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BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION
FOR PERMIT NO. 13-7697 IN THE
NAME OF TWIN LAKES CANAL CO.

**TWIN LAKES CANAL COMPANY'S
EXCEPTIONS TO PRELIMINARY ORDER
DENYING APPLICATION FOR PERMIT**

TWIN LAKES CANAL COMPANY, (hereinafter "Twin Lakes" or "TLCC"¹), by and through its attorneys of record, Holden, Kidwell, Hahn & Crapo, PLLC, hereby submits *Twin Lakes Canal Company's Exceptions to Preliminary Order Denying Application for Permit*. These exceptions are being submitted to the Director of the Idaho Department of Water Resources, Gary Spackman,² (hereinafter, the "Director") pursuant to Idaho Code § 67-5245(3) and IDAPA 37.01.01.730.02.c, and are offered in support of *Twin Lakes Canal Company's Petition for the Agency Head to Review Preliminary Order Denying Application for Permit* filed contemporaneously herewith. These exceptions are submitted in response to the *Preliminary*

¹ The acronym "TLCC" is used in the Hearing Officer's *Preliminary Order Denying Application for Permit*, but we prefer the shortened version of the company's name, "Twin Lakes." We have included reference to both for purposes of our briefing in order to ensure that there is no confusion when quoting from the *Preliminary Order*.

² Director Spackman was permanently appointed IDWR Director on July 11, 2012. He served as Interim Director for three years prior to his permanent appointment.

Order Denying Application for Permit issued on July 26, 2012 (hereinafter, “*Preliminary Order*”) by Hearing Officer (and Water Resources Program Manager) James Cefalo (hereinafter, the “Hearing Officer”).

For the reasons set forth below, the Hearing Officer’s analysis in the *Preliminary Order* falls short, and the findings of fact and conclusions of law of the Hearing Officer should be amended to approve Application for Permit No. 13-7697 with appropriate conditions rather than deny it outright as the Hearing Officer has done. The Hearing Officer’s analysis in the *Preliminary Order* failed to consider the plain language of Twin Lakes’ agreement with the Bear River Water User’s Association to mitigate for evaporative losses from the proposed reservoir. In addition, the Hearing Officer exceeded his discretionary bounds under Idaho law in his review and consideration of the local public interest. Even if the Hearing Officer was within his discretionary bounds, there was no analysis of the economic benefits of the project, and the analysis of Bonneville Cutthroat Trout issues was neither adequate nor fair to Twin Lakes. As to the other local public interest issues, the Hearing Officer’s analysis was likewise inadequate. The Director should therefore issue a final order approving Application for Permit No. 13-7697 after evidence on these issues are fully and fairly considered.

I. STANDARD OF REVIEW AND APPEAL TO AGENCY HEAD PROCESS.

The *Preliminary Order* is a preliminary order as defined in IDAPA 37.01.01.730.01 because it was “issued by a person other than agency head . . . ,” which will become a final order of the agency “unless reviewed by the agency head (or the agency’s head’s designee) pursuant to Section 67-5245, Idaho Code.” The Hearing Officer is a person other than the agency head, and therefore, because it is a preliminary order, it is subject to an appeal within the agency to the agency head. The petition must be filed with the Idaho Department of Water Resources (“IDWR”) within fourteen days (14) after the service date of the *Preliminary Order*³ (Idaho Code § 67-5245(3) and IDAPA 37.01.01.730.01.c), which, in this case, is no later than 5:00 p.m. on August 9, 2012.

Twin Lakes has elected not to file a petition for reconsideration with the Hearing Officer, which is permitted pursuant to IDAPA 37.01.01.730.02.a. A petition for reconsideration is not

³ The *Preliminary Order* was issued on July 26, 2012.

mandatory for Twin Lakes to exhaust their administrative remedies. See FEREDAY ET AL., IDAHO WATER LAW HANDBOOK, THE ACQUISITION, USE, TRANSFER, ADMINISTRATION, AND MANAGEMENT OF WATER RIGHTS IN IDAHO, at 84 (2011). The matter should now be decided by the Director.

Idaho Code § 67-5245(7) provides that the Director is not bound by the fact-finding and analysis of the Hearing Officer in the *Preliminary Order*. The Director “shall exercise all of the decision-making power that he would have had if the agency head had presided over the hearing.” In other words, the Director’s review is akin to a *de novo* review in a court setting. “The term ‘de novo’ generally means a new hearing or a hearing for the second time, contemplating an entire trial in the same manner in which the matter was heard and a review of previous hearing. On such a hearing the court hears the matter as a court of original and not appellate jurisdiction.” *Knight v. Department of Ins., State of Idaho*, 119 Idaho 591, 808 P.2d 1336 (Idaho App. 1991) (quoting *Beker Industries, Inc. v. Georgetown Irrigation District*, 101 Idaho 187, 190, 610 P.2d 546, 549 (1980)).

In reviewing the evidence presented at the hearing in this matter, “[t]he agency’s experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence.” Idaho Code § 67-5251; IDAPA 37.01.01.600. The Director may therefore step into the shoes of the Hearing Officer and make factual findings and legal conclusions as though he was the hearing officer in the first place. The Director may further “schedule oral argument in the matter before issuing a final order[,]” and may also “remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order.” IDAPA 37.01.01.730.01.d. Opposing parties “shall have fourteen (14) days to respond to any party’s appeal within the agency.” *Id.*

In addition, “[t]he agency head (or designee) may review the preliminary order on its own motion.” IDAPA 37.01.01.730.01.c. As of the date of submission of these exceptions, the Director has not provided notice of a motion to review the *Preliminary Order* on his own.

II. INTRODUCTION AND BACKGROUND.

A. The purposes and reasoning behind Twin Lakes' decision to pursue the proposed dam and reservoir.

Twin Lakes has been pursuing construction of their proposed dam and reservoir for nearly a decade. Twin Lakes' has two primary motivations for the project. First, the project will allow Twin Lakes to store 5,000 acre-feet of irrigation water to add to its existing storage supply of approximately 19,000 acre-feet, and second, the revenue generated from the dam and reservoir will allow Twin Lakes, over the course of a number of years, to fully pipe 42 miles of canals within its current 67-mile delivery system.⁴ This would avoid the major seepage losses currently experienced in the canals, and likewise eliminate evaporative losses experienced within the Twin Lakes delivery system. Testimony of Clair Bosen; *Preliminary Order* at 8 (¶46). With regards to piping and other improvements to water delivery systems, the Idaho Supreme Court has stated the “[p]lacement of irrigation ditches in underground pipes or addition of gates, collars and safety screens, is common and necessary in modern irrigation practices . . .” *Abbott v. Nampa School District No. 131*, 119 Idaho 544, 551, 808 P.2d 1289, 1296 (1991). In an effort to modernize its system, Twin Lakes hopes to have a revenue source to engage in the sorely-needed upgrades. The current cost of these upgrades exceeds forty-eight million (\$48,000,000) dollars over a construction period of 10 years. Exhibit A9 at 270.

The conserved water will be used to better irrigate crops and better allow Twin Lakes' shareholders to finish off crops at the end of the irrigation season. This would stabilize the ability of Twin Lakes' shareholders to better irrigate their farmland. The social and economic results of this enhanced water supply to both Twin Lakes shareholders and non-shareholders is not discussed in the *Preliminary Order*, but is discussed in Section III.B.1.a below. The Hearing Officer determined that “[n]o evidence was offered showing TLCC will be required to use the hydropower revenue to pipe its canal system[,]” *Preliminary Order* at 8 (¶ 46), but Twin Lakes has stated in the Draft License Application (“DLA”) and at the hearing that this is the reason for including the hydropower component of the proposed dam and reservoir. Twin Lakes will abide by its word and use the revenue for those purposes until the system upgrades are complete. Once

⁴ The piping will take out turns and bends in the canal, and result in a shorter conveyance system. This is why only 42 miles will need to be piped, as opposed to the current 67-mile system.

the system upgrades are complete, we presume other upgrades will be needed to Twin Lakes' existing reservoirs, and revenue from the hydropower generation could be used for those and other company-related purposes.

To be clear, the project is not intended to directly provide revenue to Twin Lakes stockholders in the form of yearly distributions of income. It is to better allow these stockholders to do their job well by providing water to support their farming and allow production of completed mature crops to support their farming families, keep farming alive and well in Franklin County, and support the business and services of non-Twin Lakes shareholders in Franklin County. This will preserve the social fabric of Franklin County. It is an agricultural-based county. See Exhibit A9 at 270.

B. Twin Lakes has been actively pursuing approval of its proposed dam and reservoir through the FERC process.

Twin Lakes holds a preliminary permit from the Federal Energy Regulatory Commission ("FERC"), issued on February 10, 2009, to "maintain priority of application for a license during the term of the permit while the permittee conducts investigations and secures data necessary to determine the feasibility of the proposed project and, if the project is found to be feasible, prepare an acceptable development application." Exhibit A9 at ES-1. The preliminary permit was granted after Twin Lakes' first filing of an application for preliminary permit on January 29, 2004.

Twin Lakes desires to construct a 109-foot roller compacted concrete (RCC) dam near the mouth of the Oneida Narrows canyon, which will result in a 4.6 mile-long reservoir behind the dam. Exhibit A9 at 1. The resulting proposed reservoir will be a narrow, pristine lake at the bottom of the canyon, and would provide a tailwater fishery for recreational purposes. Camping opportunities near the tailwater of the existing dam would be expanded beyond current camping capacity and access will be provided for floating activities at the base of the new dam. The shoreline of the new reservoir would be easily reachable for those traveling on foot and existing vehicle access will remain for the reach of the river below the new dam. See Exhibits A39 and A9 (maps of anticipated reservoir and associated access proposals).

The dam will not inundate any existing buildings, or any portion of the existing Oneida Dam owned and operated by PacifiCorp. The resulting reservoir will be approximately 12,647 acre-feet in size, and will provide power head for two 5.0 mega-watt generators, for a total of 10.0 megawatts of power generation. *Id.* Preliminary drawings of the dam with its dimensions are shown on Exhibits F-1 and F-2 of the DLA found at Exhibit A9.

Prior to construction of the proposed dam, it will be necessary for Twin Lakes to obtain a license from FERC. *Preliminary Order* at 4 (¶19). Associated with the FERC license, Twin Lakes must also obtain a Section 404 permit from the Army Corps of Engineers, which includes an alternatives analysis to be reviewed by the Corps and EPA. Twin Lakes will also need to obtain a Section 401 water quality certification from the EPA and the Idaho Department of Environmental Quality (“IDEQ”). *Preliminary Order* at 20 (¶¶134-136). In addition, because mitigation will be required in order to obtain the FERC license and these associated permits, Twin Lakes will be obligated to submit a Riparian Habitat Development Plan to address necessary mitigation identified in the processing of these permits. Twin Lakes is pursuing each of these permits. Testimony of Nick Josten.⁵ Additionally, it will be necessary for Twin Lakes to obtain approval of the plans, drawings, and specifications for the dam from IDWR’s dam safety program. Idaho Code § 42-1712; *Preliminary Order* at 7 (¶40).

In the FERC process, Twin Lakes’ proposed dam has been assigned Project No. 12486, or P-12486.⁶ All of the Protestants to the water rights matter have participated and/or remain participants in the FERC proceedings, and have provided comments, input, criticisms, etc., in the formulation and implementation of a study plan that was ultimately approved by FERC. Exhibit A9 at 340 (list of consulted parties with which the application consulted in preparing the FERC

⁵ Audio recordings of the Twin Lakes contested case hearing are available on IDWR’s website at http://www.idwr.idaho.gov/News/Issues/Twin_Lakes_CC/TwinLakes.htm. No transcript of the hearing has been prepared, and is typically not prepared until a contested case matter is appealed for judicial review before a district court. Therefore, citations to testimony of certain witnesses will follow the pattern of the Hearing Officer in the *Preliminary Order* with a general citation to the testimony, except in certain instances where a quote is provided, and in that instance, there is a reference to the time on the recording from which the quote was taken.

⁶ All of Twin Lakes’ FERC filings, including documents and comments filed by the Protestants in this matter who are also involved in the FERC proceedings, are available by accessing the following website, and then typing P-12486 in the Docket Number box: http://elibrary.ferc.gov/idmws/docket_search.asp

and associated environmental documents); *Id.* at A-1 through A-22 (Appendix A to Draft License Application showing a log of meeting and correspondence with interested groups).

The *Preliminary Order* mentions the Protestant's involvement in the FERC process (*Preliminary Order* at 4 (¶¶20-21)), but contains no discussion of the exhaustive FERC study plan development process and implementation. We are unsure why. A careful review and understanding of this deliberative process demonstrates that local public interest concerns were collaboratively discussed with stakeholders—nearly all of whom are Protestants to this water rights matter—during the study plan development and implementation process.

Beginning in 2006, Twin Lakes consulted with “agencies, tribes, and the public to identify potential project impacts to public resources.” *Id.* at ES-1. Twin Lakes held a series of three stakeholder meetings “to determine the focus and scope of new studies required to assess the existing condition of resources potentially affected by the project.” *Id.* Not only were comments provided as to the scope of the proposed studies, but comments were also submitted as to how the studies should be performed.

Based on the results of the stakeholder discussions and comments, Twin Lakes submitted a study plan to FERC for their approval. While that study plan was being considered by FERC, participants to the process—including the Protestants to the water right permit application—were allowed to comment on the proposed study plan and whether it was sufficient, in their view, to address the interests of the public on the resources that would be impacted by Twin Lakes' proposed project. FERC eventually approved a study plan and “specified the requirements for 24 separate studies to be conducted by Twin Lakes.” *Id.* Even while the studies were being performed, FERC directed “several study plan modifications or additions that arose during the course of the studies.” *Id.*

In 2009 and 2010, while the studies were being performed, Twin Lakes issued an annual report and held an annual study plan meeting “to present for stakeholder review the interim results from the 24 studies and to discuss the need for any modification to the study requirement[.]” which allowed for further comments from stakeholders to the FERC process. *Id.* And, as the studies were completed, Twin Lakes issued draft final reports to stakeholders for review, and those studies were “revised based on comments received and then filed with FERC as final reports.” *Id.* Twin Lakes was delayed with the finalization of some of its studies

because of PacifiCorp's efforts to exclude Twin Lakes' consultants from accessing areas below Oneida Dam. Testimony of Clair Bosen. This resulted in over a year of delay to complete the studies. *Id.* Nevertheless, Twin Lakes has been able to now complete nearly all of its studies (after FERC requested additional work) and is finalizing its license application to FERC.

