

BEFORE THE DEPARTMENT OF WATER RESOURCES

IN AND FOR THE STATE OF IDAHO

IN THE MATTER OF LICENSED WATER)
RIGHT NO. 03-7018 IN THE NAME OF)
IDAHO POWER COMPANY)

**ORDER APPROVING WITHDRAWAL
OF HEARING REQUEST AND
DESIGNATING LICENSE NO. 03-7018
A FINAL ORDER**

PROCEDURAL BACKGROUND

On November 23, 2007, the Idaho Department of Water Resources ("Department") issued a preliminary order approving water right license number 03-7018 for hydropower purposes at Brownlee Dam. A *Protest and Petition for Hearing* was filed by Idaho Power Co. ("Idaho Power") on December 3, 2007 requesting a hearing before the Director to contest the matter pursuant to Idaho Code § 42-1701A(3). Idaho Power objected to the inclusion of the following term condition in the license:

The diversion and use of water for hydropower purposes under this license is subject to review by the Director after the date of expiration of the Federal Energy Regulatory Commission license for Brownlee Dam. Upon appropriate findings relative to the interest of the public, the Director may cancel all or any part of the use authorized herein and may revise, delete or add conditions under which the right may be exercised.

Idaho Power claimed that the condition should not be included in the license because it was not included in the water right permit issued by the Department in 1976 and wasn't included in the Department's recommendation in the Snake River Basin Adjudication.

The Department held a pre-hearing conference on March 10, 2008, resulting in a scheduling order commencing discovery. On July 25, 2008, Idaho Power served upon the Department a document titled *Idaho Power Company's First Set of Discovery Requests*, which

included interrogatories and requests for production. The Department's Rules of Procedure (IDAPA 37.01.01) do not provide for the service of interrogatories and requests for production upon the Department. However, to help expedite resolution of this matter, the Department agreed to provide Idaho Power with a *Statement of Position* regarding the Department's justification for the inclusion of the contested term condition. A second scheduling order was issued on August 27, 2008. The second order set a schedule for the Department to submit the *Statement of Position* and then established a deadline for Idaho Power to submit a brief in response to the Department's *Statement of Position*.

The Department submitted the Statement of Position on October 1, 2008. However, instead of filing a brief in response a *Request for Dismissal* was filed by Idaho Power on December 22, 2008, requesting dismissal of the *Protest and Petition for Hearing* so that Idaho Power can "pursue any procedural remedy or appeal that is available once a preliminary order becomes a final order – including appealing to the district court." *Request for Dismissal* at 2.

LEGAL BASIS FOR TERM CONDITION

Because license 03-7018 may be the subject of judicial review, a brief presentation of the legal basis for the Department's inclusion of the term condition in license 03-7018 follows:

It is the legislatively declared policy of the State of Idaho to regulate and limit the use of water for power purposes. Idaho Code § 42-203B(1) provides, in part:

The legislature finds and declares that it is in the public interest to specifically implement the state's power to regulate and limit the use of water for power purposes and to define the relationship between the state and the holder of a water right for power purposes to the extent such right exceeds an established minimum flow.

Idaho Code § 42-203B(6) provides the Department with the authority to include term conditions at the time of licensing: "The director shall also have the authority to limit a permit or license for power purposes to a specific term."

Idaho Code § 42-203B(7) provides the Department with specific authority to consider the term of the FERC license in the term condition:

(7) The director in the exercise of the authority to limit a permit or license for power purposes to a specific term of years shall designate the number of years through which the term of the license shall extend and for purposes of determining such date shall consider among other factors:

...

(c) The term of any federal energy regulatory commission (FERC) license granted, or which reasonably may be granted, with respect to any particular permit or license for power purpose;

Idaho Code § 42-203B does not limit the application of the term condition to just permits.

Idaho Code § 42-203B(6) provides for inclusion of a term condition in a “permit or license.” (emphasis added). Idaho Code § 42-203B(7) authorizes inclusion of term conditions after issuance of a permit:

The term of years shall be determined at the time of issuance of the permit, or as soon thereafter as practicable if adequate information is not then available. The term of years shall commence upon application of water to beneficial use. The term of years, once established, shall not thereafter be modified except in accordance with due process of law.

The permit for water right no. 03-7018 was issued prior to passage of Idaho Code § 42-203B, thus the term condition could not have been included into the permit. As the statute authorizing the inclusion of the term condition was not in effect when the permit was issued, the next practicable opportunity to include the term condition is at licensing, as was done in this case.

Moreover, a permit is not a vested right. A permit is an inchoate right that only ripens into a vested right upon granting of a water right license by the Department. *See A & B Irrigation Dist. v. Aberdeen-American Falls Ground Water Dist.*, 141 Idaho 746, 753, 118 P.3d 78, 85 (2005); I.C. § 42-103 (right to the use of unappropriated waters acquired only by

appropriation under the application, permit and license procedure as provided for in this title).

Thus, adding a term condition at the licensing stage is not a deprivation of a vested right.

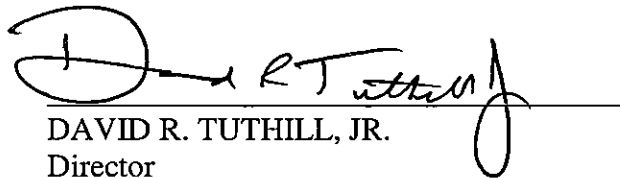
ORDER

IT IS HEREBY ORDERED that, pursuant to Idaho Power's request for dismissal, the *Protest and Petition for Hearing* filed by Idaho Power on December 3, 2007 is deemed withdrawn on the date of this order. The condition of approval contested by Idaho Power and all other provisions of water right license number 03-7018 as issued by the Department on November 23, 2007 are unchanged.

IT IS FURTHER ORDERED that as of the date of this order water right license number 03-7018 is designated a FINAL ORDER of the agency.

IT IS FURTHER ORDERED that pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by the final order may appeal the final order to district court by filing a petition in the district court of the county in which the final agency action was taken, the aggrieved party resides or operates its principal place of business in Idaho, or the real property or personal property that was the subject of the agency decision is located. Pursuant to section 67-5273, Idaho Code, the appeal must be filed within twenty-eight (28) days of the date of this order which is the date water right license number 03-7018 became a final order.

DATED this 30th day of March, 2009.


DAVID R. TUTHILL, JR.
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of April, 2009. I served a true and correct copy of the foregoing **ORDER APPROVING WITHDRAWAL OF HEARING REQUEST AND DESIGNATING LICENSE NO. 03-7018 A FINAL ORDER** by delivering it to the following individuals by the method and address as indicated below.

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