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DEPARTMENT OF
WATER RESOURCES

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

IN THE MATTER OF LICENSING WATER)
RIGHT PERMIT NO. 01-7011 IN THE) **IDAHO WATER RESOURCE**
NAME OF TWIN FALLS CANAL COMPANY) **BOARD'S REPLY IN SUPPORT OF**
AND NORTH SIDE CANAL COMPANY) **PETITION TO INTERVENE**

Petitioner the Idaho Water Resource Board (IWRB), by and through its counsel of record, hereby files this Reply in Support of Petition to Intervene in In the Matter of Licensing Water Right Permit No. 01-7011 in the Name of Twin Falls Canal Company and North Side Canal Company. This Reply responds to the Memo in Opposition to the Ground on Which the Idaho Water Resource Board Moves for Intervention (the "Opposition").

The Applicants Twin Falls Canal Company and North Side Canal Company ("the Canal Companies") oppose IWRB's Petition to Intervene for several reasons, none of which should preclude IWRB's intervention. First, the Canal Companies state that IWRB "seeks intervention on the basis that the Board's presence in [this case] is necessary to protect the State Water Plan." Opposition, p. 1-2. IWRB did not use the word "protect" in its Petition to Intervene because it was not apparent that the State Water Plan would be challenged in this case, but if the Plan is challenged, that would be sufficient reason for IWRB to intervene in the case, for it has a direct and substantial interest in protecting the Plan that it formulated.

IWRB petitioned to intervene to see that the license(s) at issue "contain all conditions necessary to comply with the State Water Plan." Petition, ¶ 10. As the executive agency created

to carry out Article XV, § 7's constitutional directive "to formulate and implement a state water plan for optimum development of water resources in the public interest," IWRB has a direct and substantial interest in seeing that there is compliance with the State Water Plan and in particular with Policies 5A through 5J involving hydro-electric water rights and other water rights on the Snake River.¹

According to the Opposition, p. 3, one of the conditions of licensure that the Canal Companies are appealing is their licenses' subordination provision to "upstream beneficial depletion-ary uses ... that are initiated later ... than the priority of [the Canal Companies'] water right." This term of the license is intimately connected to State Water Plan Policies 5A through 5E, quoted in IWRB's Petition to Intervene and set out again in the footnote.² IWRB has a direct

¹ It is common for administrative agencies to petition to intervene in licensing cases before other administrative agencies. E.g., "[S]everal state and federal agencies petitioned to intervene in the proceeding before FERC [the Federal Energy Regulatory Commission] regarding Winchester's application for an exemption." *The Steamboaters v. F.E.R.C.*, 759 F.2d 1382, 1386 (9th Cir. 1985). See also IDWR Rule of Procedure 5.17, which defines "person" to include "any ... governmental subdivision or agency, or public or private organization or entity of any character," and thus contemplates that State agencies are person who may participate in its proceedings.

² State Water Plan Policies 5A through 5E provide:

5A-SWAN FALLS AGREEMENT

It is the policy of Idaho that the Swan Falls Agreement between the state and Idaho Power Company establishes the framework for water management in the Snake River Basin.

5B-SNAKE RIVER MINIMUM FLOWS

It is the policy of Idaho that minimum average daily flows at the Murphy gaging station shall meet or exceed 3,900 cfs from April 1 to October 31 and 5,600 cfs from November 1 to March 31. The average daily flow measured at the Weiser gage shall not be less than 4,750 cfs. A minimum average daily flow of 5,000 cfs at Johnson's Bar shall be maintained and an average daily flow of 13,000 cfs shall be maintained at Lime Point (river mile 172) a minimum of 95 percent of the time. The exercise of water rights above Milner Dam has and may reduce the flow at the dam to zero.

5C-SNAKE RIVER TRUST WATER

It is the policy of Idaho that water held in trust by the state pursuant to Idaho Code 42-203B be reallocated to new uses in accordance with the criteria established by Idaho Code 42-203A and 42-203C.

5D-SNAKE RIVER BASIN DCMI

It is the policy of Idaho that 150 cfs of the water held in trust by the state above Swan Falls Dam pursuant to Policy 5C be reallocated to meet future domestic, commercial, municipal, and industrial consumptive uses in accordance with state law.

and substantial interest in seeing that licensure of the Canal Companies' hydroelectric water rights at Milner is consistent with the State Water Plan.

IWRB's Petition to Intervene does not contend that all ten of the Snake River Policies in the State Water Plan will necessarily come into play in this Milner proceeding, see Opposition, p. 4, but it contends that the Canal Companies' challenge of the Department's licensure conditions directly implicates Policies 5A through 5E. In its Petition IWRB is not now asking the Department to place additional conditions on the Canal Companies' license; it is supporting conditions of licensure that are consistent with the State Water Plan. Like all notice pleadings in Idaho's administrative and judicial hearings, relief is prayed for generally and the specific relief asked for at the close of the hearing will be shaped by the facts developed at hearing and the briefing provided by the parties. Idaho is a notice-pleading state in the administrative arena as well as in the judicial arena, see IDWR Rules of Procedure 220, 230, 240, and 250, and IWRB's general pleading in its Petition to Intervene is sufficient.