The FERC study process was exhaustive, and provided stakeholders multiple opportunities to be heard with their suggestions, concerns, criticisms, etc. We are not suggesting that the stakeholders necessarily agreed with the entirety of FERC's decision to approve the study plan and implementation, but neither did Twin Lakes. That is the point of a deliberative process. Even so, all of stakeholder-Protestants would have to agree they were certainly intimately involved in the study plan development and implementation process. We would anticipate a similar process with other proposed hydropower and water storage projects being actively discussed in Idaho, such as the Weiser-Galloway Hills proposal, adding storage in the Teton River Basin, Twin Springs Dam on the Weiser River, and others.

C. Only after the FERC studies were being conducted and nearly finalized did Twin Lakes request to move forward with the water rights process.

On March 28, 2007, Twin Lakes submitted an Application for Water Right Permit that was eventually administratively numbered 13-7697 by IDWR. *Preliminary Order* at 1. Over three years later—after Twin Lakes' studies to address public concerns were being conducted—Twin Lakes asked IDWR to move forward and commence continued processing of the application. To clarify a couple of items, IDWR requested—and Twin Lakes submitted—a revised application for permit on June 18, 2010. The application was then advertised pursuant to Idaho law in July of 2010. *Id.*

IDWR requested further amendment of the application, which Twin Lakes agreed to do, but the changes did not require re-advertisement of the application. The protest period was extended to August 30, 2010 to ensure adequate time for protests to be filed, which were filed by the following entities:

1. Oneida Narrows Organization
2. Great Salt Lake Keeper
3. Bear Lake Watch

4. Trout Unlimited
5. Greater Yellowstone Coalition
6. Bear River Water Users Association
7. Idaho Department of Fish & Game
8. Franklin County Fish & Game Association
9. PacifiCorp

Petitions to intervene were also filed by Idaho Rivers United and the United States Fish and Wildlife Service, both of which were granted. *Id.* The protestant entities and the intervenor entities are referred to herein as the “Protestants.”

Without any stipulation, the United States Fish and Wildlife Service withdrew its protest on November 16, 2011. *Id.* Pursuant to a stipulation, which is discussed extensively below, the Bear River Water Users Association (“BRWUA”) withdrew its protest subject to an agreement with Twin Lakes (*Stipulation for Withdrawal of Protest of Bear River Water User’s Association, Inc. and Settlement Agreement*, which is dated December 14, 2011) to mitigate evaporative losses from the reservoir, as well as to engage in discussions with PacifiCorp to coordinate water deliveries to avoid sometimes inconsistent water deliveries to members of BRWUA. This agreement is already part of IDWR’s administrative record in this matter and is referred to herein as the “BRWUA Agreement.”⁷

Before and during the processing of Twin Lakes’ water right permit application, Twin Lakes has taken very seriously its obligation to ensure that matters identified in the FERC process were properly addressed. Ultimately, the hearing on the above contested case was held on March 5-9, 2012, wherein Twin Lakes presented 2 ½ days of direct testimony that included cross-examination by the nine remaining Protestants (and questions from the Hearing Officer), except, somewhat surprisingly, there were no cross-examinations questions asked of Dr. Hardy and Ted Sorensen by the Protestants.

The protestants then presented 2 ½ days of their testimony, which likewise included cross-examination by Twin Lakes and questions from the Hearing Officer. On July 26, 2012, the Hearing Officer issued his decision denying Twin Lakes’ application for water right permit.

⁷ The BRWUA Agreement was inadvertently not paginated. Therefore, references to this agreement will be made with a * designation, with *1 being the first page of the agreement where the case caption is located.

II. STATEMENT OF EXCEPTIONS TO THE *PRELIMINARY ORDER ON APPEAL WITHIN THE AGENCY*.

As set forth in the *Preliminary Order*, Twin Lakes' Application for Permit No. 13-7697 was denied by the Hearing Officer because:

1. Based on the evidence in the administrative record, TLCC failed to establish elements (a) and (e) of Idaho Code § 42-203A(5). The proposed application will reduce the quantity of water under existing water rights and the proposed application conflicts with the local public interest.
2. In addition, because the application, as proposed, would impact downstream water rights in the state of Utah, approval of the application is prohibited by Article IX of the [Bear River Compact].

Preliminary Order at 30.

The Idaho Administrative Procedures Act “requires that agency orders contain reasoned explanations of decisions and that factual findings ‘shall be accompanied by a concise and explicit statement of the underlying facts of record supporting the findings.’” *Sopatyk v. Lemhi County*, 151 Idaho 809, 816, 264 P.3d 916, 923 (Idaho 2011) (quoting Idaho Code § 67-5248(1)(a)). Therefore, with regards to the *Preliminary Order*, the Hearing Officer is required to provide a reasoned explanation of his decision, which should address both persuasive and unpersuasive evidence. On certain issues, the Hearing Officer did not provide a reasoned explanation of Twin Lakes' evidence, which we presume means certain evidence—particularly evidence presented by Twin Lakes regarding the local public interest—was neither considered nor given appropriate weight by the Hearing Officer. The failure to even mention some of Twin Lakes' evidence on certain issues necessitates the filing of Twin Lakes' *Petition* to ensure that such evidence is actually considered and weighed in the overall decision now that the matter is before the Director.

Twin Lakes takes exception to the Hearing Officer's overall conclusions and supporting findings of fact and conclusions of law on elements (a) and (e) of Idaho Code §42-203A(5) (reduction of quantity of water under existing water rights and the local public interest criteria). Twin Lakes therefore requests the Director to issue a final order consistent with the evidence presented at the hearing by finding (1) that the proposed application will not reduce the quantity

of water under existing water rights, and therefore, does not violate Article IX of the Bear River Compact; and (2) that the proposed application is in the local public interest.

Twin Lakes otherwise agrees with the Hearing Officer's findings relative to the other components of Idaho Code § 42-203A(5) and its associated IDAPA rules, namely that (1) the water supply itself is sufficient for which it is sought to be appropriated (Idaho Code § 42-203A(5)(b)), (2) the application was made in good faith and was not made for delay or speculative purposes (Idaho Code § 42-203A(5)(c)), and (3) that Twin Lakes has sufficient financial resources with which to complete the work involved (Idaho Code § 42-203A(5)(d)). It was stipulated prior to the hearing by the parties that elements (f) and (g) of Idaho Code § 42-203A(5), pertaining to conservation of water resources and adverse effects to the local economy where the place of use is outside the watershed of the source of water sought, were not at issue. *Preliminary Order* at 21 (¶3).

III. ARGUMENT

A. The proposed application, with its associated mitigation plan contained in the BRWUA Agreement, will not reduce the quantity of water under existing water rights and does not violate Article IX of the Bear River Compact. The Hearing Officer ignored the actual text of the BRWUA Stipulation regarding the proposed mitigation of evaporative losses from the reservoir with Twin Lakes Water Right No. 13-901.

1. The BRWUA Agreement contains components of mitigation intended to address potential impacts to water quantity, timing, and location of the existing water use of water rights users.

The Hearing Officer simply got it wrong when he concluded that the plan offered by Twin Lakes to mitigate for evaporative losses was deficient. A review of the Hearing Officer's conclusions of law on the subject, where the Hearing Officer concludes there are shortcomings, does not even discuss the BRWUA Agreement, nor does it include a citation to it. See *Preliminary Order* at 22-23 (¶¶6-15).

As described below, the mitigation offered by Twin Lakes for evaporative losses is far in excess of the actual evaporative losses that will result from the proposed reservoir.

a. Background to the BRWUA Agreement.

The primary reason Twin Lakes has pursued construction of the new reservoir is the reservoir site is close enough in proximity to Twin Lakes' delivery system that Twin Lakes could actually use some of the storage water for irrigation purposes to bolster Twin Lakes' water supply. In addition, Twin Lakes is in the unique position to have the point of diversion for its major water right (which diverts from Mink Creek) located such that it could use a portion of this water right to mitigate for evaporation impacts from the reservoir that would negatively impact other water users. Testimony of Clair Bosen.

Our recollection is that the issue of evaporation mitigation was not extensively discussed at the hearing on this contested case, which our review of the hearing recordings confirms. Presumably, this was because the only Protestant with irrigation water rights that could actually be impacted by evaporative losses is the BRWUA (*Preliminary Order* at 4 (¶18)), and, prior to the hearing, BRWUA negotiated the BRWUA Agreement with Twin Lakes, which mitigates for any potential evaporation and resulting impacts to these water users many times over.⁸ The BRWUA Agreement was negotiated between counsel for Twin Lakes and counsel for BRWUA, Randy Budge, who is an experienced water rights attorney. BRWUA represents a significant portion of the irrigators downstream of Twin Lakes' proposed dam location:

BRWUA's membership is comprised of 4 major irrigation companies, Last Chance Canal Company and Cub River Irrigation Company in Idaho and Bear River Canal Company and West Cache Canal Company in Utah, together with approximately 81 irrigation pumps.

BRWUA Agreement at *3 (Recital J). These users constitute the majority of the water users below the proposed reservoir that could be impacted by the evaporative losses from the proposed reservoir. *Preliminary Order* at 4 (¶ 18) (citing to Testimony of Connelly Baldwin).

Given Twin Lakes' unique position to construct the proposed dam, it has consistently maintained that the proposed reservoir cannot have adverse impacts on existing water rights holders as to the historical timing, location, and quantity of water diverted under already-existing water rights, particularly those which constitute BRWUA. After all, many of these other

⁸ PacifiCorp holds irrigation water rights, but delivers water diverted pursuant to these water rights to contract holders. We are unaware of any evidence that PacifiCorp presented showing that it actually irrigates land for agricultural purposes, but it is possible.

irrigators are business associates, fellow farmers, and friends of Twin Lakes stockholders. It was therefore surprising to read, in the *Preliminary Order*, that Twin Lakes' proposed water right would allegedly impact existing water rights.

A careful review of the *Preliminary Order* reveals, quite clearly, that the Hearing Officer did not read the text of the BRWUA Agreement before concluding that the mitigation plan was deficient. *Preliminary Order* at 23 (¶11-15). Had he done so, he would have seen that the negotiated agreement—executed by the actual affected party—addresses the allegedly unmitigated parade of examples offered by the Hearing Officer.

When a new water right is proposed, it cannot injure existing water rights. Idaho Code § 42-203A(5)(a). “Injury” is not defined by statute or IDWR’s Water Appropriation Rules, but it is addressed in IDWR’s conjunctive management rules and water right processing policies which provide a water right cannot be detrimentally impacted in the historical quantity, timing, and location of the amounts the water right holder has been historically entitled. See, e.g. IDAPA 37.03.08.042.01; See also *IDWR Mitigation Plan Evaluation Checklist*, available at http://www.idwr.idaho.gov/WaterManagement/WaterRights/WaterRightTransfers/PDFs_09/Mitigation_Plan_Eval_Checklist.pdf (“A mitigation plan must offset the depletion of water associated with a new appropriation or transfer in quantity, time, location, and/or quality to protect senior water right holders.”)

The major components of the BRWUA Agreement are:

“Twin Lakes will mitigate for evaporation from the Twin Lakes Dam and its associated reservoir by providing **1.4 cfs** of water from Mink Creek under **Water Right No. 13-901** to be injected **into the Bear River.**”

...

To the extent Water Right No. 13-901, which has a priority date of April 1, 1901, is subjected to priority administration, or water under said right is for any reason not available for mitigation purposes pursuant to this Agreement, Twin Lakes shall provide the required mitigation amount from its **storage water diverted pursuant to Permit No. 13-7697** to mitigation for evaporative losses unless and until Water Right No. 13-901 is once again in priority or water thereunder is otherwise available for mitigation purposes as provided in the Agreement.

BRWUA Agreement at *4-*5 (¶¶2a and 2d) (emphasis added).

The bolded and highlighted portion is significant for many reasons. First, it identifies the quantity to be used for evaporation mitigation (1.4 cfs). Second, it identifies the water source of the mitigation as coming from Twin Lakes' 1901 priority Water Right No. 13-901. The mitigation water cannot come from any other source, including naturally-occurring excess flows. It must come from Twin Lakes' 1901 priority Water Right No. 13-901, or, if the 13-901 water is not available to mitigate for any reason, then Twin Lakes is required to release storage water from the new reservoir (authorized for diversion under Permit No. 13-7697) to mitigate for the evaporative losses.

Third, it is specific as to where the 1.4 cfs is to be delivered, which is 1.4 cfs of water—again, under Water Right No. 13-901—delivered “into the Bear River.” This means that to the extent there is any impediment to 1.4 cfs reaching the confluence of Mink Creek with the Bear River—such as illegal diversions or conveyances losses—adjustments must be made to ensure the agreed-to amount reaches the Bear River. Otherwise, there would be no true mitigation to the BRWUA.

The 1.4 cfs in the Bear River for evaporation mitigation is tied to, but separate from, Twin Lakes' proposed FERC mitigation for impacts to Bonneville Cutthroat Trout of releasing 10 cfs of Water Right No. 13-901 past Twin Lakes' Mink Creek diversion for tributary reconnection. With no conveyance loss, the 10 cfs will eventually be injected into the Bear River and provides fisheries benefits associated with reconnecting tributaries. The determination of whether the 10 cfs environmental mitigation is sufficient will be made by FERC in its review process. *Preliminary Order* at 5 (¶24).

