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Attorneys for Rathdrum Power LLC

RECEIVED
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DEPARTMENT OF
WATER RESOURCES

BEFORE THE DEPARTMENT OF WATER RESOURCES OF
THE STATE OF IDAHO

IN THE MATTER OF LICENSE NO. 95-
8924 IN THE NAME OF RATHDRUM
POWER LLC

LICENSE NO. 95-8924

PETITION FOR RECONSIDERATION OF
PRELIMINARY ORDER OR IN THE
ALTERNATIVE PETITION TO AMEND
FINAL ORDER

Rathdrum Power LLC ("Rathdrum"), by and through its attorneys, Stoel Rives LLP, files this Petition for Reconsideration of Preliminary Order or in the Alternative Petition to Amend Final Order, pursuant to the Idaho Administrative Procedures Act at Idaho Code § 67-5201 et seq., the Department's Rules of Procedures, IDAPA 37.01.01, and precedential agency orders, to increase or eliminate the maximum annual diversion volume included in License No. 95-8924 issued on February 27, 2008.

I. BACKGROUND

Rathdrum owns and operates a natural gas fired power plant ("Plant") in Rathdrum, Idaho which uses water for cooling and boiler make up. Depending upon regional energy needs, the Plant operates up to twenty-four hours per day and, up to eight thousand (8000) hours per year. See Affidavit of Tommy Arnett in Support of Petition for Reconsideration or in the Alternative

Petition to Amend Final Order (hereinafter "Affidavit of Tommy Arnett") at ¶ 2.

Application for Permit No. 95-08924, in the name of Rathdrum Generation Partners, LP,¹ was approved by the Department on November 16, 1995, with a priority date of August 10, 1995, in the amount of 4.49 cfs for irrigation, industrial (power plant cooling and operation), and domestic use (office building), for three hundred sixty five days per year. *See* Exhibit A.

Rathdrum timely filed a request for extension of time to submit proof of beneficial use. On September 28, 1998, the Department approved the request, extending the time within which to submit proof of beneficial use to October 1, 2002. *See* Exhibit B. Rathdrum timely submitted proof of beneficial use. A beneficial use field exam was conducted by the Department on September 29, 2006. The Department issued a Preliminary Order on Water Right License No. 95-8924, on February 27, 2008 ("Preliminary Order"). Exhibit C.

The permit application submitted by Rathdrum and approved by the Department (the "Permit") set forth a diversion rate of 4.49 cfs. Exhibit A. The Permit did not specify a maximum diversion volume. In contrast, the Preliminary Order granting the License sets forth a maximum annual diversion volume of 758.4 AF, which was apparently derived from the beneficial field report.

Rathdrum did not fully appreciate the affect of the annual maximum diversion volume limitation in the Preliminary Order until recently. *See* Affidavit of Tommy Arnett at ¶ 7. Rathdrum has and will continue to annually use larger volumes of water than what was included in the Preliminary Order. *See* Affidavit of Tommy Arnett at ¶¶ 3 and 4. Because of existing contractual obligations to deliver electricity, Rathdrum will face substantial hardships if it is

¹ A name change form was duly filed with the Department indicating that Rathdrum Power LLC is the permit holder.

required to reduce water usage to the annual limit in the Preliminary Order. *See* Affidavit of Tommy Arnett at ¶ 8.

The beneficial use report was prepared by a water rights examiner by the name of Wayne Baldwin. At the time of the beneficial field exam, Rathdrum had records available which would have demonstrated that the annual diversion volume used at the Plant varied from 466.9 AF in 2003, 902.2 AF in 2004, and 801.5AF in 2005. Prior to the issuance of the Preliminary Order granting the license, records were available which demonstrated that the annual diversion volume for 2006 was 470.4 and for 2007 was 820.5.AF. The former well license, which belonged to the previous owner and which applied to one of the wells Rathdrum now owns, permitted an annual diversion volume of 973 AF. *See* Water Right No. 95-7032.

