the Ground Water Districts seek to address by intervening. The Upper Snake Water Users and the

²⁹ *Canal Companies' Response* at 11.

³⁰ Mud Lake Water Users is not a participant in Subcase No. 00-92023.

³¹ *Canal Companies' Response* at 11.

Ground Water Districts have no intention of broadening the issues squarely before the hearing officer. Consequently, intervention is appropriate as the Upper Snake Water Users and the Ground Water Districts have not and will not unduly broaden the issues before the hearing officer.

6. In summary, the Upper Snake Water Users and the Ground Water Districts meet all of the necessary requirements to intervene under the Department's rules.

For the reasons set forth above, the Upper Snake Water Users and the Ground Water Districts meet the requirements set forth in IDAPA 37.01.01.350 through 354. As a result, the hearing officer should permit the Upper Snake Water Users and the Ground Water Districts to intervene to ensure that their interests are adequately protected.

B. The Upper Snake Water Users and the Ground Water Districts have standing to intervene in this matter.

1. Introduction.

In addition to the argument made by Canal Companies relative to intervention, the Canal Companies also allege that the Upper Snake Water Users and the Ground Water Districts lack legal standing to participate. In support of this conclusion, the Canal Companies' allege that "[t]he parties seeking intervention in this action do not hold water rights that can be harmed by any decision that results from these Canal Companies['] appeal and protest of their water right License no. 01-07011." Therefore, they "do not have a distinct and palpable injury, or even threat thereof, that is capable of redress in the Canal Companies license protest proceeding."³²

It appears, though is not entirely clear from their brief, that the Canal Companies are actually making two arguments. First, that under general principles of standing, the individual members who

³² *Id.* at 8.

make up the Upper Snake Water Users and the Ground Water Districts cannot show “a distinct and palpable injury, or even threat thereof, that is capable of redress,”³³ and therefore do not have standing, and second, that without the individual members being injured, the Upper Snake Water Users and the Ground Water Districts do not meet the standards for “organizational” or “associational standing.” It appears that the Canal Companies have blended these two issues, but for the sake of clarity and thoroughness, each of these issues will be addressed in turn.

2. The individual water users that make up the Upper Snake Water Users and the Ground Water Districts have alleged an injury in fact—curtailment of water rights—and that the relief they request in this matter will prevent the claimed injury; therefore, the individual members have standing.

The Canal Companies cite generally to the Idaho Supreme Court case of *Young v. City of Ketchum* as the source of the standards relevant to standing law. The *Canal Companies' Response*, however, does not include all of those standards, which the Court explained as follows:

It is a fundamental tenet of American jurisprudence that a person wishing to invoke a court's jurisdiction must have standing. Standing is a preliminary question to be determined by this Court before reaching the merits of the case. The doctrine of standing is a subcategory of justiciability. As this Court has previously noted, the doctrine is imprecise and difficult to apply. Standing focuses on the party seeking relief and not on the issues the party wishes to have adjudicated. To satisfy the case or controversy requirement of standing, a litigant must “allege or demonstrate an injury in fact and a substantial likelihood the relief requested will prevent or redress the claimed injury.” This requires a showing of a “distinct palpable injury” and “fairly traceable causal connection between the claimed injury and the challenged conduct.” But even if a showing can be made of an injury in fact, standing may be denied when the asserted harm is a generalized grievance shared by all or a large class of citizens.

...

This Court has consistently found a lack of standing in cases in which the plaintiffs were on the same ground as citizens generally.³⁴

³³ *Id.*

³⁴ *Young v. City of Ketchum*, 137 Idaho 102, 104-05, 44 P.3d 1157-60 (2002) (internal citations omitted).

As to the issue of injury, we believe it is quite clear that the individual entities and individuals consisting of Upper Snake Water Users and the Ground Water Districts will be injured if the subordination condition is amended in a manner that does not subordinate the Canal Companies' hydropower right at Milner to ground water recharge. The injury called for under the standing analysis is the same as the "direct and substantial interest" requirement for intervention, which is set forth in detail above. Accordingly, for the reasons given above, the relief requested by the Upper Snake Water Users and the Ground Water Districts—appropriate subordination language—would "prevent or redress the claimed injury," and the entities and individuals consisting of the Upper Snake Water Users and the Ground Water Districts therefore meet this standing requirement.

Additionally, the Canal Companies argue that the injury claimed by the Upper Snake Water Users and the Ground Water Districts is generalized because it involves all junior water right holders, and this fact mandates a finding of no standing. This position is not supported by Idaho law.