As currently proposed to FERC, the 10 cfs flows will come from Water Right No. 13-901, not from “naturally-occurring natural flows” which would make their way to the Bear River naturally. BRWUA Agreement at *2 (Recital D) (“In order to meet FERC’s mitigation requirements, Twin Lakes has proposed to mitigate environmental impacts to fish and to mitigate for evaporation impacts of the reservoir by allowing **10 cfs of Water Right No. 13-901 to flow past Twin Lakes’ authorized point of diversion** to provide natural flow water down to where Mink Creek flows into the Bear River in order to reconnect Mink Creek, which has been determined to be an important spawning tributary for Bonneville Cutthroat Trout.” (emphasis added)).

Of the 10 cfs environmental reconnect amount, once that water makes its way to the Bear River, the BRWUA Agreement calls for 1.4 cfs is to remain flowing down the Bear River the entire year. *Id.* Thus, the mitigation plan is a release of 10 cfs of Water Right No. 13-901 past Twin Lakes' Mink Creek diversion, all of which is to be measured and accounted for by the local watermaster. Assuming none of the 10 cfs is lost or diverted by other water users, Twin Lakes may thereafter pump 8.6 cfs from its Bear River pumping station into its delivery system. If some portion of the 10 cfs is lost, Twin Lakes' pumping would be adjusted by the watermaster pursuant to his duties to ensure that 1.4 cfs remains in the Bear River to offset evaporative losses.

In addition to measuring and accounting for diversions, watermaster duties inherently include determining stream flow gains and losses in order to deliver appropriate amounts of water. Idaho Code § 42-105 (Water diverted under a water right may be injected into a natural stream, and then reclaimed, with due allowance "made for loss by evaporation and seepage." When such water supplies are injected into a natural stream, they remain subject "at all times" to the director of IDWR "and shall be subject to the regulation of the watermaster within an established water district." Such water is subject to "the requirement of measurement and reporting."); See also IDWR's *Watermaster Handbook* at 26, available at http://www.idwr.idaho.gov/WaterManagement/waterDistricts/PDF/watermaster_handbook.pdf ("Both storage and natural flow can be allocated properly if all diversions including storage and natural flow diversions, storage inflow, outflow (or releases) and changes in storage contents are measured on a regular basis. In districts having multiple storage users with separate storage accounts, the water district should maintain a daily storage account balance for each storage user. **Since some Idaho streams have reaches with significant losses, it may sometimes be appropriate to determine storage conveyance losses and assess such losses to the delivery of stored water. Losses may also need to be assessed to delivery of exchange water. Storage water, exchanges, and losing reaches are all very unique and site specific and should be addressed on a case by case basis. The Department can review and assist with distribution procedures involving storage exchanges.**" (emphasis added)). Utilization of a watermaster for distribution and accounting of water was also described at the hearing by David Tuthill:

Well, the role of the water master is to ensure that the exercise of a junior right does not injure a senior. That's why the state has a water district, that's the purpose of regulation, and certainly the first water right in a basin has free use of

all the water, the second water right in a basin has to be diverted with the senior in mind. So, particularly relative to a new storage water right, there is opportunity to exercise the right without injuring seniors in many cases. I think there is that opportunity in this case, and, to ensure that there's no impact on the seniors is the responsibility of the water master who's elected locally, but appointed by the Director of the Department. And that process has worked well in Idaho and our sister states as well.

Testimony of David Tuthill at 39:10.

The watermaster also administers conditions contained in an approved and permitted water right. Watermaster comments are often requested by IDWR when mitigation plans are proposed. See IDWR's *Mitigation Plan Evaluation Checklist* at item 8 (watermaster comments). Thus, while IDWR may approve a water right **appropriation**, it is the watermaster that actually enforces the plan in the **administration** and execution of the mitigation plan.

Given Twin Lakes' and the BRWUA's knowledge of water distribution by the watermaster, the BRWUA Agreement specifically provides that "the Parties agree that the local watermaster shall regulate water diversions in Mink Creek to ensure that the mitigation amount is not diverted and used by other water users before it is injected into the Bear River." BRWUA Agreement at *5 (¶ 2(c)). Calculation of any conveyance losses that may occur in Mink Creek is inherent in the watermaster's duties, as explained above, and would be addressed by adjusting Twin Lakes' redirection amount of 8.6 cfs downward if such losses or illegal diversions existed. To the extent the watermaster could not perform these measuring/monitoring/accounting duties, Twin Lakes agreed that it would "establish a monitoring and accounting plan acceptable to BRWUA to ensure the mitigation water amounts are not diverted prior to injection into the Bear River in violation of the terms of this Agreement." BRWUA Agreement at *5 (¶ 2(c)).

As a final failsafe, Twin Lakes and the BRWUA agreed that if 13-901 was unavailable due to priority administration, or was not available for mitigation purposes **for any other reason**—which would include the unlikely event that all nearly all of the 10 cfs of the bypass flows was not available due to conveyance losses or illegal diversions—then Twin Lakes' backup is to supply storage water releases of 1.4 cfs from its 5,000 acre-foot irrigation storage supply (diverted under Permit No. 13-7697) which would be released into the Bear River unless and until 13-901 is again in priority or otherwise available. BRWUA Agreement at *5 (¶ 2(d)).

The bottom line is that no matter what may prevent 13-901 from not providing mitigation water, Twin Lakes' storage water could be used to mitigate for evaporative losses.

Overall, Twin Lakes was careful about taking care of existing irrigators. In order to fully address the Hearing Officer's alleged deficiencies in Twin Lakes' written mitigation plan with the BRWUA, and in order to appreciate the actual mitigation offered by Twin Lakes and accepted by BRWUA, it is helpful to start from the beginning and address how the BRWUA Agreement addresses mitigation of evaporative losses to existing water rights and the potential impacts to such rights in quantity, timing, and location of their historically available amounts.

b. Quantity: Calculation of Mitigation Amounts.

There were two methods of calculating evaporative losses from the proposed reservoir discussed at the hearing, the first of which is an Idaho Department of Environmental Quality method for wastewater lagoons used by Twin Lakes' engineers (Schiess & Associates) in a FERC study (*Study 13.0 Reservoir Capacity and Evaporative Loss Study Final Report*, Exhibit A32), and the second of which is a methodology accepted under IDWR's current policies prepared by Twin Lakes' counsel in conjunction with IDWR staff. Each is discussed in turn.

The IDEQ methodology is a very conservative method of calculating evaporation, meaning that it errs on the side of a high evaporation calculation favorable to water users and unfavorable to Twin Lakes. This methodology is taken from a "Department of Environmental Quality (DEQ) memorandum titled Procedure for Evaluating Wastewater Treatment Lagoon Seepage Rates, dated January 22, 2002." Exhibit A32 at 6. The mathematical equation is set forth on page 6 of Exhibit A32, and requires a "pan evaporation value," which Schiess obtained from a Logan, Utah weather station. Based on that value, Schiess calculated evaporative losses in inches, and multiplied this amount by the total surface area of the reservoir (362 acres) to arrive at a total estimated annual evaporation of 991 acre-feet. If the volumetric amount of 991 acre feet is converted to a diversion rate⁹ over 365 days, the result is a constant rate every day of the year of 1.3688 cfs, or rounded up, 1.4 cfs.¹⁰

⁹ One (1) cfs diverted for 24 hours yields 1.9835 acre-feet. See http://www.idwr.idaho.gov/WaterManagement/WaterMeasurement/water_measurement.htm (conversion amounts on right hand side of IDWR webpage).

¹⁰ $991 \text{ AF} \div 365 \text{ days} = 2.715 \text{ AF/day}$; $2.715 \text{ AF/day} \div 1.98 \text{ AF/cfs/day} = 1.3688 \text{ cfs}$, or rounded up, 1.4 cfs.

The second method, or IDWR method, utilizes information obtained and analyzed by the University of Idaho to determine the evaporation from open water surfaces, as well as the evapotranspiration and consumptive irrigation water requirements of various crops. See summary found at ETIdaho website (<http://www.kimberly.uidaho.edu/ETIdaho/>). Because climates vary throughout Idaho, the information available at the ETIdaho website utilizes and incorporates data from different weather stations located throughout the state, one of which is the Preston 3 NE National Weather Service station (Station 107346). Within each weather station, there are different categories of crops and "Open water – deep systems (lakes, reservoirs)." This is the category most applicable to the proposed reservoir because it involves water deeper than 4 meters. See Allen and Robison, *Evaporation and Consumptive Irrigation Water Requirements for Idaho* at 40 (deep systems are "relatively clear lakes with reservoirs deeper than 4 m"), available at http://www.kimberly.uidaho.edu/ETIdaho/ETIdaho_Report_April_2007_with_supplement.pdf. The Twin Lakes reservoir will be deeper than 4 m (or approximately 13 feet), and therefore the "open water – deep systems" category is appropriate.

The "precipitation deficit" amounts from the "open water – deep systems" category is equivalent to the total evaporation from such a system, which for the values obtained at the Preston weather station, shows a positive evaporative amount in the months of June, July, August, and September only. The other months show a negative precipitation deficit due to spring/fall/winter precipitation, meaning there is no overall evaporation during those months because of precipitation offsets.

Based on these values, Twin Lakes calculated a total evaporation of 112.99 acre-feet per year under the IDWR method. Using the same mathematical calculations explained above to convert a volume to a daily diversion rate, the result over 365 days is .27 cfs. If the same acre-foot amount is converted to a diversion rate over the June through September growing season (122 days), the amount is .47 cfs. *Preliminary Order* at 9 (¶ 56). During the peak evaporation month of August, which has 31 days, the 51.54 acre-feet of evaporation equates to .84 cfs. The daily diversion rates for the remaining months of June, July, and September, are .16 cfs, .64 cfs, and .23 cfs, respectively.

Overall, the Hearing Officer agreed that the IDWR method was "more reliable" than the IDEQ method. *Preliminary Order* at 9 (¶ 57). Despite this more reliable methodology, Twin

Lakes offered BRWUA the more conservative diversion amount of 1.4 cfs to be injected in the Bear River all year. The constant 1.4 cfs amount is 167% more than the highest calculated evaporation amount of a constant .84 cfs for the month of August alone. Thus, even as to the evaporative losses in the extreme heat of August, Twin Lakes proposed an amount far in excess of the actual evaporation amount. For the months of June, July, and September, these percentages are even higher (875%, 219%, and 609%, respectively).

Therefore, in terms of quantity, Twin Lakes certainly meets IDWR's criteria in mitigating for impacts to this component of injury due to evaporation from the proposed reservoir. The BRWUA Agreement calls for mitigation amounts greater than actual evaporative losses. For fellow irrigators, Twin Lakes sought to ensure no detrimental impact to other irrigation water right holders, under any possible scenario.

c. Timing: When mitigation water will be delivered.

The BRWUA Agreement also ensures that the timing component of injury is addressed. The BRWUA Agreement calls for injection of 1.4 cfs of Water Right No. 13-901 into the Bear River to occur **all year**, not just during the months that positive evaporation actually occurs (in only four of the twelve months in a calendar year). This is possible because Twin Lakes' water right, 13-901, authorizes the "year-round diversion of 300 cfs to be used for irrigation purposes or irrigation storage in its reservoirs." *Preliminary Order* at 2 (¶5). Thus, the BRWUA Agreement requires delivery of 1.4 cfs to the Bear River, even in October through May of the following year.

To put this into perspective, in a calendar year, Twin Lakes will deliver 991 acre-feet to mitigate for the actual evaporation of only 112.99 acre-feet. This equates to an 877% mitigation of the actual evaporation that would occur, or stated another way, an over-mitigation of 878.01 acre-feet, which is enough to irrigate 225 acres of farmland at a rate of 3.5 acre-feet per acre. See *Field Headgate Requirements, IDWR Eastern Region*, available at http://www.idwr.idaho.gov/WaterManagement/WaterRights/WaterRightTransfers/images/east_h_e.jpg (the amount of water required in Franklin County is 3.5 acre-feet per acre). Of course, these acre-feet amounts presume that Twin Lakes will always divert the remaining 8.6 cfs

(assuming no conveyance loss) that makes it to the Bear River, which it will not. Thus, additional acre-feet will be injected into the Bear River.

In terms of timing, Twin Lakes has also agreed that, to the extent it is allowed by FERC, it will buffer peak releases by PacifiCorp. BRWUA Agreement at *5 (¶3(a)). The 2003 PacifiCorp license restricts how quickly PacifiCorp can ramp down its releases, but it does not limit how quickly PacifiCorp can ramp up. Exhibit P205 at 20 (ramping rates allow up to 3.0 inches for every 15 minutes on the descending arm of the ramp. There are no limits to the ascending arm of the ramp). Thus, these fluctuations remain an issue, and the BRWUA can actually improve past impacts of timing injury caused by these fluctuations. Therefore, Twin Lakes' written mitigation plan outlined in the BRWUA Agreement would satisfy the timing component of injury, and may even improve upon it.

d. Location: Where the mitigation water will be delivered.

The final component of injury is a change in location of historic water flows to existing water right holders. Injury as to location could occur if depletions occur at a location above an existing water right diversion, and replacement water is returned downstream of that location. There are no irrigation diversions between the proposed dam location and the confluence of Mink Creek with the Bear River. Testimony of Clair Bosen. Therefore, between where the water depletions would occur (the proposed reservoir) and where the mitigation water is injected (the confluence of Mink Creek with the Bear River), no water right diversions will be impacted. Twin Lakes has therefore satisfied the location component of potential injury.

The official designation of mitigation water by IDWR will occur either as a result of the water right permit application approval for 13-7697, or through a separate transfer proceeding under Idaho Code § 42-222 to amend the nature of use of 10 cfs of 13-901. See *Mitigation Plan Evaluation Checklist* at item 9 ("Replacement water normally requires a separate filing, such as a transfer or Water Supply Bank rental, whereas non-use of water is normally addressed in the conditions of the new application or transfer approval."). Twin Lakes believes its mitigation is categorized as non-use of water, and can therefore be addressed in the conditions of approved Permit No. 13-7697. However, Twin Lakes will follow whatever process is determined by

IDWR to be appropriate to ensure that the 10 cfs mitigation flow past its diversion, as well as a guaranteed delivery of 1.4 cfs into the Bear River, is documented in Twin Lakes' water right.

