John K. Simpson, ISB No. 4242
Travis L. Thompson, ISB No. 6168
Shelley M. Davis, ISB No. 6788
BARKER ROSHOLT & SIMPSON LLP
1010 W. Jefferson St., Ste. 102
P.O. Box 2139
Boise, Idaho 83701-2139
(208) 336-0700 – Telephone
(208) 344-6034 – Facsimile

Attorneys for North Side Canal Company and Twin Falls Canal Company

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR PERMIT & LICENSE NO. 01-07011 APPLICANT: Twin Falls Canal Company & North Side Canal Company	))))))))))	**RESPONSE IN OPPOSITION TO THE IDAHO WATER RESOURCE BOARD'S MOTION TO AMEND ITS PETITION TO INTERVENE**

COMES NOW, the North Side Canal Company and Twin Falls Canal Company, collectively the "Petitioners," (sometimes referred to as "the Canal Companies"), by and through their counsel the law firm Barker Rosholt & Simpson, LLP, and submit this Response in Opposition to the Idaho Water Resource Board's Motion to Amend its Petition to Intervene. The Idaho Water Resource Board (hereinafter "IWRB") was granted intervention in these License Protest Proceedings upon its initial Petition to Intervene by Order of this Hearing Officer dated March 27, 2009. The Order limited the IWRB's intervention to only those matters relating to the subordination clause included for the first time by the Idaho Department of Water Resources (hereinafter "IDWR") in the License it issued in October, 2008. In its initial Petition to Intervene the IWRB alleged that it is the body responsible for formulating and implementing the Idaho

State Water Plan and sought intervention only on the basis that the Board's presence in the Petitioners' license appeal is necessary to protect the State Water Plan. The IWRB now moves for permission to amend its Petition to Intervene alleging that it is necessary for the IWRB to participate on the additional basis "to protect" its recharge water right permits and applications for permit.[1]. Beyond this argument, IWRB does not articulate the reasons for its motion. If the Idaho Water Resource Board's purpose in amending the grounds for its intervention to include these permits and application is merely to demonstrate that it has attempted to undertake the legislature's directive to implement groundwater recharge, then the Canal Companies do not oppose the amendment. However, if the Idaho Water Resource Board's Motion to Amend its Petition for Intervention again seeks to unnecessarily broaden the scope of the Canal Companies' License Protest proceedings by requiring the parties to undertake and be subject to additional analysis of each of the permits and applications pending by the IWRB for groundwater recharge then the Motion should be denied. In other words, IWRB should be prohibited from changing the scope of this case into something it is not, particularly where IWRB did not protest the Canal Companies' original application for permit as required by Idaho law. An intervenor in any administrative proceeding takes that proceeding as it is framed by the petitioner.

FACTUAL AND PROCEDURAL HISTORY

The Canal Companies herein incorporate, as if set forth in full, the Factual and Procedural History as set forth in its initial RESPONSE IN OPPOSITION TO THE GROUNDS ON WHICH THE IDAHO WATER RESOURCE BOARD MOVES FOR INTERVENTION. Since the submission of that Response in Opposition, on March 13, 2009, at which time the Hearing Officer orally granted the Petitions to Intervene of the Ground Water User Petitioners

[1] Although numerous other senior water rights to the Snake River affect IWRB's ability to use "whatever recharge rights it now has or may be granted", the fact that water rights are administered by priority in Idaho does not give IWRB a new "interest" or right to expand the scope of this proceeding.

and the Idaho Water Resource Board. On March 27, 2009, the Hearing Officer issued a written Order Granting Petitions for Intervention. In that Order the Hearing Officer limited the IWRB's intervention to the second matter appealed by the Canal Companies, namely the condition inserted in the License relating to subordination which states:

> *The diversion and use of water for hydropower purposes under this water right shall be subordinate to all subsequent upstream beneficial depletionary uses, other than hydropower, within the Snake River Basin of the state Idaho that are initiated later in time than the priority of this water right and shall not give rise to any right or claim against any junior-priority rights for the depletionary or consumptive beneficial use of water, other than hydropower, within the Snake River Basin of the state of Idaho initiated later in time than the priority of water right no. 01-7011.*

The IWRB filed its Motion to Amend its Petition to Intervene on September 30, 2009.

STANDARD OF REVIEW

Parties seeking intervention in an administrative hearing process before the Idaho Department of Water Resources must conform to the Department's Rules of Procedure sections 37.01.01.350-354. Specifically the party seeking intervention must demonstrate "a direct and substantial interest...in the proceeding" which cannot be "adequately represented by the existing parties." IDAPA 37.01.01.351 and 353. If the hearing officer determines "that an intervenor has no direct or substantial interest in the proceeding, the presiding officer may dismiss the intervenor from the proceeding." IDAPA 37.01.01.353.

