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DEPARTMENT OF
WATER RESOURCES

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF TRANSFER)
NO. 75342 IN THE NAME OF PETER)
B. BRECK AND ANTONIA HUNTER)
BRECK, TRUSTEES OF THE BRECK)
FAMILY 1998 REVOCABLE TRUST)
_____)

**ANSWER IN SUPPORT OF
TROUT UNLIMITED'S
PETITION TO INTERVENE**

On November 19, 2009, Peter Breck and Antonia Breck, trustees of the Breck Family 1998 Revocable Trust (the "Applicants") filed their *Applicants' Motion for Order Denying Petition to Intervene by Trout Unlimited* (the "Motion"). The Motion requested that the Idaho Department of Water Resources ("IDWR") deny Trout Unlimited's ("TU's") *Petition to Intervene* (the "Petition") because TU's interests in this proceeding are adequately represented by the Idaho Water Resource Board (the "Board"). The correct action for IDWR is to deny the Applicants' Motion and grant TU's Petition.

Based upon the Motion, the sole question for IDWR is whether the Board adequately represents the interests of TU. A timely-filed petition for 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." IDAPA 37.01.01.353. The correct result depends upon the adequacy of the representation by a party—the Board—not whether the issues to be litigated by the Board and TU—protection of the minimum stream flow—are congruent.

TU identified in its Petition that its mission is to conserve, protect and restore North America's coldwater fisheries and their watersheds, and the related fishing, ecological, aesthetic, business and other interests in the Big Wood River. In order to

make their argument factually the Applicant's must assume without proof that if there is a factual hearing in this matter the Board will present evidence from, for instance, fisheries biologists, fishermen, ecologists, ecohydrologists, and/or outfitters, to the same extent and purposes as TU. The Applicant's argument must also assume with no proof that acting alone the Board would only settle this case in a way that adequately protects TU's interests. Without offering proof to support them, these assumptions carry no weight. In fact, the Applicant's only argument is really that because the Board's will defend its minimum flow water rights, that defense will necessarily protect TU's fisheries interests.

This argument is disproved by the very statutes that establish the minimum stream flow program. I.C. § 42-1501 recognizes that, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, navigation, transportation, and water quality are all beneficial purposes for which a minimum flow water right may be established and recognizes that the general public interest is served by such rights:

The preservation of the water of the streams of this state for such purposes when made pursuant to this act is necessary and desirable for all the inhabitants of this state, is in the public interest and is hereby declared to be a beneficial use of such water.

The Board necessarily represents the often conflicting interests of all the inhabitants of Idaho, not just the interests of TU, in the minimum stream flow program. The statutes also recognize that the Board often does not have the expertise to adequately represent specific minimum stream flow purposes. I.C. § 42-1503 provides a procedure by which IDWR forwards minimum stream flow applications to interested state agencies, including the department of fish and game, and a procedure to provide notice to organizations that may have a specific interest in a minimum stream flow application, such as TU. This procedure would not be necessary if the Board "adequately represented" those specific interests in its minimum stream flow applications. By extension, those additional entities and agencies advocate for specific interests the Board may not adequately represent when it defends its minimum stream flow rights such as in the present case.

TU found no Idaho case law construing what "adequate representation" is in the context of the IDWR's Rules of Procedure or the Idaho Rules of Civil Procedure. Case law regarding the analogous Federal Rule regarding intervention reveals, however, that the difference between TU's specific fisheries interests in the Big Wood River minimum

flows and the Board's general public interest responsibilities satisfies the minimal requirement to show that the Board's representation of TU's interests is inadequate:

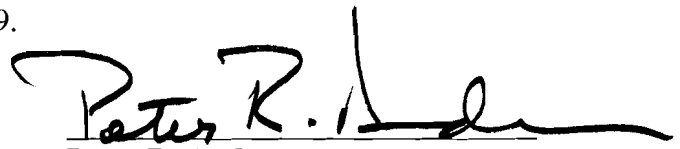
They [the Plaintiffs opposing intervention] assert the interests are identical here because both the government and the intervenors have the same objective to sustain the creation of the monument. As the above cases make clear, however, the government's representation of the public interest generally cannot be assumed to be identical to the individual parochial interest of a particular member of the public merely because both entities occupy the same posture in the litigation. In litigating on behalf of the general public, the government is obligated to consider a broad spectrum of views, many of which may conflict with the particular interest of the would-be intervenor. ...This potential conflict exists even when the government is call upon to defend against a claim which the would-be intervenor also wishes to contest.

Plaintiffs also maintain that, given the government's past conduct in this litigation, there is nothing to indicate it will not continue to vigorously represent the interest of the intervenors in defending the creation of the monument. However, "it is not realistic to assume the agency's programs will remain static or unaffected by unanticipated policy shifts." [citation omitted].

Utah Assoc. of Counties v. Clinton, 255 F.3d 1246, 1255-1256 (10th Cir. 2001)(vacating lower court order denying motion to intervene.) *See also In re Sierra Club*, 945 F.2d 776, 780 (4th Cir. 1991)(vacating lower court order denying motion to intervene because although the intervenor and state agency may share the same objectives, they represent different interests in the litigation). Likewise, although TU and the Board may have the same objectives in this litigation--protection of the Big Wood River minimum flow water rights--their respective interests may well diverge at times. IDWR should not make the same error the lower courts made in the cited case law and deny TU's Petition.

TU meets all of the standards and requirements imposed by the Department's Rules, and therefore respectfully request an order granting its intervention in this matter.

DATED this 2nd of December, 2009.


Peter R. Anderson
Trout Unlimited

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the following described pleading or document on the parties listed below by mailing with first class postage thereon, a true and correct copy thereof on this 2nd day of December, 2009.

DOCUMENT SERVED:

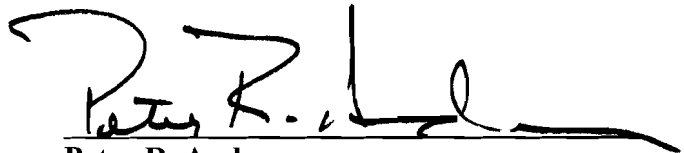
**ANSWER IN SUPPORT OF TROUT
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A handwritten signature in black ink, appearing to read "Peter R. Anderson", written over a horizontal line.

**Peter R. Anderson
Trout Unlimited**