Although Rathdrum had records available for preceding three years at the time the beneficial field exam was conducted in 2006, the water rights examiner's volume calculations were based solely on data collected for 2005. The person from Rathdrum that accompanied the water right examiner was not aware of the reason that the water right examiner requested the 2005 data. Affidavit of Tommy Arnett at ¶ 6. Had Rathdrum understood the basis for the annual volume datum, Rathdrum would have provided a more complete picture of actual water use at the Plant as well as Plant capacity to use water in the future. *Id.* Furthermore, the volume calculations contained in the beneficial use report for 2005 are erroneous. Rathdrum recorded an annual diversion volume of 801.5 AF for 2005 while the Beneficial Use Field Report sets the annual diversion volume based on the 2005 data at 758.4 – a difference of 43.1 AF. *Id.* at ¶ 2. Rathdrum believes the discrepancy occurred because not all of the water sources within the Plant were considered.

Had the water rights examiner been provided correct information, it would have been

apparent that the data for 2005 did not correctly demonstrate the requirements of the Plant processes under all operational conditions. With the maximum diversion volume limited to 758.4 AF based on this 2005 data, the Plant can only operate at approximately 60% capacity. To the extent an annual maximum diversion volume is appropriate, the annual amount should be based on the capacity of the Plant operating at full capacity, including some margin for extreme weather condition and other factors, the estimated maximum annual diversion volume under full capacity is 2100 AF. *See* Affidavit of Tommy Arnett at ¶ 4.

Adherence to the diversion volume of 758.4 AF does not provide adequate water to operate the Plant at full capacity. Indeed, adherence to the diversion volume of 758.4 barely allows the Plant to operate at just over half capacity. As a result, adherence to the current erroneous volume would likely cause the Plant to be put out of operation, significantly impacting its contractual obligations and may require Rathdrum to secure an alternate supply of water. *See* Affidavit of Tommy Arnett at ¶ 8.

III. APPLICABLE AUTHORITY

Under the Idaho Administrative Procedures Act, the Department is authorized to reconsider a preliminary order issued pursuant to Idaho Code section 67-5243. *See* Idaho Code § 67-5243(3) and 67-5245(2). Alternatively, since Rathdrum did not file a Petition for Reconsideration within fourteen (14) days of service of the Preliminary Order, Rathdrum requests that the Director of Idaho Department of Water Resources withdraw the Preliminary Order and substitute it with a new Order. The Director has such authority under IDAPA 37.01.01.760 since the time period to file a judicial appeal of the Preliminary Order does not expire until April 9, 2008.

In this instance, the Department should reconsider its Preliminary Order issued to

Rathdrum because the maximum diversion volume included in the license was based on incomplete and inaccurate data and because the maximum diversion volume in the Preliminary Order does not correctly demonstrate the requirements of the Plant processes. The actual maximum diversion volume at the Plant prior to issuance of the license was a maximum of 902.2 AF in 2004. The estimate maximum diversion volume with the Plant operating at full capacity is 2100 AF. Affidavit of Tommy Arnett at ¶ 4.

The undisputed evidence in this matter reveals that the data used by the Department in estimating maximum annual diversion volume was incomplete and erroneous. The Department based its estimation solely on data from 2005. The Department should have considered records from 2003, 2004, 2006 and 2007 as well as the amount of water necessary to allow the Plant to operate at full capacity under contract. Moreover, the 2005 data the Department actually relied on was not accurate.

Failure to correct these oversights will deprive Rathdrum of its rightful use of water which should have been authorized pursuant to Idaho law under the Preliminary Order and may result in Plant closure and failure of Rathdrum to comply with its contractual obligations unless an alternate water supply can be found. Pursuant to Idaho Code sections 67-5243 and 67-5245(2), the Department should reconsider its Preliminary Order and issue an amended preliminary order or final order adjusting the maximum diversion volume to reflect the full operating capacity of the Plant. Alternatively, because of the unique operation of the Plant, the Department should consider not including a maximum annual diversion volume at all in the License.