ARGUMENT

A. The Additional Grounds on Which the Board Seeks Intervention May Unduly Broaden the Issues Being Appealed/Protested by Petitioners:

At section 6.1 of its Motion the IWRB alleges that it holds water permits for groundwater recharge numbered 1-7054 and 37-7842, and that it has filed applications for permit for nineteen additional groundwater recharge rights in basins 01 and 21.

Allowing the IWRB to amend its petition to intervene because it has two water right permits for groundwater recharge, and nineteen additional applications to appropriate water for groundwater recharge[2], may unduly broaden the scope of the issues presented by the Petitioners appealing the subordination condition and other conditions in the license. Since IWRB only vaguely claims that its purpose in amending its petition is to "protect is [*sic*] water rights", the Canal Companies are unaware of how these water right permits and applications may be used by IWRB in this proceeding. By raising the issue of its own water right permits and applications for permit for recharge, IWRB may be seeking to expand the scope of these proceedings beyond those identified in the Canal Companies' original petition. If the Canal Companies are forced to prepare a case that hinges upon the exercise and use of IWRB's water right permits, including the applications for permit, including consulting experts to analyze the history and propriety of the development of those permits and applications alleged to be potentially affected by the Milner project, that would clearly unduly broaden the scope of these proceedings,and in that case, the Motion should be denied.

However, in the event that the Board simply seeks through this amendment to demonstrate that it has applied for over 15,000 cfs of Snake River surface water for year round groundwater recharge above the Milner project then the Petitioners do not oppose the amendment.

CONCLUSION

The IWRB has already been allowed to intervene in these proceedings for purposes of addressing the IDWR's inclusion of the subordination clause in the Canal Companies

[2] The total amount of year round groundwater recharge sought to be appropriated by the IWRB above the Milner Project, including permit no. 1-7054 and the nineteen applications for permit that the IWRB claims it has made, total 15,317.01 cfs of diversion from the Snake River. This representation only underscores the fact that the Milner hydropower project would be rendered inoperable if the Department is allowed to breach its Agreement with the Canal Companies and insert the new subordination condition in License No. 1-7011.

hydropower license no. 1-7011 on the basis that its' presence is necessary to protect the state water plan. It should not be allowed to further broaden these proceedings by requiring the parties to these proceedings to undertake additional analysis of IWRB's water right permits and applications that are beyond the scope of this proceeding.

Dated this 7th day of October, 2009

BARKER ROSHOLT & SIMPSON LLP

John K. Simpson, ISB No. 4242
Travis L. Thompson, ISB No. 6168
Shelley M. Davis, ISB No. 6788
BARKER ROSHOLT & SIMPSON LLP
205 North Tenth Street, Suite 520
P.O. Box 2139
Boise, ID 83701-2139

Attorneys for North Side Canal Company and Twin Falls Canal Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of February, 2009, I served a true and correct copy of the foregoing document, **RESPONSE IN OPPOSITION TO THE IDAHO WATER RESOURCE BOARD'S MOTION TO AMEND ITS PETITION TO INTERVENE**, upon the following persons via the method indication below:

Interim Director Gary Spackman Idaho Department of Water Resources 322 E. Front St. Boise, Idaho 83720-0098	____ U.S. Mail, Postage Prepaid ____ Hand Delivered ____ Overnight Mail _X_ Facsimile
Randall C. Budge Candice M. McHugh Racine Olson Nye Budge & Bailey, Chtd. P.O. Box 1391 Pocatello, ID 83204-1391 Fax No. (208)232-6109	____ U.S. Mail, Postage Prepaid ____ Hand Delivered ____ Overnight Mail _X_ Facsimile
Robert L. Harris, Esq. HOLDEN KIDWELL HAHN & CRAPO, PLLC P.O. Box 50130 1000 Riverwalk Dr., Ste. 200 Idaho Falls, ID 83405 Fax No. (208)523-9518	____ U.S. Mail, Postage Prepaid ____ Hand Delivered ____ Overnight Mail _X_ Facsimile
Lawrence Wasden Steven L. Olsen Michael S. Gilmore Idaho Atty. Gen. Office P.O. Box 83720 Boise, ID 83720-0010 Fax No. (208) 854-8073	____ U.S. Mail, Postage Prepaid ____ Hand Delivered ____ Overnight Mail _X_ Facsimile

Shelley M. Davis