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**DEPARTMENT OF
WATER RESOURCES**

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Attorneys for Fisheries Development Co.

BEFORE THE DEPARTMENT OF WATER RESOURCES OF

THE STATE OF IDAHO

_____)	
IN THE MATTER OF LICENSED WATER)	
RIGHT NUMBER 36-08089)	PETITION FOR CORRECTION
_____)	AND/OR CLARIFICATION OF
_____)	LICENSED WATER RIGHT NO. 36-08089
_____)	

COMES NOW, Fisheries Development Co. (hereinafter referred to as "FDC"), by and through its attorneys, Ringert Clark, Chartered, and hereby petitions the Director of the Idaho Department of Water Resources (hereinafter referred to as "IDWR"), to modify and/or clarify the license issued for water right number 36-08089.

SUMMARY AND AUTHORITY

Water right number 36-08089 was licensed to FDC on February 29, 2000 for 120.2 cfs for power purposes. The license included the following Conditions of Approval and Remarks:

7. Rights 36-07725 and 36-08089 when combined shall not exceed a total diversion rate of 120 cfs and a total annual maximum diversion volume of 87022.1 af.
8. Right 36-07725 is also diverted through the point of diversion described above.
9. Sufficient water shall be left undiverted from Billingsly Creek so that the flow of water in Billingsly Creek between the point of diversion and the point where water

is returned to the creek is at least twenty-five (25) cubic feet per second.

However, water right no. 36-07725 is a nonconsumptive fish propagation right for 100 cfs, that does not contain any condition that would require FDC to limit its diversion below the authorized rate to leave 25 cfs in Billingsly Creek. IDWR should correct and/or clarify water right no. 36-08089 so that when FDC uses 100 cfs for fish propagation pursuant to right no. 36-07725, right no. 36-08089 is entitled to reuse FDC's discharge of the same 100 cfs for power purposes even if there is less than 25 cfs in Billingsly Creek.

This petition is filed pursuant to IDAPA 37.01.01.230.01(a), which provides for petitions seeking to correct, modify, amend or stay existing orders or rules, and I.C. § 67-5232, IDAPA 37.01.01.230.01(b), and IDAPA 37.01.01.400, which provide for petitions seeking a declaratory ruling, clarification or construction on the applicability of any law, statute, rule or order administered by IDWR or a party's rights or obligations under such law.

FACTS AND ANALYSIS

On June 2, 1982, FDC filed an application for permit to divert 150 cfs from Billingsly Creek and use it for hydroelectric power generation (36-08089). FDC had previously filed an application for permit to divert 100 cfs from Billingsly Creek for fish propagation on November 29, 1976 (36-07725). The point of diversion for both water rights is the same. FDC proposed to use 100 cfs of water discharged from the fish propagation raceways built under water right no. 36-07725 and divert an additional 50 cfs of water directly to the power generation facilities. The additional 50 cfs would not circulate through the fish propagation facilities.

A hearing was held regarding FDC's application and on March 23, 1984, IDWR issued a

Proposed Memorandum Decision and Order (hereinafter “Memorandum Decision”). Subsequently, on April 18, 1984, IDWR issued an Order Adopting Proposed Memorandum Decision and Order. The Order Adopting Proposed Memorandum Decision and the Memorandum Decision are attached hereto as Exhibit A for IDWR’s reference. The Memorandum Decision sets forth the facts and background regarding FDC’s application, including the fact that 100 cfs of the power generation was re-use of the fish propagation right. Pursuant to the Memorandum Decision, FDC’s application was approved for 150 cfs for power generation on April 1, 1989.

Water right number 36-08089 was licensed to FDC on February 29, 2000 for 120.2 cfs for power purposes. The water right was licensed for 120.2 cfs rather than 150 cfs due to proof of beneficial use. Water right number 36-07725 was licensed to FDC on February 7, 2000 for 100 cfs for fish propagation purposes. Both licenses contained conditions that they are diverted from the same point of diversion and that “when combined shall not exceed a total diversion rate of 120 cfs and a total annual maximum diversion volume of 87022.1 af.”

However, water right number 36-07725 contained Condition No. 9, which provides that:

9. Sufficient water shall be left undiverted from Billingsly Creek so that the flow of water in Billingsly Creek between the point of diversion and the point where water is returned to the creek is at least twenty-five (25) cubic feet per second.

No such condition is present in 36-07725. Thus, FDC can divert 100 cfs for fish propagation pursuant to 36-07725 even when flows in Billingsly Creek are 25 cfs or less. The 100 cfs would then be discharged from the fish propagation raceways, through the power generation facility and back to Billingsly Creek. The use for power generation pursuant to 36-08089 is non-consumptive, so the water is going to have to flow past the power generation facilities regardless of whether the

power generation plant is operating or not. Thus, it follows that when FDC is diverting 100 cfs for fish propagation, it should also be entitled to use the water for power generation even if there is 25 cfs or less flowing in Billingsly Creek. There is no question that 100 cfs of 36-08089 is reuse of the water discharged from the fish propagation raceways. Obviously, the additional 20.2 cfs that does not circulate through the fish propagation facilities could not be diverted if the flows in Billingsly Creek are 25 cfs or less, but there is no reason that FDC should not be allowed to reuse the 100 cfs that is diverted and discharged through the fish propagation facilities, even if there is 25 cfs or less in Billingsly Creek.

However, Condition No. 9 contained in water right no. 36-08089 could be interpreted to preclude the use the 100 cfs for power generation when the water is diverted for fish propagation and there is less than 25 cfs flowing in Billingsly Creek. This interpretation would of Condition No. 9 would fail to consider that 100 cfs of 36-08089 is reuse of water from the fish propagation facilities and fail to consider that the water is still going to be flowing through the power generation facilities. Water would still be flowing through the power generation facilities, but FDC could not operate the power generation.

In order to clear up any confusion regarding the reuse of 100 cfs for power generation and to clarify the administration of water right no. 36-08089 when there is 25 cfs or less in Billingsly Creek, FDC has filed this petition.

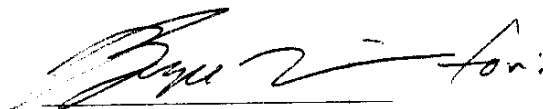
RELIEF REQUESTED

For the reasons discussed above, FDC respectfully requests that IDWR modify and/or clarify water right no. 36-08989, in particular Condition No. 9, so that when water is diverted for fish

propagation purposes under water right no. 36-07725, then such water may be re-used for power purposes even if there is less than 25 cfs in Billingsly Creek.

Respectfully submitted this 16th day of March, 2005.

RINGERT CLARK, CHARTERED

A handwritten signature in black ink, appearing to read "Daniel V. Steenson", written over a horizontal line.

Daniel V. Steenson

Attorney for Fisheries Development Co.