In summary, Twin Lakes' written contract with the BRWUA outlining its mitigation agreement meets IDWR's criteria of protecting existing water rights in their quantity, timing, and location. Contrary to the Hearing Officer's findings, existing water rights will not be injured under the BRWUA Agreement. The water rights will actually be enhanced. This is why BRWUA entered into its agreement with Twin Lakes. Twin Lakes' mitigation would also provide additional amounts for hydropower generation, even though PacifiCorp's hydropower water rights could not call for water against irrigation water rights. See discussion in the following section, *infra*.

2. The Hearing Officer failed to consider the actual text of the BRWUA Agreement regarding the proposed mitigation of evaporative losses from the reservoir with Twin Lakes' Water Right No. 13-901. The Hearing Officer's alleged deficiencies are addressed by the plain language of the BRWUA Agreement.

Failing to consider the BRWUA Agreement was an obvious error by the Hearing Officer. If he had considered it, he would have seen that it addresses Hearing Officer's findings that the mitigation plan is deficient.

The BRWUA Agreement is a contract between the BRWUA and Twin Lakes, and as such, "[c]onstruction of the meaning of a contract begins with the language of the contract. 'If the contract's terms are 'clear and unambiguous,' the determination of the contract's meaning and legal effect are questions of law . . . and the meaning of the contract and intent of the parties must be determined from the plain meaning of the contract's own words.'" *McKay v. Boise Project Bd. of Control*, 141 Idaho 463, 111 P.3d 148 (Idaho 2005).

The Hearing Officer's first concern is described on page 23 of the *Preliminary Order*, where he determines that "TLCC appears to be seeking mitigation credit for bypass flows that would occur regardless of the mitigation requirement." *Preliminary Order* at 23 (¶11). This concern is based on the Hearing Officer's belief that at certain times of the year, no mitigation would take place because flows past the TLCC headgate will exceed 10 cfs. *Id.* This concern is not legitimate when considering the plain language of the BRWUA Agreement, which provides

that 10 cfs of 13-901 must bypass Twin Lakes' Mink Creek point of diversion, with 1.4 cfs of that amount remaining in the Bear River. BRWUA Stipulation at *2,*4 (Recital D and Paragraph ¶2a) (emphasis added). The mitigation water cannot come from any other source, including "naturally-occurring excess flows." It must come from Twin Lakes' 1901 priority Water Right No. 13-901. Twin Lakes' proposal is not to guarantee only a 10 cfs minimum flow past its headgate on Mink Creek, which is what the Hearing Officer appears to believe. Rather, it is to always provide (when the water right is in priority) 10 cfs above and beyond what would be flowing past the diversion. This is why the 10 cfs is specifically tied to Water Right No. 13-901.

By way of example, suppose that flows in Mink Creek are at 400 cfs, where Twin Lakes would be entitled to divert the entirety of its 300 cfs 13-901 water right. Under the BRWUA Agreement, Twin Lakes would only divert 290 cfs, and leave the remaining 10 cfs¹¹ of Water Right No. 13-901 in Mink Creek. This means that 110 cfs would bypass the Twin Lakes diversion. 10 cfs of the 110 cfs would not be "naturally-occurring" water, and is therefore water that "would not otherwise be available to the impacted parties." See *Preliminary Order* at 23 (¶12).

By way of further example, suppose the flows at the Twin Lakes diversion are at 100 cfs. Twin Lakes would only divert 90 cfs and the remaining 10 cfs would flow down Mink Creek. In this scenario, Twin Lakes guarantees a 10 cfs minimum flow in Mink Creek, and this 10 cfs would likewise not be "naturally-occurring" water. The BRWUA Agreement calls for injection of 1.4 cfs of Water Right No. 13-901 into the Bear River to occur **all year**, not just during the months that evaporation actually occurs. Twin Lakes' water right, 13-901, authorizes the "year-round diversion of 300 cfs to be used for irrigation purposes or irrigation storage in its reservoirs." *Preliminary Order* at 2 (¶5). Thus, the BRWUA Agreement shows that the water used to mitigate for evaporation losses from the proposed reservoir is not water that would otherwise have entered the Bear River from Mink Creek. Furthermore, as described above, the BRWUA provides that if water normally diverted under Water Right No. 13-901 is not available to mitigate "**for any reason**," then Twin Lakes is required to release storage water

¹¹ The determination of whether 10 cfs is sufficient in the eyes of FERC remains undecided. However, if FERC believes an increased amount of bypass flows are necessary, Twin Lakes President Clair Bosen testified that the bypass flows would be increased to that amount. The 10 cfs amount could therefore be increased.

from the new reservoir (authorized for diversion under Permit No. 13-7697) to mitigate for the evaporative losses.

For these reasons, the Director should find that the BRWUA addresses the first deficiency alleged by the Hearing Officer.

The second concern of the Hearing Officer is that the mitigation plan “does not address the possibility that mitigation water will not actually reach the Bear River” because the water may be lost in the lower reach of Mink Creek, and because there are “recorded water rights” on Mink Creek downstream of the Twin Lakes diversion that may divert Mink Creek water. *Preliminary Order* at 23 (¶¶13-14). However, this concern is answered in the BRWUA Agreement language quoted above because the 1.4 cfs must be “injected into the Bear River.” Of the 10 cfs bypass amount, once that water makes its way to the Bear River, the BRWUA Agreement calls for 1.4 cfs is to remain flowing down the Bear River the entire year. *Id.* This must be measured and accounted for by the local watermaster as part of his inherent duties. Assuming none of the 10 cfs is lost or diverted by other water users, Twin Lakes may thereafter pump 8.6 cfs from its Bear River pumping station into its delivery system. If some portion of the 10 cfs is lost, Twin Lakes’ pumping will be adjusted by the watermaster pursuant to his duties to ensure that 1.4 cfs remains in the Bear River to offset evaporative losses. This means that to the extent there is any impediment to 1.4 cfs reaching the confluence of Mink Creek with the Bear River—such as illegal diversions or conveyances losses—adjustments must be made to ensure the agreed-to amount reaches the Bear River. Otherwise, there would be no true mitigation to the BRWUA.

With specific regard to the Hearing Officer’s findings that there are recorded “water rights” between Twin Lakes’ Mink Creek diversion and Mink Creek’s confluence with the Bear River, the “water rights” described by the Hearing Officer are statutory claims, not water rights. As such, they are unadjudicated allegations that someone has a water right appropriated under the constitutional method of appropriation. See Idaho Code § 42-243. Until they are adjudicated, they are not recognized as water rights, and it is possible that the statutory claims may not be adjudicated as a water right after investigation during an adjudication proceeding.

However, even if we presume that the statutory claims are eventually adjudicated as valid, the water released by Twin Lakes past its diversion is allocated to Water Right No. 13-

901, and pursuant to the authorized mitigation Twin Lakes anticipates will be included in the permit approval, this mitigation water would be supervised by the watermaster to ensure it reaches the Bear River. See discussion of watermaster duties described in Section III.A.1.a above. The water bypassing the Twin Lakes Mink Creek diversion is not “naturally-flowing” water because it is allocated for mitigation purposes under Twin Lakes water right and hence cannot be diverted by any water user between Twin Lakes’ Mink Creek diversion and the confluence with the Bear River. Such water is authorized to be delivered through Idaho’s natural streams subject to the control of the watermaster. Idaho Code § 42-105.

Water Right 13-901 is also senior in priority to the two statutory claims with diversions below Twin Lakes’ Mink Creek diversion, and their diversion of Twin Lakes’ exchange water would violate the prior appropriation doctrine and Idaho law. We should also note that the non-water right character of statutory claims is recognized in priority administration, where, for example, a statutory claim with a claimed 1922 priority date water right would receive water only **after** a licensed 2000 water right is fully satisfied. See Idaho Code § 42-607. The statutory claim claimants cannot, under Idaho law, interfere with or steal the mitigation water.

Further, as to this second concern, to the extent the watermaster is not fulfilling his measuring/monitoring/accounting duties, Twin Lakes agreed that it would “establish a monitoring and accounting plan acceptable to BRWUA to ensure the mitigation water amounts are not diverted prior to injection into the Bear River in violation of the terms of this Agreement.” BRWUA Agreement at *5 (¶ 2(c)). The accounting component of Twin Lakes’ duties includes accounting for any potential conveyances losses, or illegal diversions. “Accounting” is defined as a “detailed statement of the debits and credits between parties to a contract or to a fiduciary relationship[.]” BLACK’S LAW DICTIONARY, “accounting” (9th ed. 2009). In other words, Twin Lakes would become a *de facto* watermaster and be responsible and accountable for ensuring delivery of 1.4 cfs of 13-901 water makes it to the confluence of Mink Creek and the Bear River if the actual watermaster cannot or will not perform his duties.

As a final failsafe, to the extent water is not available under 13-901, Twin Lakes and the BRWUA agreed that if 13-901 was unavailable due to priority administration, or was not available for mitigation purposes **for any other reason**—which would include the unlikely event that all nearly all of the 10 cfs of the bypass flows was not available due to conveyance losses or

illegal diversions—then Twin Lakes’ backup is to supply storage water releases of 1.4 cfs from its 5,000 acre-foot irrigation storage supply (diverted under Permit No. 13-7697) which would be released into the Bear River unless and until 13-901 is again in priority or otherwise available. BRWUA Agreement at *5 (¶ 2(d)). In addition to conveyance losses and illegal diversions, there are other events that could result in the non-availability of water under 13-901, such as a landslide blocking portions of Mink Creek. The language included in the BRWUA would protect against the entire spectrum of these unforeseen and unlikely (though possible) events. The bottom line is that no matter what may prevent 13-901 from not being able to supply mitigation water, Twin Lakes storage water could be used to mitigate for evaporative losses.

In short, presuming the watermaster is fulfilling his duties, we cannot conceive of how statutory claims located below Twin Lakes’ diversions could impact the location of Twin Lakes’ release of mitigation water. Losses in the creek would result in an adjusted redirection amount at Twin Lakes’ pump station. Stealing of water by the two statutory claim holders would be addressed with the watermaster that is locally elected and also appointed by the Director of the Idaho Department of Water Resources. The second of the Hearing Officer’s concerns with Twin Lakes’ mitigation plan outlined in the BRWUA Agreement is addressed by the plain language of the agreement which requires injection of 1.4 cfs of water under Twin Lakes’ Water Right No. 13-901 into the Bear River, and the inherent duties of the watermaster.

The third and final concern voiced by the Hearing Officer is a finding that “TLCC’s proposal to use Mink Creek flows as exchange water to fill the proposed reservoir during times when there is no unallocated water available on the Bear River fails for the same reasons.” *Preliminary Order* at 23 (¶15). For the reasons set forth above addressing the Hearing Officer’s scenarios, the mitigation plan succeeds for these reasons. Also, the exchange referred to by the Hearing Officer is an option offered by Twin Lakes in its FERC filings to provide multiple options for filling the reservoir in the rare event when Bear River water is not available in a low snowpack year, and is not related to mitigation for evaporative losses. Exhibit A9 at 36. This is not likely to ever be an issue because there are no storage reservoirs between the proposed Twin Lakes reservoir and the Idaho-Utah state line, and there have been historic flows of available water at that location. Exhibit P701 at 7 (chart of daily flow fluctuations at the Idaho-Utah state line).

To the extent there is a need for Twin Lakes to divert water to fill the irrigation storage portion of its water right during the non-irrigation season, then it could capture the necessary inflows from Oneida Dam into its reservoir to fill the irrigation portion of its proposed water right—other than designated irrigation storage releases from PacifiCorp—because downstream irrigation water rights are not within their season of use, and PacifiCorp’s water rights in Utah at Cutler Dam are constrained by historical practice not to make a delivery call for hydropower generation on Idaho irrigation water rights. Exhibit P225 at 1 (¶1.a.) (*Agreement Regarding the Bear River System* between PacifiCorp, Scottish Power, the State of Idaho, the State of Utah, and the State of Wyoming stating that “PacifiCorp’s water rights are constrained by the historic practice of not making a delivery call for hydropower generation;”); See also P252 (Order of the State Engineer for Water Right No. 29-4364 dated April 3, 2008 stating that “[t]he State Engineer is of the opinion that if this application is approved it would be in the best public interest to subordinate the approval to all prior and future applications to use water in the Bear River drainage above the applicants point of diversion and that the application would be able to use the water under this right as it is available at the point of diversion and would have no call upon the river system to release water to satisfy the right.”¹²). PacifiCorp’s hydropower rights would also be considered subordinated to irrigation water rights under current Idaho and IDWR law and policy. See, e.g., Idaho Code § 42-203B and C; *Idaho Power Co. v. Idaho Dept. of Water Resources*, 151 Idaho 266, 255 P.3d 1152 (Idaho 2011).

Also, the referred-to exchange would have to be approved through a formal exchange application. See Idaho Code §42-222 and Idaho Department of Water Resources forms available at www.idwr.idaho.gov. However, this could seemingly be done without incident because there are no intervening diversions below the proposed dam site and the confluence with Mink Creek. And it could certainly only be done if there is no detrimental impact on an existing approved mitigation plan, such as the proposed evaporation mitigation component of the 10 cfs bypass contemplated in the BRWUA Agreement.

¹² See also Exhibit P252 (explanatory for Utah application to appropriate water No. 29-4364: “After approval of this application, PacifiCorp’s operations will continue to be subject to its October 5, 1999 and the April 18, 2000 Agreements with the states of Utah, Idaho and Wyoming and the Amended and Restated Bear Late Settlement Agreement dated July 2, 2004. These agreements provide that PacifiCorp’s water rights are constrained by the historic practices of not making a delivery call for hydropower generation and that PacifiCorp’s water rights are used primarily for existing irrigation uses and contractual obligations, with hydropower generation being an incidental purpose.”).

In the context of the Hearing Officer's third concern, however, he goes further and states that because Twin Lakes' Mink Creek diversion freezes during the winter months, water bypassing the diversion cannot be considered replacement water or exchange water because Twin Lakes would not be able to physically divert the water. First, we note the circular logic. One of the main reasons Twin Lakes is attempting to construct the dam is to generate revenue to pipe the system to avoid freezing, and allow Twin Lakes to divert its water right year round. Yet, at this point, to get the approval for the dam and mitigate for evaporation impacts, the Hearing Officer finds that Twin Lakes cannot get credit for the bypasses it needs for mitigation because its system freezes up. This places Twin Lakes in an impossible situation, and on the legal question of whether Twin Lakes could get mitigation credit for flows during the winter months, we disagree with the Hearing Officer's conclusion on this issue.