IV. RELIEF REQUESTED

For the reasons set forth above, the Petitioner respectfully requests that the Department issue an amended preliminary order or final order increasing the maximum diversion volume from 758.4 AF to the full capacity of the Plant of 2100 AF. Alternatively, the Department should delete the maximum annual diversion volume from the License.

DATED: April ^{7th} , 2008.

STOEL RIVES LLP



Kevin J. Beaton
Attorney for Rathdrum Power LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of April, 2008, I served a true and correct copy of the foregoing **Petition for Amendment of Existing Order License** in the above-entitled matter as follows:

Idaho Department of Water Resources
Northern Region
7600 N. Mineral Drive, Suite 100
Coeur d'Alene, ID 83815

☒ Via Facsimile
☐ Via U.S. Mail Service
☐ Via Overnight Delivery Service
☐ Via Hand-Delivery

Idaho Department of Water Resources
322 E. Front St
PO Box 83720
Boise, Idaho 83720-0098

☐ Via Facsimile
☐ Via U.S. Mail Service
☐ Via Overnight Delivery Service
☒ Via Hand-Delivery


Kevin J. Beaton
Attorney for Rathdrum Power LLC

EXHIBIT A

State of Idaho Department of Water Resources Permit To Appropriate Water

NO. 95-08924

Proposed Priority: August 10, 1995 Maximum Diversion Rate: 4.49 CFS

This is to certify, that RATHDRUM GENERATION PARTNERS L P
777 108TH AVE NE STE 1750
BELLEVUE WA 98004

has applied for a permit to appropriate water from: GROUNDWATER

and a permit is APPROVED for development of water as follows:

<u>BENEFICIAL USE</u>	<u>PERIOD OF USE</u>	<u>RATE OF DIVERSION</u>
IRRIGATION	03/15 to 11/15	0.12 CFS
INDUSTRIAL	01/01 to 12/31	4.46 CFS
DOMESTIC	01/01 to 12/31	0.04 CFS
Totals		4.49 CFS

LOCATION OF POINT(S) OF DIVERSION: NWNE , Sec. 11, Township 51N, Range 05W
NENW , Sec. 11, Township 51N, Range 05W
KOOTENAI County

PLACE OF USE: IRRIGATION

<u>TWN RGE SEC</u>	<u>ACRES</u>	<u>ACRES</u>	<u>ACRES</u>	<u>TOTAL</u>
51N 05W 11	NWNE	4.0		4.0

Total number of acres irrigated: 4.0

PLACE OF USE: INDUSTRIAL

<u>TWN RGE SEC</u>			
51N 05W 2	NESE	NWSE	SWSE
	SESE		
11	NENE	NWNE	SWNE
	SENE	NENW	NWNW
	SWNW		

PLACE OF USE: DOMESTIC

<u>TWN RGE SEC</u>	
51N 05W 11	NWNE

CONDITIONS OF APPROVAL AND REMARKS

1. Proof of construction of works and application of water to beneficial use shall be submitted on or before October 1, 1998.
2. Subject to all prior water rights.
3. Project construction shall commence within one year from the date of permit issuance and shall proceed diligently to completion unless it can be shown to the satisfaction of the Director of the Department of Water Resources that delays were due to circumstances over which permit holder had no control.

NOV 6 1995

State of Idaho
Department of Water Resources**Permit To Appropriate Water**

NO. 95-08924

CONDITIONS OF APPROVAL AND REMARKS

4. After specific notification by the department, the right holder shall install a suitable measuring device or shall enter into an agreement with the department to determine the amount of water diverted from power records and shall annually report the information to the department.
5. Right holder shall comply with the drilling permit requirements of Section 42-235, Idaho Code.
6. Construction of the well must comply with Idaho well construction standards.
7. The rate of diversion of water for irrigation under this right and all other water rights on the same land shall not exceed 0.03 cubic feet per second for each acre of land.
8. The issuance of this right does not grant any right-of-way or easement across the land of another.
9. Industrial use is for power plant cooling and operation.
10. Domestic use is for office building.

