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Department of Water Resources

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ORIGINAL

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF THE PETITION FOR ADMINISTRATION BY A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT # 2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, AND TWIN FALL CANAL COMPANY	)	**STATE AGENCY GROUND WATER USERS' OPPOSITION TO IDAHO POWER'S PARTICIPATION AS A PARTY**

The Idaho Department of Fish & Game, the Idaho Department of Health & Welfare, the Idaho Department of Juvenile Corrections, and the Idaho Transportation Department, who have intervened as the State Agency Ground Water Users (SAGWU), by and through their counsel of record, Michael S. Gilmore, Deputy Attorney General, file this Opposition to Idaho Power's participation as a party in the proceeding. This Opposition is based upon the following grounds:

Idaho Power Company originally petitioned to intervene in this matter on February 15, 2005. Its Petition to Intervene alleged that like the Surface Water Coalition (SWC) Petitioners, "Idaho Power owns water rights that depend upon Snake River flows, and sources tributary thereto. These rights include storage rights in, and hydropower rights below, American Falls Reservoir. *Idaho Power also holds water rights downstream of Milner Dam that rely upon Snake River flows and tributary spring flows in the Thousand Springs area.*" Idaho Power Petition to Intervene, pp. 3-4 (footnote included in text; emphasis added).

The Petition also alleged that, like the SWC Petitioners, Idaho Power has been "deprived of the full water supply to which [it is] lawfully entitled as a result of junior ground water depletions from the ESPA" and that "Idaho Power's water rights may in the future ... be deprived of their full water supply." *Id.*, p. 4. "Accordingly, Idaho Power seeks to intervene ... in support of the [SWC] Petition *and to protect its vested water rights*." *Id.* (emphasis added).

Idaho Power stated that "disposition of this action will affect the administration of water rights, *both within the ESPA and statewide*," that Idaho Power sought intervention "to ensure that long-term solutions ... do not cause injury *to Idaho Power's senior water rights*," and that Idaho Power's participation "will not unduly broaden the issues before IDWR." *Id.* (emphasis added).

Under IDWR's Rules of Procedure, intervention will be granted when the Petitioner "shows a direct and substantial interest in any part of the subject matter of a proceeding and does not unduly broaden the issues." Rule 353, IDAPA 37.01.01.353. The SAGWU oppose Idaho Power's petitions to participate as a party in this matter because its Petition to Intervene says too little and because its Petition to Intervene says too much.

Idaho Power does not allege that its water rights or a portion of its water rights are among the water rights held by the members of the Surface Water Coalition, *i.e.*, it does not allege that its water rights are among the water rights that are demanding the cessation of ESPA ground water uses as part of the Surface Water Coalition call.[1] Thus, its Petition says too little because Idaho Power has not itself participated in the call and has no water rights that will be evaluated as part of the analysis of the call.

Idaho Power also alleges that it has "water rights downstream of Milner Dam that rely upon Snake River flows and tributary spring flows in the Thousand Springs area." Petition to Intervene, p. 4, n.2. Because Idaho Power's water rights are separate and distinct from those of members of the Surface Water Coalition and because they include water rights downstream from the SWC members' points of diversions, it is inevitable that Idaho Power's participation as a

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[1] Idaho Power could also show a direct and substantial interest by alleging that it had ground water rights subject to the SWC call, but to the best of the SAGWU's knowledge, Idaho Power has no such ground water rights.

party "to ensure that long-term solutions ... do not cause injury to Idaho Power's senior water rights" will broaden the issues if injury to Idaho Power is an issue. Evaluating the effects of the SWC call on water rights downstream from the diversion points of SWC members cannot do anything but broaden the *factual* issues in this matter. Moreover, because Idaho Power is subject to the Swan Falls Agreement, consideration of the effect of long-term solutions on its rights will broaden the *legal* issues in this matter. Thus, Idaho Power's Petition to Intervene says too much.

To the best of the SAGWU's knowledge, Idaho Power has not made a call against any ground water users. Like any water user (or more generally, like any property owner) who has not made a demand to enforce its property rights, Idaho Power has no legally cognizable stake with regard to other water users' (or other property owners') demands regarding their water rights (or property interests). To use an analogy from real property law, suppose that property owners A and B each had different easements over property owned by C. A sues C to enforce A's easement. Would B have standing to intervene in that case regarding A's easement without making a demand with regard to B's own easement, or would B have standing to contest a settlement between A and C? Of course not. B's legal rights are independent of A's, and B would have no standing regarding A's easement, even if the Court's decision or a settlement regarding A's easement would have practical effects upon B's easement. "The essence of the standing inquiry is whether the party seeking to invoke the court's jurisdiction has alleged such a personal stake in the outcome of the controversy as to assure the concrete adversariness which sharpens the presentation upon which the court so depends for illumination of difficult constitutional questions." *In re Doe*, 134 Idaho 760, 746, 9 P.3d 1226, 1230 (2000) (citations and internal punctuation omitted).

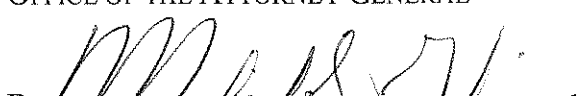
The same analysis should apply here. As a practical matter, Idaho Power's water rights may be affected by the outcome of the Surface Water Coalition call. So will the water rights of every user of Snake River water downstream from Milner. But Idaho Power has no personal stake in the SWC's call in the sense that Idaho Power can decide how that call will be litigated, what the nature of the SWC's rights are and how they will be quantified, whether the SWC's

rights will be satisfied or unsatisfied by a given decision of the Director or by a given settlement, etc. Idaho Power is but a bystander to the SWC's rights and has no standing regarding them.

Idaho Power has not alleged that the issues for which it would have standing—its own rights—are co-extensive with the SWC's rights, nor could it. Idaho Power cannot pursue issues of the effect of the call upon its own water rights without introducing additional legal and factual issues, including the Swan Falls settlement. Idaho Power's participation in this case as a party should be denied for lack of standing and because it will unduly broaden the issues.

DATED this 22nd day of June, 2005.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of June, 2005, I caused to be served a true and correct copy of the foregoing by regular U.S. Mail, postage prepaid, to:

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