First, we note that under IDWR's evaporation methodology, which the Hearing Officer agreed with (*Preliminary Order* at 9 (¶57)), there is no actual evaporation that occurs during the winter months. But Twin Lakes agreed to provide the additional 10 cfs bypass flow year round because while there may be issues with Twin Lakes **physically** not being able to divert the water, Twin Lakes is nevertheless **legally** entitled to do so under its water right, and that is what is necessary for the mitigation to be sufficient.

As described above, the designation of this water as mitigation water by IDWR will occur either as a result of the water right permit application approval for 13-7697, or through a separate transfer proceeding under Idaho Code § 42-222 to amend the nature of use of 10 cfs of 13-901. See *Mitigation Plan Evaluation Checklist* at item 9 ("Replacement water normally requires a separate filing, such as a transfer or Water Supply Bank rental, whereas non-use of water is normally addressed in the conditions of the new application or transfer approval."). Twin Lakes will therefore designate a portion of its water right as a bypass flow. There was no evidence presented that Twin Lakes has partially forfeited its water right. The opposite is true, where Twin Lakes diverts as much as it can to fill its reservoirs and use its water right during the non-irrigation season. Therefore, it would qualify under IDWR's processing standards as a water right eligible for mitigation purposes, even if it is not—at times—physically diverted during the winter months in a given year due to circumstances beyond its control. *Mitigation Plan Evaluation Checklist* at Item 8 ("forfeiture has not occurred."); See also Idaho Code 42-

222(3) and *Jenkins v. State, Department of Water Resources*, 103 Idaho 384, 389, 647 P.2d 1256, 1261 (1982) (providing that forfeiture in Idaho occurs if water rights are not applied to a beneficial use for a period of five continuous years. Forfeiture must be proven by clear and convincing evidence, which is a heightened evidentiary standard required in cases such as fraud, where the outcome is one disfavored in the law). Idaho does not recognize what we presume the Hearing Officer would call a “seasonal partial forfeiture,”¹³ and therefore, the water right is eligible for an approved mitigation plan under IDWR’s current processing standards. It has not been forfeited, and could be incorporated into the approval of Permit No. 13-7697.

In the alternative, the Hearing Officer’s conclusion on this issue is akin to a forfeiture argument, and there is a statutory defense to forfeiture that would apply by analogy. A water right is not forfeited because of circumstances beyond the water user’s control. Idaho Code § 42-223(6). “Whether the water right owner has control over nonuse of water shall be determined on a case-by-case basis.” *Id.* We invite the Director to consider whether freezing temperatures caused by Mother Nature nearly every year, which freezes Twin Lakes 67-mile delivery system, is beyond Twin Lakes’ control. Clearly, it is, especially with a forty-eight million (\$48,000,000.00) price tag looming over Twin Lakes to pipe its system. Thus, even if there is merit to the Hearing Officer’s forfeiture-like position, the Director should find that these circumstances are beyond the control of Twin Lakes, and Water Right No. 13-901 would be available to provide mitigation for evaporative losses from the reservoir.

Overall, as described above, Twin Lakes’ mitigation plan contained in the BRWUA Agreement fully mitigates for evaporative losses. We do not understand why it was not discussed in the *Preliminary Order*, particularly when the water users the Hearing Officer is claiming to protect—with his findings that the mitigation plan is deficient—are the very water users who executed the written agreement with Twin Lakes and withdrew their protest on that basis. The Hearing Officer’s deficient analysis of the mitigation plan supports a perception that Twin Lakes was not upfront or serious about its mitigation obligations. Twin Lakes is serious about its mitigation obligations, and the Director should determine that there is no injury to existing water rights because of the mitigation plan.

¹³ The Idaho Supreme Court has confirmed that Idaho’s forfeiture statute (Idaho Code § 42-222(3)) applies where a portion of the water right is unused for the continuous five-year statutory time period. *State v. Hagerman Water Right Owners*, 130 Idaho 727, 947 P.,2d 400 (1997).

3. **Because the BRWUA Agreement fully mitigates for evaporative losses, the Bear River Compact does not prohibit the approval of Application for Permit No. 13-7697.**

The Hearing Officer stated that “[i]f the evaporative losses associated with the proposed reservoir were fully mitigated to the satisfaction of IDWR, the Compact would not prohibit the approval of Application 13-7697.” *Preliminary Order* at 29 (¶56). As explained above, evaporative losses will be fully mitigated under the provisions of the BRWUA Agreement, which will therefore offset any impacts to Idaho water right holders and Utah water right holders. Therefore, approval of Application for Permit No. 13-7697 is not prohibited by Article XI of the Bear River Compact.

4. **Even if the plain language of the *BRWUA Stipulation* fails to address a specific situation or is ambiguous in any way—which it does not—Idaho Code § 42-203A(5) and IDAPA 37.03.08.045.01.a.iv allow IDWR, through either the Hearing Officer or the Director, to cure any alleged ambiguities or add provisions relating to non-addressed situations to ensure complete mitigation. Upon review, the Director should do what the Hearing Officer inexplicably failed to do by exercising his discretion and include any necessary conditions in the final order to address any remaining injury concerns.**

In addition to the above regarding the BRWUA Agreement, IDAPA 37.03.08.045.01.a.iv permits the Director, as well as the Hearing Officer, to do the following: “An application that would otherwise be denied because of injury to another water right may be approved upon conditions that will mitigate losses of water to the holder of an existing water right, as determined by the Director.” See also Idaho Code § 42-203A(5) (stating that the Director “may grant a permit upon conditions.”). In other words, there is general presumption in favor of approving water right permit applications by IDWR if the permit can be conditioned appropriately.

As explained above, the BRWUA Agreement addresses the perceived deficiencies described by the Hearing Officer. But even if the BRWUA Agreement did not, the Hearing Officer could have included conditions in the permit approval that would have addressed the perceived issues of conveyance losses, measuring and accounting, etc. The Hearing Officer’s

failure to do so, along with the failure to discuss the BRWUA Agreement discussed above, indicates that the Hearing Officer did not follow the general presumption in favor of approving water right permit applications that can be conditioned appropriately. This calls into further question the Hearing Officer's local public interest analysis—which the Hearing Officer determined Twin Lakes did not satisfy—and whether he appropriately analyzed this issue and/or gave appropriate consideration to Twin Lakes and the evidence it presented at the hearing.

B. Application for Permit No. 13-7697 is in the local public interest under Idaho law.

1. The Hearing Officer made findings of fact and conclusions of law on matters outside the Department's appropriate jurisdictional bounds under the local public interest.

Most of the Hearing Officer's *Preliminary Order* discusses local public interest matters. There was little weight given to Twin Lakes' evidence, as demonstrated by the lack of any discussion of Twin Lakes' evidence in the *Preliminary Order*. This is discussed in Section B.2 below. Before this discussion, however, we must first address the fact that the *Preliminary Order* demonstrates that the Hearing Officer made findings of fact and conclusions of law on matters outside the Department's appropriate jurisdictional bounds under the local public interest criteria.

The limits of the Department's analysis of local public interest matters are not well defined by statute or administrative rule. Even the Hearing Officer noted that the current definition of local public interest as defined in Idaho Code § 42-202B(3) has not been incorporated into updated administrative rules found at IDAPA 37.03.08.40.05.g-h and 45.01.e. *Preliminary Order* at 26 (¶33).

The Hearing Officer articulated this concern at the hearing, particularly as to whether matters like mule deer migration should be considered as part of the local public interest and whether it is within the expertise of IDWR to consider. Attorneys for the Idaho Department of Fish and Game argued that the broader environmental matters were items that could be considered by the Hearing Officer, and quoted legislative history on the amendment to the definition of the local public interest found at Idaho Code § 42-202B(3). Twin Lakes continued to oppose discussion of what are matters outside of the narrowed local public interest definition, but ultimately the Hearing Officer allowed introduction of this evidence. The Hearing Officer

then relied on his analysis of these complicated matters, which are being addressed by FERC and the other agencies discussed above (IDEQ, EPA, the Corps), in the *Preliminary Order*.

The obvious problem is that if the local public interest includes consideration of any matter that can be tied back to water, the spectrum of issues that can be introduced and decided by an IDWR hearing officer is endless. Virtually every issue can be tied back to water through a degree of separation analysis. Additionally, such broad consideration of these issues presumes that IDWR hearing officers are experts on very specialized areas, and there was no discussion in the *Preliminary Order* of the Hearing Officer's technical expertise or qualification to consider these very specialized issues. The result is an IDWR determination of issues that are within the jurisdiction or are under consideration by separate agencies or groups that possess the technical, legal, and administrative expertise to fully address the matter.

A careful analysis of the legislative history of House Bill 284—the bill that narrowed the local public interest definition—reveals that there is more to the legislative history than that presented at the hearing.

In the beginning, the local public interest review requirement was added by the Idaho Legislature in 1978 to the statutory review criteria of the Director required for approval of appropriations of new water rights. 1978 Idaho Sess. Laws, ch. 306, § 1 (codified as amended at Idaho Code §§ 42-203B(3), 42-203A(5)(e)). As originally enacted, the provision stated:

[W]here the proposed use is such . . . that it will conflict with the local public inters, where the local public interest is defined as the affairs of the people in the area directly affected by the proposed use, . . . the director of the department may reject such application

1978 Idaho Sess. Laws, ch. 306, § 1 (codified as amended at Idaho Code §§ 42-203B(3), 42-203A(5)(e)).

This provision provided the Department authority to consider matters other than the traditional issues of injury, enlargement, beneficial use, and speculation. However, at the time, there was little guidance on the scope of issues that could appropriately be considered by IDWR in a contested hearing until the Idaho Supreme Court case of *Shokal v. Dunn*, 109 Idaho 330, 339, 707 P.2d 441, 450 (1985).

In *Shokal*, Trout Company applied for a new water right to appropriate 100 cfs from Billingsley Creek for fish propagation and hydropower generation. *Id.* at 332, 707 P.2d at 443.

Local individuals protested, and after the protest hearing, IDWR approved the permit application. *Id.* The protestants subsequently appealed the agency decision to a district court, which reversed and remanded the decision for further proceedings. *Id.* Upon remand, and after additional hearings, IDWR approved the permit application again, only this time with conditions. One of the conditions was a requirement to submit a new design and construction plan for the proposed facility. *Id.* at 332-33, 707 P.2d at 443-44. When Trout Company submitted new plans, they were challenged by the protestants because they were a “radical” departure from the original application. The protestants submitted requests to IDWR for rehearing, which were denied, and a final order was issued granting the application. The protestants again appealed to the district court where that court reviewed and remanded the decision to IDWR for further proceedings, and included guidelines for IDWR to consider regarding the local public interest. *Id.*

On appeal to the Idaho Supreme Court, it affirmed the decision to remand, and then took upon itself the “difficult task” of defining the local public interest. *Id.* at 337, 707 P.2d at 448. The court identified Idaho Code § 42-1501, Idaho’s minimum stream flow statute, as a “related statute” because it also contained public interest standards and because the legislature “approved the term ‘public interest’ in [Idaho Code §§ 42-203A(5) and 42-1501] on the *same day*” *Id.* at 338, 707 P.2d at 449 (italics in original). The court felt that the legislature “must have included the public interest on the local scale to include the public interest elements listed in section 42-501[,]” which included “fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, and water quality.” *Id.*

However, the *Shokal* court also described the need for IDWR to exercise restraint and afford the appropriate deference to administrative agencies that have jurisdiction over the matter being considered. That deference would include a determination that the matter is or will be addressed by an administrative agency, and then to condition exercise of the water right permit accordingly in order for IDWR to retain continuing jurisdiction over the permit:

[We] add a word of caution regarding the differing functions of [IDWR] and the Department of Health and Welfare. [IDWR] must oversee the water resources of the state, insuring that those who have the permits and licenses to appropriate water use the water in accordance with the conditions of the permits and licenses and limits of the law. It is not the primary job of [IDWR] to protect the health and welfare of Idaho’s citizens and visitors—that role is vested in the

Department of Health and Welfare, including compliance with the water quality regulations and monitoring effluent discharge in our state's waterways. Nevertheless, although these agencies may have separate functions, [IDWR] is precluded from issuing a permit for a water appropriation project which, when completed, would violate the water quality standards of the Department of Health and Welfare. It makes no sense whatsoever for [IDWR] to blindly grant permit requests without regard to water quality regulations. Hence, [IDWR] should condition issuance of a permit on a showing by the applicant that the proposed facility will meet the mandatory water quality standards. Under this rule, [IDWR] has the authority to withhold a permit application until it receives a proposed design which appears to be in compliance with the water quality standards. **Once the conditional permit is granted, [IDWR] has continuing jurisdiction over compliance with the conditions of the permit, including suspension or revocation of the permit for proven violations of the permit's conditions regarding water quality.**

Id. at 340-41, 707 P.2d 441 (emphasis added). This language indicates that IDWR should review the permit application only to see if the applicant is in compliance with existing standards or will be in compliance pending review by another agency. Nowhere in *Shokal* did the Idaho Supreme Court authorize IDWR to develop its own standards on these overlapping issues.

In 2003, the Legislature relied upon the principles of *Shokal* when it narrowed the definition of the local public interest as follows:

“Local public interest” is defined as the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource.