This permit is issued pursuant to the provisions of Section 42-204, Idaho Code.
Witness the signature of the Director, affixed at Boise, this

18 th day of October, 1995.

Karl J. Dreher
for Karl J. Dreher, Director

NOV 3 1995



EXHIBIT B

State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, P.O. Box 83720, Boise, Idaho 83720-0098
Phone: (208) 327-7900 FAX: (208) 327-7866

PHILIP E. BATT
GOVERNOR

KARL J. DREHER
DIRECTOR

September 28, 1998

Rathdrum Generation Partners
Limited Partnership
9405 Arrowpoint Blvd
Charlotte NC 28273-8110

RE: Permit No. 95-08924

Dear Permit Holder:

I have enclosed a copy of the approved request for extension of time submitted in connection with the above referenced permit, which extends the time within which to submit proof of beneficial use to **October 1, 2002**. Please note that the department granted the extension based on due diligence. It is important that you work diligently towards completion of this project since the department **will not** be able to grant additional extension requests based on due diligence.

Section 42-248, Idaho Code, which became effective on July 1, 1996, requires you or the owner of this water right to maintain current ownership and address records on file with the department. Please contact this office or any regional office of the department for the proper form to file a change of ownership of a water right and/or a change in the address of the owner.

Please contact me at (208)327-7953, if you have any questions regarding this matter.

Sincerely,

JULIE L. YARBROUGH
Senior Secretary, Water Allocation Bureau

Enclosure

c: IDWR - Regional Office

MICROFILMED

SEP 29 1998



State of Idaho

EXHIBIT

DEPARTMENT OF WATER RESOURCES

Northern Region, 7600 N. Mineral Drive, Suite 100 • Coeur d'Alene, Idaho 83815

Phone: (208) 762-2800 • Fax: (208) 762-2819 • Web Site: www.idwr.idaho.gov

C. L. "BUTCH" OTTER
Governor

DAVID R. TUTTILL, JR.
Director

February 27, 2008

RATHDRUM POWER LLC
PO BOX 995
RATHDRUM ID 83858

RE: License No. 95-8924
Issuance of License

Dear Water Right Holder(s):

The Department of Water Resources has issued the enclosed Water Right License confirming that a water right has been established in accordance with your permit. Please be sure to thoroughly review the conditions of approval and remarks listed on your license.

The license is a PRELIMINARY ORDER issued by the Department pursuant to section 67-5243, Idaho Code. It can and will become a final order without further action by the Department unless a party petitions for reconsideration or files an exception and/or brief within fourteen (14) days of the service date as described in the enclosed information sheet.

Please note that water right owners are required to report any change of water right ownership and/or mailing address to the Department within 120 days of the change. Failure to report these changes could result in a \$100 late filing fee. Contact any office of the Department or visit the Department's homepage on the Internet to obtain the proper forms and instructions.

If you have any questions, please contact me at 208 762-2800.

Sincerely,

Keith E. Franklin
Sr. Water Resources Agent

Enclosure(s)

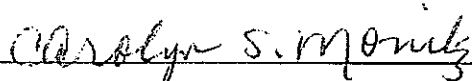
CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2008 I mailed a true and correct copy, postage prepaid, of the foregoing PRELIMINARY ORDER(Approved License) to the person(s) listed below:

RE: WATER RIGHT NO.

95-8924

RATHDRUM POWER LLC
PO BOX 995
RATHDRUM ID 83858

A handwritten signature in cursive script, reading "Carolyn S. Monitz", is written over a horizontal line.