The Idaho Supreme Court has found a lack of standing in cases where the plaintiffs were on the same ground as all citizens generally, but the court has found standing when there is a distinct set of affected citizens. In the *Young* case, the Idaho Supreme Court specifically discussed the case of *Van Valkenburgh v. Citizens for Term Limits*.³⁵ There, the Court found standing because the Canal Companies alleged they would suffer a "distinct palpable injury" to their right to vote if the Secretary of State were allowed to implement a statute regarding a term limits pledge. As recounted in *Young*, "[t]his Court concluded the Canal Companies had alleged an injury not suffered by all

35 135 Idaho 121, 15 P.3d 1129 (Idaho 2000).

citizens, and found the Canal Companies to have standing to challenge the constitutionality of the term limits pledge statute.³⁶

In the matter before the hearing officer, the issue is not generalized because the potential injury to the individual members of the Upper Snake Water Users and the Ground Water Districts is not shared by all citizens in general. These groups consist of entities and individuals who possess water rights. Not every citizen in Idaho possesses individual water rights or receives irrigation water from an irrigation district or canal company. There is simply no generalized allegation of injury here. Moreover, even among Idaho water right holders, there is a specific set of individuals who will be affected by the subordination language of the Milner hydropower license, which includes those represented by the Upper Snake Water Users and the Ground Water Districts. Consistent with the Idaho Supreme Court standards, there is no generalized allegation of injury, and the Upper Snake Water Users and the Ground Water Districts have standing in the matter currently before the hearing officer.

3. On behalf of their individual members, the Upper Snake Water Users and the Ground Water Districts meet the requirements for organizational or associational standing.

With regards to associational or organizational standing,³⁷ Idaho has adopted a three-point test for organization standing which was articulated in the case of *Glengary-Gamlin Protective Association, Inc. v. Bird*.³⁸ The three-point test is:

[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

³⁶ 137 Idaho at 106, 44 P.3d at 1161.

³⁷ There are not different legal standards. In cases throughout the United States, the terms "organizational standing" and "associational standing" are used interchangeably. In Idaho, the term "organization standing" is used.

³⁸ 106 Idaho 84, 675 P.2d 344.

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 participation of individual members in the law suit.³⁹

In *Canal Companies' Response*, they have only argued that the Upper Snake Water Users and the Ground Water Districts, as representatives of their individual members, do not meet the first prong of the above three point test. The Canal Companies only state that "[a]n organization only has standing to sue when its members would otherwise have standing to sue in their own right."⁴⁰ This only concerns the first requirement for organizational standing set forth above. Because the second and third requirements have not been addressed, we presume the Canal Companies would agree that the Upper Snake Water Users and the Ground Water Districts meet those requirements, and therefore, they will not be addressed.

As to the first requirement, the individuals who make up the Upper Snake Water Users and the Ground Water Districts are individual water users, and consequently, have sufficient interests to intervene on their own behalf. The injury called for under the standing analysis is the same as the "direct and substantial interest" requirement for intervention, which is set forth in detail above.

We note additionally that in the *Sierra Club* case, discussed above, the Sierra Club argued that AFBF did not have associational standing to represent the individual farmers, and the district court agreed. The Fifth Circuit reversed, holding that "the AFBF's members have standing to intervene individually in the Sierra Club's suit; we have held above that the farmers have sufficient interests related to the [Edwards] Aquifer and the USDA's subsidies."⁴¹ Similarly, the individual

³⁹ *Glengary-Gamlin Protective Association, Inc. v. Byrd*, 106 Idaho 84, 87, 675 P.2d 344, 348 (S.Ct. 1983); quoting *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 433, 443, 97 S. Ct. 2434, 2441, 53 L. Ed 2d 383 (1977).

⁴⁰ *Canal Companies' Response* at 8.

⁴¹ *Sierra Club v. Glickman*, 82 F.3d 106 (5th Cir. 1996).

water users—mostly farmers—who make up the Upper Snake Water Users and the Ground Water Districts have sufficient interests in the licensing of Water Right No. 01-7011. As a result, the individual members of the Upper Snake Water Users and the Ground Water Districts have standing, and therefore, the organizations seeking intervention on their behalf have met the first requirement for organizational standing.

As stated above, the second and third requirements for organizational standing have not been raised by the Canal Companies, and therefore presume their concession that the Upper Snake Water Users and the Ground Water Districts meet the second and third requirements.

- 4. In summary, the individual members of the Upper Snake Water Users and the Ground Water Districts have standing, and the entities representing the individual members—the Upper Snake Water Users and the Ground Water Districts—have organizational standing to represent them.**

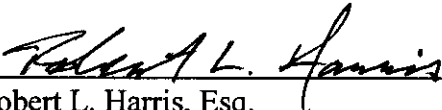
For the reasons set forth above, the Upper Snake Water Users and the Ground Water Districts have standing to intervene pursuant to IDAPA 37.01.01.350 through 354. As a result, the hearing officer should permit the Upper Snake Water Users and the Ground Water Districts to intervene to ensure that their interests are adequately protected.

III. CONCLUSION.

For the reasons set forth above, the Upper Snake Water Users and Ground Water Districts meet the necessary standards for intervention and standing in this matter. As a result, the Upper Snake Water Users and Ground Water Districts' Petitions to Intervene must be granted.

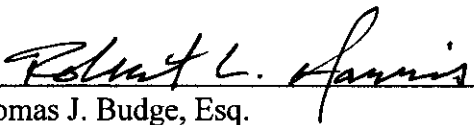
DATED this 20th day of February, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, a true and correct copy thereof on this 26th day of February, 2009.

DOCUMENT SERVED: **PETITION TO INTERVENE**

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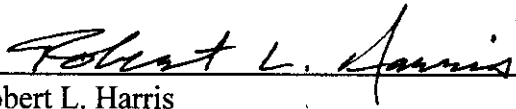
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