2003 Idaho Sess. Laws, ch. 298 (codified at Idaho Code §§ 42-203B(3)).

The purpose of this amendment was to re-focus the Department's local public interest review on issues within its jurisdiction relating to the affected water resource. Subsequent to *Shokal*, IDWR had considered an array of issues generally addressed under Idaho's Local Land Use Planning Act, or “LLUPA.” Idaho Code § 67-6501 *et seq.* These issues included air quality, dairy odor, flies, traffic, etc. The entire legislative Statement of Purpose for the 2003 amendment provides:

This legislation clarifies the scope of the “local public interest” review in water right applications, transfers and water supply bank transactions. This legislation is intended to ensure that the Department of Water Resources has adequate authority to require that diversions, transfers and other actions affecting water resources do not frustrate the public's interest in the effective utilization of

its water resources. The "local public interest" should be construed to ensure the greatest possible benefit from the public waters is achieved; however, it should not be construed to require the Department to consider secondary effects of an activity simply because that activity happens to use water. For example, the effect of a new manufacturing plant on water quality, resident fish and wildlife and the availability of water for other beneficial uses is appropriately considered under the local public interest criteria. On the other hand, the effect of the manufacturing plant on the air quality is not within the local public interest criteria because it is not an effect of the diversion of water but rather a secondary effect of the proposed plant. While the impact of the manufacturing plant on air quality is important, this effect should be evaluated by DEQ under the E P H A. As noted by the Idaho Supreme Court in *Shokal v. Dunn*, 109 Idaho 330 (1985), "[i]t is not the primary job of Water Resources to protect the health and welfare of Idaho's citizens and visitors . . . that role is vested" in other agencies.

Water Resources' role under the "local public interest" is to ensure that proposed water uses are consistent with securing "the greatest possible benefit from [the public waters] for the public." Thus, within the confines of this legislation, Water Resources should consider all locally important factors affecting the public water resources, including but not limited to fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation, navigation, water quality and the effect of such use on the availability of water for alternative uses of water that might be made within a reasonable time. This legislation contemplates that "[t]he relevant impacts and their relative weights will vary with local needs, circumstances, and interests." "The determination of what elements of the public interest are impacted, and what the public interest requires, is committee to Water Resources' sound discretion."

In recent years, some transactions have been delayed by protests based on a broad range of social, economic and environmental policy issues having nothing to do with the impact of the proposed action on the public's water resource. Applicants have experienced costly delays and have been required to hire experts to respond to issues at an agency whose propose has nothing to do with those issues.

This legislation also clarifies that the effect on the local economy of a watershed or local area that is the source of a proposed use of water but not the place of use for the proposed use shall be considered. The purpose of this criteria is to ensure that out of basin transfers do not deprive a local area of use of the available water supply.

Statement of Purpose, H.B. 284 (2003).

H.B. 284's statement of purposes confirms that issues such as fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation, navigation, and water quality are matters

that can be considered by a Hearing Officer in his analysis of local public interest issues. This portion of the legislative history, as recounted by IDFG's attorneys, is accurate, but it is not complete.

The statement of purpose for H.B. 284 also quotes from the *Shokal* case, and describes the very scenario *Shokal* does, in that IDWR must exercise restraint and afford the appropriate deference to administrative agencies that have jurisdiction over a matter being considered. That deference would include a determination that the matter is or will be addressed by an administrative agency, and then to condition exercise of the water right permit accordingly in order for IDWR to retain continuing jurisdiction over the permit. It is not enough to simply say that a matter is a topic that can be considered by the Hearing Officer. The second part of the analysis requires a determination of whether the matter is within the jurisdiction of another administrative agency and will be addressed by that agency, such as FERC and the other agencies involved in this matter (IDEQ, EPA, the Corps, etc.). If it is, then the Hearing Officer should defer to that agency's expertise—even if the matter is water related—rather than interpret and apply another agency's rules. This avoids duplicative review by separate agencies, which could result in differing standards between IDWR and these other agencies.

The local public interest concerns raised by the Protestants have been raised in the FERC process, which has been ongoing for nearly eight (8) years. As described above, the Protestant's concerns have been voiced in the FERC process, and as a result of these concerns, the FERC studies have been tailored to study the issues which the Protestants are concerned about. Ultimately, FERC and the other associated federal and state agencies have the necessary expertise to consider the totality of the wide-ranging issues associated with the Twin Lakes project. The purpose of introducing Twin Lakes' studies was to provide the Hearing Officer with the knowledge and understanding that the studies were done in accordance with a study plan that involved input from the Protestants, implementation of that plan, completion of the studies, and the initial results of those studies. With the knowledge that those studies will be analyzed by FERC and the other involved agencies pursuant to their expertise, the Hearing Officer should have concluded that the project is in the local public interest and conditioned the issued water right permit such that it could only be exercised in accordance with an issued FERC license, which necessarily includes completion of other federal and state licensing requirements

(Section 404 permit, Section 401 certification, etc.)

The Hearing Officer acknowledged this potential problem, and stated that there are topics raised by the parties in this matter that “may be somewhat related to the Department’s review criteria,” but as to those issues—described on Page 29 (¶57) of the *Preliminary Order*—“the Department does not have sufficient expertise in these areas to make a determination on their outcomes. **It would be improper for IDWR to approve or deny an application for permit based on IDWR’s interpretation of application of another agency’s or group’s rules.**” *Preliminary Order* at 30 (¶58) (emphasis added).

Despite this acknowledgment, the Hearing Officer did offer findings as to matters based on his interpretation of FERC’s rules. For example, with regards to whether or not the 10 cfs bypass flow is sufficient mitigation for Bonneville Cutthroat Trout, the Hearing Officer concluded that the 10 cfs bypass flow “does little” and that the mitigation will need to be “far greater” than Twin Lakes proposed:

The mitigation proposed by TLCC, releasing 10 cfs continuously past its Mink Creek diversion, does little to mitigate for the impacts to local public interest elements. The 10 cfs released will not improve aquatic habitat in lower Mink Creek, will not create a significant amount of riparian habitat or improve the quality of existing riparian habitat, will not improve spawning conditions for BCT, will provide very few water quality benefits, and may not even provide fish passage from the Bear River to the upper section of Mink Creek. It is unknown how much of Mink Creek will be rewatered by the 10 cfs minimum flow because the extent of the “dewater” section of lower Mink Creek was not defined.

...

Based on the evidence in the administrative record relating to the local public interest, any mitigation proposed to offset impacts to the local public interests caused by inundation of the Oneida Narrows would have been substantial, far greater than has been proposed by TLCC.

Preliminary Order at 28 (¶¶46, 49). Yet earlier, the Hearing Officer stated quite clearly that the determination of what mitigation needs to be performed, including whether the 10 cfs bypass flow is enough, remains a FERC question: “Until FERC issues TLCC a license, however, the actual scope of mitigation required of TLCC is unknown.” *Id.* at 6 (¶29).

In another example, the Hearing Officer based part of his decision to deny the permit application on local public interest grounds because of the 2002 PacifiCorp relicensing

agreement, and the work that has been done by PacifiCorp and the parties to the agreement in the Oneida Narrows. *Preliminary Order* at 27 (¶ 44). But the analysis of those impacts are matters that remain squarely subject to FERC and other agencies' review and analysis, a matter that was specifically noted by the Hearing Officer: "Despite the potential impact to PacifiCorp's existing license and settlement agreement, FERC issued the 2005 Preliminary Permit on the basis that the final TLCC proposal may not result in an 'impermissible alteration' of the PacifiCorp license. **This issue, and others raised by the FERC protestants, will be considered by FERC in its review of the final license application.**" *Preliminary Order* at 5 (¶ 24) (emphasis added); See also *Id.* at ¶23 (summarizing FERC's stated concerns that the proposed project could interfere with the 2003 settlement agreement). How can the Hearing Officer, on one hand, find that the work under the 2002 agreement will be impermissibly impacted, and yet earlier state that whether there will be an "impermissible alteration" will be determined by FERC? The issue is squarely within FERC's jurisdiction, and should not have served as a basis for the Hearing Officer to deny the water right permit application on local public interest grounds.

These contradictory findings—and there are others in the *Preliminary Order*—highlight the problem with the *Preliminary Order* because on all matters pending before FERC and other federal and state agencies, the Hearing Officer should not have articulated his own standards on these issues which are within the respective agency's expertise. Instead, after the Hearing Officer satisfied himself that the matters were being addressed appropriately—and the matters are being satisfactorily addressed by 24 studies under FERC's carefully and deliberately crafted study plan—he should have approved the water right permit contingent upon approval from FERC and the other agencies involved in the FERC process from whom authorization must be obtained. Instead, the Hearing Officer delved into areas outside his expertise, the result of which is a decision on these FERC issues that are based on IDWR's own rules, not on the rules of the expert agencies. This was done outside of the Hearing Officer's authority under the local public interest.

It is clear that the Director has constitutional and statutory authority to condition a hydropower water right permit. Article XV, § 3 of the Idaho Constitution provides that "[t]he right to divert and appropriate the waters of any natural stream to beneficial uses, shall never be denied, **except that the state may regulate and limit the use thereof for power purposes.**"

(emphasis added). With this constitutional provision, Idaho policy has consistently been to treat hydropower rights as a separate class of water rights, subject to additional control and regulation from the State of Idaho. This provision affords the Director with constitutional authority to condition hydropower permits and license, which is outlined at Idaho Code §§ 42-203B through C, and includes the right to subordinate them to subsequent upstream beneficial uses, limit the permit or license to the term of the FERC license, etc. For example, IDWR has issued hydropower water right permits with the following conditions:

The diversion and use of water under this right and any license subsequently issued is subject to review by the Director on the date(s) of expiration of any license issued by the Federal Energy Regulatory Commission. 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.

The rights for the use of water acquired under this right shall be junior and subordinate to all other rights for the use of water, other than hydropower, within the State of Idaho that are initiated later in time than the priority of this right and shall not give rise to any claim against any future rights for the use of water, other than hydropower, within the State of Idaho initiated later in time than the priority of this permit.

This right does not constitute Idaho Public Utilities Commission or Federal Energy Regulatory Commission approval that may be required.

Use of water under this approval shall comply with applicable water quality standards of the Division of Environmental Quality of the Idaho Department of Health and Welfare.

See, e.g., Permit Nos. 83-7133 (State of Idaho), 84-7171 (Ford Hydro Ltd Partnership), 95-9006 (Jeffrey and Annake Connaway), 1-7058 (Chi-Black Canyon Inc.), and 1-7010B (Bypass Limited); See also License No. 1-7011 (North Side and Twin Falls Canal Companies).

IDWR's past practice when permitting and licensing hydropower water rights is to provide appropriate deference to these separate administrative agencies. As an example described above, even though water quality is an item that can be considered by IDWR in its review of local public interest matters, IDWR has deferred to the IDEQ and IDHW on this issue by conditioning the permit such that the use of water under the hydropower permit must comply with the rules and standards articulated by the sister state agencies of IDWR.

IDWR's past practice on the local public interest criteria on a FERC project is perhaps best summarized by Twin Lakes' final witness, former IDWR Director David Tuthill:

My view of the project was that the FERC, the Federal Energy Regulatory Commission, has the mandate of reviewing public interest. So I described that if this project came to me as Director when I was in that job, then I would look at the outcomes of the FERC process weighing the public interest issues as one aspect of the application relative to the availability of water, the benefit to the local people, the benefit to hydropower, as a benefit to creating energy, for all those things, this is a very positive project in my view. And the balance consists of the other issues- the free flowing nature of the river, these other recreational issues. So, as I described, I'm not in a position to make that judgment, that's a judgment that in my view is assigned to the Federal Energy Regulatory Commission, but relative to other issues, this is a good project.

(Explaining why Water Right No. 1-7011 (the Milner hydropower water right license) was conditioned on also having a FERC license)): Well, Idaho has long had a close look at hydropower, relative to the State's water rights and relative to subordination so there are many issues involved. But, the State, in my experience, has recognized that the Federal Energy Regulatory Commission has a role in hydropower, as does the state- it's a joint role in terms of the regulations, the permitting process, and public review process, et cetera. So, often times, there's a question about which comes first, the state water right, or the FERC water right, what that interrelationship is. And, in issuing Milner, as we have done, what the agency has done in other cases, there's a link between the water right and the FERC process and the Milner license actually states there's a review when the existing FERC license expires to see if the water right should continue. So there's an ongoing relationship, there's a standard condition of approval that has been adapted and adopted by the Department for use on hydropower rights.

Testimony of David Tuthill (beginning at 34:01 and 37:50 respectively).

Therefore, the Director should properly analyze the local public interest in his review of the *Preliminary Order* and find that the proposed water right permit is in the local public interest because the local public interest matters identified by the Protestants have been addressed in the FERC study plan development and implementation processes, where comments have been submitted throughout, and the studies have now been completed in that process. Remaining matters are being addressed before IDEQ, EPA, and the Corps. To ensure that the exercise of Twin Lakes' proposed water right permit remains in the local public interest, consistent with past IDWR practice, the Director should condition exercise of the water right permit upon obtaining and maintaining a FERC license to operate the project just as IDWR has historically done. The

Director could also include additional conditions as he deems necessary to ensure that Twin Lakes obtains and complies with permits that may be required by other agencies to construct the project.

2. **Even if the Hearing Officer properly considered the local public interest in contravention of Section III.B.1 above, the Hearing Officer did not discuss or cite to significant evidence presented by Twin Lakes regarding the local public interest, and therefore, the evidence was not properly weighed or considered by the Hearing Officer.**

Even if the Hearing Officer was within his bounds under Idaho law to analyze the issues he did—and we believe he was not—the *Preliminary Order* nevertheless remains deficient because the Hearing Officer failed to weigh the evidence presented by Twin Lakes, as demonstrated by the lack of discussion of Twin Lakes' evidence in the *Preliminary Order*. The statements made by the Hearing Officer relating to the benefits to agriculture only focused on benefits to Twin Lakes' shareholders and are found on pages 27-28 of the *Preliminary Order* (¶ 45): “[t]he irrigation storage and hydropower revenue generation has the potential to increase water supply and agricultural yields for the TLCC shareholders, particularly if hydropower revenues are used to pipe the TLCC main canal.”; (See also ¶ 48: “Although the potential benefits to TLCC shareholders would be sizeable, . . .”). Conversely, the Hearing Officer devotes over twelve pages of discussion relating to impacts on recreation and environmental matters.