The Canal Companies make three procedural arguments at page 4 of their Opposition: (1) IWRB has not stated whether it will seek additional conditions to be inserted in the license or whether it objects to terms already in the license. (2) IWRB's Petition to Intervene is untimely because IWRB did not object to the license provisions by October 10, 2007, following IDWR's issuance of its Notice of Intent to Issue License on September 5, 2007. (3) IWRB did not timely file a Motion for Hearing within 15 days of issuance of the License on October 20, 2008.

IWRB responds as follows: (1) As explained earlier, whether IWRB will seek additional conditions or oppose those imposed will depend upon developments during this contested case. (2) IWRB did not provide a written comment by the October 10, 2008, deadline for comment before a contested case was initiated; if no contested case had been initiated in the Milner

5E-SNAKE RIVER BASIN AGRICULTURE

It is the policy of Idaho that appropriated water held in trust by the state pursuant to Policy 5C, less the amount of water necessary to provide for present and future DCMI uses as set forth in Policy 5D, shall be available for reallocation to meet new and supplemental irrigation requirements which conform to Idaho Code 42-203A, 203B, 203C and 203D.

license, IWRB would not now claim a right to file a late comment under the September 5, 2007, Notice of Intent. (3) IWRB did not file a Motion for Hearing within fifteen days of October 20, 2008, so that means that IWRB did not itself initiate a contested case under the Administrative Procedure Act. But all of these things are beside the point.

The Canal Companies initiated a contested case under the Administrative Procedure Act. When they did so, they opened up all of the contested case procedures under the Administrative Procedure Act and under the Department's Rules of Procedure. IWRB has met the procedural requirements of Rules 230, 351 and 352 to petition to intervene. The Department's rules do not condition the right of intervention upon previously filing comments before the contested case was initiated or upon having moved for a contested case hearing. Having decided to initiate a contested case hearing before the Department, the Canal Companies must take the bitter with the sweet, including the possibility of intervention by persons who had not previously filed written comments with the Department.

The Canal Companies also contend that IWRB is adequately represented in these proceedings because IDWR acknowledged in its Final Order that it has an obligation to exercise its duties consistent with the State Water Plan. Opposition, pp. 4-5. If IDWR and IWRB have similar interests, they may be required under the Rule 560 to consolidate some of their presentations, but that is not reason to preclude IWRB's Intervention. Moreover, IDWR may be materially benefited by IWRB's explicit articulation of the State Water Plan's Policies as applied to the facts of this case. That is something that IDWR cannot do on its own; only the IWRB can articulate what the IWRB means and intends by its Policies.

The Canal Companies argue that IWRB has no direct and substantial interest in this proceeding. Opposition, pp. 5-8. IWRB's direct and substantial interest in seeing that the State Water Plan is properly applied could not be more apparent on its face. Moreover, if there is any doubt or ambiguity about IWRB's interpretation of the Plan as it applies to the Milner Licensing, there is no more efficient and direct way for the Department to resolve that doubt or ambiguity than by asking IWRB itself what is meant. And there is no more efficient and direct way for

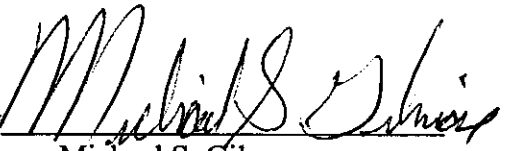
IWRB to communicate its views to the Department and to the parties than by participating as a party to the proceeding. IWRB would not be second-guessing the Department's construction and application of the State Water Plan, Opposition, p. 6; it would be instructing the Department what the State Water Plan means. Neither will the Department fully represent IWRB because the Department cannot perform IWRB's role of articulating the meaning of the State Water Plan; only IWRB can.

Contrary to the Canal Companies' argument, Opposition, p. 7, IWRB's Intervention would not broaden the case. The Department has already put the issue of compliance with the State Water Plan into this case, and the Canal Companies' third issue is directly intertwined with the Plan. IWRB's Petition to Intervene is limited to issues related to the State Water Plan. That is not a broadening of the issues.

None of the Canal Companies' objections to IWRB's intervention hold water. Their objections should be rejected and the Hearing Officer should grant IWRB's Petition to Intervene.

Respectfully submitted this 20th day of February, 2009.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By 
Michael S. Gilmore
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of February, 2009, I caused to be served a true and correct copy of the foregoing by the following method to:

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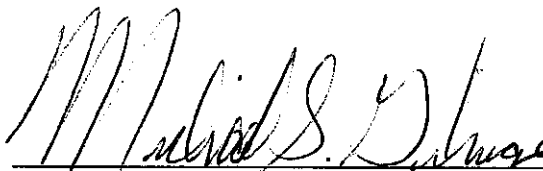
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