Carolyn S. Monitz
Technical Records Clerk

State of Idaho
Department of Water Resources
Water Right License

WATER RIGHT NO. 95-08924

Priority: August 10, 1995

Maximum Diversion Rate: 4.49 CFS
Maximum Diversion Volume: 758.4 AF

It is hereby certified that RATHDRUM POWER LLC
PO BOX 995

RATHDRUM ID 83858 has complied with the terms and conditions of the permit, issued pursuant to Application for Permit dated August 10, 1995, and has submitted Proof of Beneficial Use on October 01, 2002. An examination indicates that the works have a diversion capacity of 4.49 cfs of water from:

SOURCE

GROUND WATER and a water right has been established as follows:

<u>BENEFICIAL USE</u>	<u>PERIOD OF USE</u>	<u>DIVERSION RATE</u>	<u>ANNUAL DIVERSION VOLUME</u>
INDUSTRIAL	01/01 to 12/31	4.46 CFS	757.7 AF
DOMESTIC	01/01 to 12/31	0.04 CFS	0.6 AF
IRRIGATION	03/15 to 11/15	0.01 CFS	0.1 AF

LOCATION OF POINT(S) OF DIVERSION:

GROUND WATER, NE1/4NE1/4, Sec. 11, Twp 51N, Rge 05W, B.M., KOOTENAI County

GROUND WATER, NW1/4NE1/4, Sec. 11, Twp 51N, Rge 05W, B.M., KOOTENAI County

PLACE OF USE: INDUSTRIAL

Twp	Rge	Sec	NE	NW	SW	SE	Totals
51N	05W	11	X	X	X	X	

PLACE OF USE: DOMESTIC

Twp	Rge	Sec	NE	NW	SW	SE	Totals
51N	05W	11	X				

PLACE OF USE: IRRIGATION

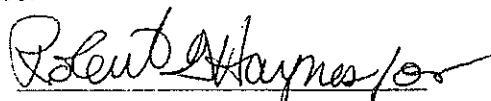
Twp	Rge	Sec	NE	NW	SW	SE	Totals
51N	05W	11	.1				.1

CONDITIONS OF APPROVAL

1. Industrial use is for power plant cooling and operation. Domestic use is for office building.
2. The rate of diversion of water for irrigation under this right and all other water rights on the same land shall not exceed 0.03 cubic feet per second for each acre of land.
3. After specific notification by the department, the right holder shall install a suitable measuring device or shall enter into an agreement with the department to determine the amount of water diverted from power records and shall annually report the information to the department.
4. The issuance of this right does not grant any right-of-way or easement across the land of another.

This license is issued pursuant to the provisions of Section 42-219, Idaho Code. The water right confirmed by this license is subject to all prior water rights and shall be used in accordance with Idaho law and applicable rules of the Department of Water Resources.

Signed and sealed this 26th day of February 2008.



DAVID R. TUTHILL, JR.
Director

Statement of Available Procedures and Applicable Time Limits

RESPONDING TO PRELIMINARY ORDERS ISSUED BY THE IDAHO DEPARTMENT OF WATER RESOURCES (To be used in connection with actions when a hearing was not held)

(Required by Rule of Procedure 730.02)

The accompanying order or approved document is a "Preliminary Order" issued by the department pursuant to section 67-5243, Idaho Code. It can and will become a final order without further action of the Department of Water Resources ("department") unless a party petitions for reconsideration, files an exception and brief, or requests a hearing as further described below:

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the department within fourteen (14) days of the service date of this order. **Note: the petition must be received by the department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See Section 67-5243(3) Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding with the Director. Otherwise, this preliminary order will become a final order of the agency.

REQUEST FOR HEARING

Unless a right to a hearing before the Department or the Water Resource Board is otherwise provided by statute, any person aggrieved by any final decision, determination, order or action of the Director of the Department and who has not previously been afforded an opportunity for a hearing on the matter may request a hearing pursuant to section 42-1701A(3), Idaho Code. A written petition contesting the action of the Director and requesting a hearing shall be filed within fifteen (15) days after receipt of the denial or conditional approval.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, requests for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with IDAPA Rules 37.01.01302 and 37.01.01303 (Rules of Procedure 302 and 303).

FINAL ORDER

The Director will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

Unless a different date is stated in a final order, the order is effective fourteen (14) days after its issuance if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

- (a) the petition for reconsideration is disposed of; or
- (b) the petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.