The Idaho Administrative Procedures Act “requires that agency orders contain **reasoned** explanations of decisions and that factual findings ‘shall be accompanied by a concise and explicit statement of the underlying facts of record supporting the findings.’” *Sopatyk v. Lemhi County*, 151 Idaho 809, 816, 264 P.3d 916, 923 (Idaho 2011) (quoting Idaho Code § 67-5248(1)(a)). For a project of this significance to Franklin County, and to Idaho as well, the *Preliminary Order* falls short of the expected standard of analysis on a project that has been ongoing before FERC for over eight (8) years, has involved twenty-four (24) studies, and countless man-hours from Twin Lakes representatives in the FERC proceedings. Two sentences compared to twelve pages is not a reasoned explanation.

1. Economic Considerations.

What has been most difficult to explain to Twin Lakes' shareholders after their review of the *Preliminary Order* is a legitimate reason for the lack of discussion of the economic and positive rub-off effects of the proposed project to all of the residents in Franklin County, both to shareholders and non-shareholders. Twin Lakes conducted 24 studies at a cost of over two million (\$2,000,000.00) dollars. There was extensive testimony and evidence presented at the hearing on the benefits of the project, and the absence of any discussion of that testimony and evidence shows that the evidence was either not considered by the Hearing Officer, or was not given appropriate weight. Upon review, the Director should consider and fully weigh the following items.

Twin Lakes conducted two scientifically-based studies regarding socio-economics and recreation use and preferences. The socio-economics study is found at Exhibit A18 and was conducted by Rocky Mountain Social Science from Paradise, Utah. This study presented findings "from an assessment conducted to characterize existing social and economic conditions and evaluate potential socioeconomic consequences associated with possible construction of the [proposed reservoir]." Exhibit A18 at 7. The study used generally accepted scientific sampling methodologies to randomly sample the general population, such as on the ground surveys, mail surveys, and web-based surveys. Additionally, the study looked at economic value and impact, which was also based on well-accepted scientific methodologies. *Id.* at 64.

Twin Lakes also conducted a recreation use and preference study, which was conducted by the Institute for Outdoor Recreation and Tourism at Utah State University. Exhibit A17. The study contained results from data collected from intercept surveys at the Oneida Narrows site and in locations near to the proposed reservoir site. Exhibit A17 at 4.

The analysis and key points of these surveys, as well as an analysis of the economic benefits of the project based upon information from the USDA, are summarized on pages 263 to 272 of the Draft License Application (Exhibit A9). The population of Franklin County is primarily "farmers, ranchers and persons employed in agricultural services." Exhibit A9 at 264. Even though there was a reduction of farms and farmed lands, it is clear that Franklin County's economy "continues to depend heavily on agriculture." *Id.* In 2007, the total market value of Franklin County's agricultural production was seventy-nine million (\$79,000,000) dollars.

According to the Idaho Department of Labor's Franklin County Workforce Trends, "Agricultural trade and manufacturing provide 32 percent of all jobs in Franklin County. Agriculture accounts for another 6 percent so over a third of the jobs are agricultural or agriculture-related." *Id.* at 264.

We recognize that the direct beneficiary of the proposed Twin Lakes project will be its shareholders. *Id.* at 270. Twin Lakes irrigates approximately 18,000 acres in Franklin County, which is approximately 36% of the 49,000 total acres. *Id.* Twin Lakes' existing off-stream storage reservoirs store 19,000 acre-feet, but this amount is not enough to finish crops on Twin Lakes' acreage, particularly during drought years. Testimony of Clair Bosen. The additional water "will prevent loss of farm production during periodic drought conditions." Exhibit A9 at 270. As supplemental water, the amount is more significant because it allows the finishing of already-growing crops during drought years, such as this one, where widespread drought results in higher prices for consumers. Most of the United States is currently suffering through such a drought.

Equally important is Twin Lakes' proposal to pipe Twin Lakes' delivery system to eliminate water losses in its conveyance system. Testimony of Clair Bosen.; Exhibit A9 at 270. This would allow more water to be available for use by farmers, resulting in increased irrigation rotations to produce better crops, and to provide "finishing" irrigation at the end of the growing season when temperatures are often at their highest. Storage water is good for the economy because it enhances agricultural uses. Testimony of David R. Tuthill (30:10).

The benefits afforded to Twin Lakes from increased storage and water savings have direct positive impacts to non-stockholders as well. In the construction of the dam itself, at an estimated cost of over twenty-five million dollars (\$25,739,325—Exhibit A9 at 17), local jobs will be created. Additionally, just in the construction of the piped Twin Lakes system, the estimated costs are forty-eight million (\$48,000,000) over a ten-year period and will create seventy-five (75) full time jobs over 10 years. *Id.* Construction of a piped system will also allow pressurized irrigation, which will reduce energy costs to Twin Lakes' stockholders, which is an additional benefit.

The economic benefits to Franklin County were described at the hearing by Blair Hawkes, who was a long-tenured CEO of Ireland Bank, a very localized bank with branches in

Preston and other smaller Idaho communities. He testified as an expert on local economic conditions. Mr. Hawkes testified that the ability to pay back loans in an agricultural economy is dependent on the ability to grow crops, which is dependent on an adequate water supply. Testimony of Blair Hawkes (5:15). There is no other manufacturing in Franklin County, its economy is totally dependent on agriculture, and the receipts of small businesses are totally relational to the well-being of agriculture. *Id.* (7:15, 8:06, and 8:30 respectively). In Mr. Hawkes' view, the project will "definitely" have a positive impact on the local economy because there is a great corollary between the well-being of the community and job creation and the well-being of agriculture. *Id.* (11:00 and 13:35).

In a word, the project will provide stability. Further, the economic benefits to all Franklin County residents will be significant, and will include increased storage water, conservation of energy, production of clean and renewable energy, and increased jobs. Overall, "Twin Lakes Canal Company represents 230 farm families that together manage 18,000 acres of land and are responsible for 6% of the total economic output of Franklin County." Exhibit A9 at 272. And even beyond these considerations, the project will have a positive impact on the social fabric of Franklin County by supporting farming families, and keep the farming heritage going for generations. The economic benefits to Franklin County from the additional water will exceed the revenue resulting from dollars spent recreating in the Oneida Narrows.

The importance private agriculture plays in Idaho, and the public benefits that flow from agriculture, are perhaps best summarized by the Idaho Supreme Court: "[t]he irrigation and reclamation of arid lands is a well recognized public use . . . even if the irrigation project is ostensibly intended to benefit only private individuals." *Canyon View Irrigation Co. v. Twin Falls Canal Co.*, 101 Idaho 604, 607, 619 P.2d 122, 125 (1980) (internal citations omitted). Even in the context of obtaining easements or land to convey irrigation water, irrigation is a "public" use and one pursuant to which the power of eminent domain may be exercised. Idaho Code §§ 7-701 and 42-1106. Thus, when private individuals benefit, development of the state occurs, which is in everyone's best interests.

Accordingly, the benefits to the State of Idaho are not "minimal," as determined by the Hearing Officer. *Preliminary Order* at 28 (¶ 48) ("The benefits to the state of Idaho would also be minimal."). The Idaho Legislature disagrees. The need for development and use of additional

storage water for all of Idaho has been recently confirmed by the Idaho Legislature. In 2008, the Legislature passed legislation directing the Idaho Water Resource Board to investigate potential new surface water projects across the state.¹⁴ In particular, House Joint Memorial No. 8 (“HJM8”) confirmed the Idaho Legislature’s support for the study of additional water storage projects. HJM8 specifically referenced drought, population growth and urban development, and the fact that Idaho stores only 25% of its annual average runoff (while other states can store several times their runoff) as public reasons why Idaho should investigate and support additional surface water storage projects. *See also* Senate Bill 1511 and House Bill 644 (both of which were passed in 2008, and specifically addressed funding for investigation of specific storage projects). As a result of the widespread support for new storage reservoirs, there are a number of water storage projects being actively discussed in Idaho, such as the Weiser-Galloway Hills proposal, adding storage in the Teton River Basin, Twin Springs Dam on the Weiser River, and others.

As publicly elected representatives of the citizens of the State of Idaho, it is self-evident that the Legislature’s support for additional storage reflects the broad public benefit that irrigation storage provides, even if private individuals and companies ultimately construct the projects. Both the Idaho Legislature and Idaho Judiciary have confirmed the public benefits that result from private irrigation projects. The Twin Lakes project will therefore not just benefit “only a few,” neither is it “selfish and inconsiderate,” nor intended to “line the pockets” of only a few people who are part of the corporation, as some of the public comments submitted on this matter allege.

Upon review, we invite the Director to consider the items set forth above, and offer a fair analysis of these issues in his written final order. We believe after proper consideration of these issues, the result will be an issued water right permit with appropriate conditions.

¹⁴ A 2010 powerpoint presentation from the Idaho Water Resource Board summarizing this recent legislation is found at http://www.idwr.idaho.gov/waterboard/WaterPlanning/CAMP/TV_CAMP/PDF/2010/06-10-10_StorageStudies.pdf. House Joint Memorial No. 8 and its associated statement of purpose can be found at <http://legislature.idaho.gov/legislation/2008/HJM008.html>.

2. Environmental Considerations.

The construction of a dam and reservoir typically occurs in a canyon, and the proposed Twin Lakes reservoir is no exception. Twin Lakes' fully recognizes that this will have impacts on the historical use of the canyon for certain types of recreation, and likewise recognizes that there are interests in the canyon that will be adversely affected. Twin Lakes' survey studies also indicate that: "Approval of the project would undoubtedly generate dissatisfaction among the substantial segment of the local area population that is actively engaged in uses of, and strongly attached to, existing river environment conditions and recreation opportunities in the project area." Exhibit A9 at 272. We would anticipate similar concerns with other proposed hydropower and water storage projects being actively discussed in Idaho, such as the Weiser-Galloway Hills proposal, adding storage in the Teton River Basin, Twin Springs Dam on the Weiser River, and others.

However, there will be recreational opportunities at the new reservoir. The resulting proposed reservoir will be a narrow, pristine lake at the bottom of the canyon, and would provide a tailwater fishery for recreational purposes. Camping opportunities near the tailwater of the existing dam would be expanded beyond current camping capacity and access will be provided for floating activities at the base of the new dam. The shoreline of the new reservoir would be easily reachable for those traveling on foot and existing vehicle access will remain for the reach of the river below the new dam. See Exhibits A39 and A9 (maps of anticipated reservoir and associated access proposals). Visitors to Franklin County have historically spent more utilizing reservoirs in the county than the entire Bear River located in Franklin County. Exhibit P714 (the total dollars spent on utilizing reservoirs in the county exceeds the amounts spent on the entire Bear River).

It is also anticipated that there will be environmental impacts because of the dam and reservoir, and that FERC and the other involved agencies will determine whether those impacts will be so great as to deny the project's FERC license, or to allow it, but with mitigation requirements to offset those impacts. As described above, the full analysis of these issues will be vetted through the FERC process, as well as with EPA, the Corp of Engineers, and other federal agencies that have specific expertise in these areas. This should satisfy Twin Lakes' burden of persuasion as the local public interest.

However, because the Hearing Officer made specific factual findings on certain environmental matters, in the interest of thoroughness, we submit that some of these findings do not present a full picture of the evidence presented on certain issues. There is additional and significant evidence that was overlooked and not considered. This evidence is discussed below.

The Hearing Officer categorized the Bear River, in its Lower Division, as “a highly regulated system, with four on-stream hydropower reservoirs (Soda, Grace, Oneida, and Cutler), storage deliveries from Bear Land, and multiple irrigation diversions.” *Preliminary Order* at 4 (¶16). However, the Hearing Officer also characterized the Oneida Narrows section of the Bear River as “free-flowing” river, which appears to be a reference to the canyon nature of this stretch of the river. To be clear, it is apparent that the water flows in the Bear River are subject to significant human influence.

One of the reasons the Hearing Officer denied Twin Lakes’ permit application on local public interest grounds was because of concerns over Bonneville Cutthroat Trout, or “BCT.” The Hearing Officer also cited to portions of IDFG publications in favor of his conclusions, but a careful review of the evidence, and even the IDFG information, reveals that the information included in the *Preliminary Order* was selective and does not provide a full picture of the trout makeup and existing degraded BCT habitat that exists in the Oneida Narrows.

The historic impacts of the existing hydropower reservoirs, operated by PacifiCorp, have resulted in marginal trout habitat in the Bear River. In 2007, the Idaho Department of Fish and Game characterized the degraded trout habitat in the Bear River as follows:

Habitat for trout in the Bear River is marginal due to high, turbid irrigation flows in summer and marginal flows during winter when water is being stored in Bear Lake. Power facilities have been detrimental to fishing because reservoirs associated with them have rapid turn over, are vertically unstable, and block spawning migrations. In addition, PacifiCorp’s Soda Point (Alexander) and Oneida Narrows facilities alter flows frequently and this causes significant fluctuations in the river below.

Exhibit P711 at 360 (IDFG 2007-2012 Fisheries Management Plan, or “FMP.” This plan was published five years after the 2002 PacifiCorp settlement agreement.); See also *Preliminary Order* at 13 (¶ 82) (discussion of the 2007 IDFG FMP). The marginal habitat is partially due to releases from Oneida Dam by PacifiCorp, as stated by IDFG, but the Hearing Officer determined that those releases are not a problem: “After the 2003 License was issued, large, immediate

fluctuations in flows below the Oneida facility are no longer a significant issue and the proposed project will have little value in buffering river fluctuations.” *Id.* at 19 (¶128). In fact, while the 2003 PacifiCorp license restricts how quickly PacifiCorp can ramp down its releases, it does not limit how quickly PacifiCorp can ramp up. Exhibit P205 at 20 (ramping rates allow up to 3.0 inches for every 15 minutes on the descending arm of the ramp. There are no limits to the ascending arm of the ramp). While it is true that the height of the peaks and valleys of PacifiCorp’s releases has improved (Exhibit A9 at 28), IDFG’s FMP indicates that these fluctuations remain an issue, and continue to impact trout habitat. The Hearing Officer’s findings that flow buffering will provide little benefits are contrary to this evidence.

The BRWUA Agreement likewise demonstrates that the BRWUA remain concerned with fluctuating releases, because to the extent it is required or requested, Twin Lakes agreed to buffer these peak releases that have resulted in inconsistent deliveries. BRWUA Agreement at *5 (¶3).

Additionally, one of the threats to BCT is “introductions of non-native fish species.” Exhibit P700 at 8. Nevertheless, IDFG engages in a rigorous stocking program in the Oneida Narrows where it annually stocks—“to meet demands for sport fishing”—24,000 rainbow trout in the Bear River, with “[a]bout half of these fish [12,000] stocked in three sites below Oneida Dam.” *Id.* at 13. The stocking continues even with sampling surveys conducted in 2005 and 2006 that showed that “no BCT were collected below Oneida Dam.” *Id.*

There has also been historic planting of other fish species. *Id.*; See also Exhibit A12 at 11-32 (results of Dr. Hardy’s fish sampling study in the Bear River below Oneida Dam). “Past stocking efforts within the Bear River drainage have resulted in established populations of introduced brown trout, smallmouth bass, and walleye. . . . [BCT] populations in the Bear River system may also suffer from increased competition and predation due to established populations of non-native species. Based on the recent trend of increase in the smallmouth bass population, competition and predation may continue to increase and negatively affect the [BCT] population.” Exhibit A12 at 31-32. The Oneida Narrows has been treated by IDFG as a “put-and-take” type fishery management area, which is “a management scheme using intensive stocking of catchable size (larger than 8 inches) hatchery rainbow trout to provide high consumptive catch rates.” Exhibit P711 at 105; Testimony of David Teuscher. A “put-and-take” fishery is “used where long-term survival and growth is limited due to water area characteristics or harvest rates.” *Id.*

Specific to the Oneida Narrows, “[h]igh abundances of [rainbow trout] are a result of continuous stocking of hatchery rainbow trout by Idaho Fish and Game in order to maintain the put and take fishery of the Bear River Narrows.” Exhibit A12 at 26.

A separate fishery management scheme is used for wild species, and is referred to as a “wild” fishery management type. This management scheme “relies on the natural production potential of a water body to provide angling opportunity for native trout. This type of management may also apply to naturalized populations of non-native salmonids.” *Id.* This management type is “applied to water bodies with good to excellent trout habitat where consumptive fishing pressure is light to moderate.” *Id.* If the Oneida Narrows was prime or critical BCT habitat, it seems that it should be managed as a “wild” fishery, but it is not. We do not understand the Hearing Officer’s lack of analysis on this issue.

Thus, on one hand, there is opposition to the proposed dam by IDFG and others because of its claimed impacts on BCT. But there is also opposition from IDFG and others because Oneida Narrows is a non-native recreational fishery. These positions are contrary to one another. One cannot expect to restore a native population by annually planting thousands of non-native fish, especially when there are other existing non-native fish species (smallmouth bass, walleye, etc.) also competing for natural resources to survive. These non-natives are also preying on BCT. Exhibit A12 at 31-32. Again, we do not understand the Hearing Officer’s lack of analysis on this issue.

The detrimental impacts of the non-native fish on BCT are evident when reviewing past fishery surveys. IDFG summarized a 2005 electrofishing and radio telemetry study and found no BCT “downriver from Oneida Dam to near the Utah border.” Exhibit P711 at 361. Other studies found similarly. Of the over 5,000 fish samples by Dr. Hardy, only 12 were BCT. Exhibit A12 at 20. This sampling was similar to prior historical sampling records: “Between 1987 and 2005, five collection efforts were made in the area of reach 4/5. Out of a total of 3,358 fish collected (Table 8), only 10 were [BCT] (<.2%) Similarly, five collections were made in reach 3 from 1974 through 2005 (Table 9). Approximately 1,524 fish, including 7 [BCT] (0.5%) were collected.” *Id.*

Thus, the Oneida Narrows portion of the Bear River is currently not a wild BCT fishery. It may be considered “stocked rainbow trout habitat,” but it is not ideal BCT habitat because of

the continually introduced non-native species, unfavorable year round temperature regime, and flow fluctuations. This in no way suggests that the main stem of the Bear River is not utilized by BCT as a migratory corridor during spawning or for short term holding because BCT, at times, use it, but they do not remain there year round, especially from late spring to early fall given the temperature regimes under existing conditions. See, generally, Exhibit A12 (including the conclusion found at page 159) and Testimony of Dr. Hardy.

Given these findings, Twin Lakes is more interested in protecting and enhancing BCT than protecting a recreational fishery of non-native species. Twin Lakes acknowledge that the proposed dam will result in the loss of a recreational river fishery for non-native fish. However, by focusing efforts on a major tributary to the Bear River—Mink Creek—the proposed dam will allow Twin Lakes to implement bypass flows at its Mink Creek headgate to improve connectivity of Mink Creek. Even with Mink Creek's current state—which will be improved—Dr. Hardy's telemetry study showed that nearly as many BCT (11) were tagged in Mink Creek as were tagged in the Bear River (14). Exhibit A12 at 105-106. The Hearing Officer noted the 14 BCT that were tagged in the Oneida Narrows, but did not mention the 11 that were tagged in Mink Creek. *Preliminary Order* at 12 (¶79). In fact, “[f]ish were not tagged from Mink Creek until collection efforts failed to produce the required number of [BCT] from the Bear River and approval was given by Idaho Department of Fish and Game (after June 20th).” Exhibit A12 at 109.

Additionally, it does not appear that significant provisions of the 2002 PacifiCorp settlement agreement have been implemented to address BCT concerns. As noted by the Hearing Officer, “[t]he BCT restoration plan and telemetry study, if completed, were not offered into the administrative record in this case.” *Preliminary Order* at 18 (¶ 121). Twin Lakes likewise does not believe the restoration plan and telemetry study have been completed.

If people really want to get serious about enhancing BCT populations, there should be widespread support of the Mink Creek reconnect and the Twin Lakes project. If people want to retain a non-native recreational fishery, then we understand the opposition to the project. In terms of restoring BCT, Mink Creek is “likely the best spawning tributary in [the Riverdale management unit] for [the] fluvial [BCT] population.” *Preliminary Order* at 13 (¶82) (alterations in original) (quoting Exhibit P712 at 57). Reconnecting tributary spawning habitats

for mainstem fluvial populations is one of the primary focuses of the management plan for conservation of BCT in Idaho. Exhibit P712 at 56.

Tributary reconnects have been implemented—and lauded—for years by groups such as Trout Unlimited (“TU”). For example, TU recently spearheaded a water project on Badger Creek, a tributary to the Little Lost River, to reconnect it. See <http://www.tu.org/conservation/western-water-project/restore>. Badger Creek is a spawning stream for bull trout. Similar to Mink Creek, diversions for irrigation purposes in the summer diminished flows in the creek, and at times, even eliminated these flows. After installing irrigation improvements (conversion from flood irrigation to sprinkler), TU also worked through the necessary water rights transfer process to allow higher temperature and lesser quality water to be diverted from the Little Lost River instead of diversion of colder, cleaner water from Badger Creek. The result was utilization of Water Right No. 33-35A (a 1907 priority water right with diversion rate of .72 cfs from Badger Creek), which was injected into the Little Lost River and was then rediverted at location upstream of the confluence with Badger Creek. See Application for Transfer and Amended Transfer of Water Right (found in the documents backfile of Water Right No. 33-35A, available at <http://www.idwr.idaho.gov/apps/ExtSearch/WRAJSearch/SearchPage.aspx>). The result was “less water diverted form the creek while ranch productivity increased[,]” and most importantly, “trout were spawning there just a week after the project was completed.” See <http://www.tu.org/conservation/western-water-project/restore>.

Virtually the same template is proposed by Twin Lakes. By allowing it to store irrigation water on a degraded main stem river, and simultaneously using the dam to produce hydropower revenue which will be used to improve Twin Lakes’ delivery system efficiency, less water will be needed by Twin Lakes from Mink Creek, and with a minimum 10 cfs flowing down Mink Creek (under Twin Lakes Water Right No. 13-901, similar to the Badger Creek Water Right No. 33-35A) above any natural flows already occurring, the habitat is enhanced and the flows are stabilized in a tributary with colder, cleaner water. See Exhibit A14. This will fully connect the length of Mink Creek (13.1 miles (Exhibit P712 at 57)) for a longer period of time, and make it available for BCT use. While the 10 cfs appears more than adequate, that amount may increase if FERC determines that flows above the proposed 10 cfs are needed, and Twin Lakes is willing to provide it:

Peter Anderson: Once [the Mink Creek Diversion] is under [FERC's] jurisdiction, you'll accept their determination what the appropriate minimum stream flow that you should release?

Bosen: Yes.

Testimony of Clair Bosen (Recording #3 at 22:30).

In order to make the project work for Twin Lakes, it is necessary to eliminate 4.6 miles of highly-regulated and "marginal" (Exhibit P711 at 360) BCT habitat located in the portion of the Bear River in the Oneida Narrows reach. While this certainly has an impact on use of the canyon, it is a necessary trade-off to provide the extra storage water and hydropower capability to allow Twin Lakes to offer bypass flows in Mink Creek to benefit imperiled BCT.

The Hearing Officer determined that "the most favorable temperature regime for trout (including BCT) in the Bear River between Oneida Dam and the Idaho-Utah border is located in the Oneida Narrows." *Preliminary Order* at 10 (¶66). This favorable temperature regime that already exists below Oneida Dam will be shifted downstream below the new proposed dam, where there remains approximately five (5) miles of trout habitat. *Preliminary Order* at 12 (¶78). This is habitat that, as Dr. Hardy explained, can be used by BCT as a migratory corridor during spawning or for short term holding because BCT may, at times, will use it, but they do not remain there year round. But in addition, BCT will have available to it enhanced flows and enhanced access in Mink Creek and its 13.1 mile length.

In sum, because the Hearing Officer failed to consider the above information regarding BCT and recreational matters in his analysis, on appeal, the Director should consider this information and give it appropriate weight in the final order.

3. The 2002 PacifiCorp Settlement Agreement and its incorporation into the 2003 PacifiCorp license.

One of the major arguments advanced at the hearing by the Protestants was the Twin Lakes' proposed project would detrimentally impact the provisions of the 2002 PacifiCorp settlement agreement, and the PM&E measures called for in the agreement. *Preliminary Order* at 17-18 (¶¶117-124). The Hearing Officer determined that the Twin Lakes project would cause such impacts, and stated that the 2002 agreement was "an additional interest [that] has developed within the Oneida Narrows" and "[t]he local public interest has a substantial interest in

preserving and perpetuating the benefits derived from the work performed under the 2002 agreement.” *Id.* at 27 (¶44). This analysis served as a basis for finding that the proposed water right permit application was not in the local public interest. We believe this analysis fails to consider two important items.

First, it is important to recognize what the 2002 agreement does **not** say. It does not say that another project cannot be constructed below the existing Oneida Dam. In fact, it contemplates that such action may occur through FERC, and in that case, there may be grounds for a party to commence alternative dispute resolution procedures under the settlement agreement:

5.3.6 Action by Third Party. If, during the terms of the New Licenses, a third party successfully petitions FERC or obtains a court order modifying the operation of one or all of the Projects in a manner that is inconsistent with this Agreement, then any Party who objects to such order may give notice to the other Parties and commence ADR Procedures to determine whether such inconsistency can be mitigated by agreement of the Parties. In addition, the aggrieved Party or Parties may seek rehearing or appeal of such order. If, after pursuit of the ADR procedures or other proceedings, the order complained of remains in effect, or as modified is still inconsistent with this Agreement, any Party may withdraw from this Agreement.

Exhibit P205 at 33. So while Governor Kempthorne may have signed the agreement on behalf of the State of Idaho (*Preliminary Order* at 17 (¶117), he did not forever prohibit future Idaho projects such as Twin Lakes’ proposed project. What he did agree to was an “out” on the PacifiCorp license if the proposed project will significantly impact that license.

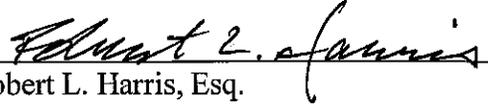
Additionally, to the extent there are impacts to PacifiCorp’s FERC license, we know those impacts will be analyzed by FERC: “Despite the potential impact to PacifiCorp’s existing license and settlement agreement, FERC issued the 2005 Preliminary Permit on the basis that the final TLCC proposal may not result in an ‘impermissible alteration’ of the PacifiCorp license. This issue, and others raised by the FERC protestants, will be considered by FERC in its review of the final license application.” *Preliminary Order* at 5 (¶24) (emphasis added); See also *Id.* at ¶23 (summarizing FERC’s stated concerns that the proposed project could interfere with the 2003 settlement agreement). Again, as we explained above, the determination of whether or not Twin Lakes’ proposal will impermissibly impact the 2002 settlement agreement is a matter

squarely within FERC's purview, and should not have served as a basis for the Hearing Officer to deny the water right permit application on local public interest grounds.

IV. CONCLUSION

For the reasons set forth above, the Director should approve Application for Permit No. 13-7697 with appropriate conditions rather than deny it outright as the Hearing Officer has determined. The Hearing Officer's analysis in the *Preliminary Order* failed to consider the plain language of Twin Lakes' agreement with the Bear River Water User's Association to mitigate for evaporative losses from the proposed reservoir. In addition, the Hearing Officer exceeded his discretionary bounds under Idaho law in his review and consideration of the local public interest, and even if the exercise of that discretion was appropriate, he failed to consider and appropriately weigh evidence presented by Twin Lakes relative to the local public interest. Upon a careful review of the evidence, Twin Lakes anticipates a final order from the Director approving the water right permit application with appropriate conditions as IDWR has historically done.

DATED this 9th day of August, 2012.


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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the following described pleading or document on the parties listed below by hand delivery, email, mail, or by facsimile, with the correct postage thereon, on this 9th day of August, 2012.

DOCUMENT SERVED: TWIN LAKES CANAL COMPANY'S EXCEPTIONS TO PRELIMINARY ORDER DENYING APPLICATION FOR PERMIT

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Director, Idaho Department of Water Resources
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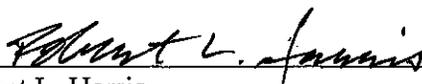
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