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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
RESPONSE TO PACIFICORP'S
EXCEPTIONS TO PRELIMINARY ORDER**

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 Response to PacifiCorp's Exceptions to Preliminary Order*. This response is submitted in response to *PacifiCorp's Exceptions to Preliminary Order* dated August 8, 2012 (hereinafter, "*PacifiCorp's Exceptions*").²

PacifiCorp's Exceptions were submitted to the Director of the Idaho Department of Water Resources, Gary Spackman, (hereinafter, the "Director"), pursuant to Idaho Code § 67-

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 Twin Lakes also submitted exceptions to the *Preliminary Order* on August 9, 2012, and will be referred to herein as "*Twin Lakes' Exceptions*."

ORIGINAL

5245(3) and IDAPA 37.01.01.730.02.c. The exceptions were submitted in response to the *Preliminary 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”).

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 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* (Idaho Code § 67-5245(3) and IDAPA 37.01.01.730.01.c). Under these rules, *PacifiCorp’s Exceptions* were timely filed.

Opposing parties, such as Twin Lakes, “shall have fourteen (14) days to respond to any party’s appeal within the agency.” IDAPA 37.01.01.730.01.d. In the future, 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.

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. 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.

II. ARGUMENT.

- A. **The Director should not undertake FERC's role to determine whether or not the Twin Lakes project will impermissibly conflict or interfere with the FERC license issued for FERC Project No. 20, which includes PacifiCorp's Oneida Dam. The determination of whether there will be an impermissible alteration is a matter to be decided by FERC, subject to review by federal courts.**

PacifiCorp's main exception to the *Preliminary Order* is the Hearing Officer's findings that Twin Lakes would acquire eminent domain authority to condemn necessary project lands if Twin Lakes' license application to FERC is ultimately approved. *Preliminary Order* at 24-25 (¶23). The bulk of PacifiCorp's exceptions brief discusses case law regarding how and to what extent a new proposed FERC license can interfere with an existing FERC project operating under an existing FERC license, and how such interference is analyzed. *PacifiCorp's Exceptions* at 2-4. However, there is no discussion as to how these cases are relevant or important for the Director's consideration of whether Twin Lakes' water right permit application is made in good faith pursuant to Idaho Code § 42-203(A)(5) and IDAPA 37.03.08 (Rules 40.05.e and 45.01.c).

There is no dispute that Twin Lakes does not currently own any of the properties that will encompass the project boundaries. *Preliminary Order* at 7 (¶36) (citing to Testimony of Clair Bosen). Once a FERC license is issued, Twin Lakes will attempt to negotiate the purchase of project lands on a willing buyer/seller basis. Testimony of Clair Bosen. To the extent good faith negotiations are unfruitful, it is anticipated that Twin Lakes will seek to obtain these lands through eminent domain pursuant to § 421 of the Federal Power Act (16 U.S.C. § 814). Because some of these lands are within PacifiCorp's project area, Twin Lakes' president (Clair Bosen) met with FERC officials in Washington D.C. to determine if this would be a deal-breaker for the Twin Lakes project. Testimony of Clair Bosen. The FERC officials indicated at that time it was not a deal-breaker, and acknowledged this in FERC's subsequent *Order Issuing Preliminary Permit* (Exhibit A10):

According to PacifiCorp, the proposed project would result in decreased generation at its Oneida development (part of Bear River Project No. 20), would interfere with its operational requirements at the Oneida development, and would interfere with its obligations to provide irrigation water to downstream users.

The Commission's practice is that where it is clear at the preliminary permit application stage that the development proposed in the permit application would cause impermissible alterations of an existing license under Section 6 of the FPA, the Commission will not grant the permit.

The proposal could eliminate a river reach used for whitewater recreation and affect the restoration and enhancement of BCT habitat, which are measures contained in PacifiCorp's license. However, the Commission has stated that the loss of a recreation area associated with a project may not be barred by section 6. It would be a matter of degree and might hinge on whether the proposed project would offer comparable facilities.

Nevertheless, it is not sufficiently clear with respect to this permit proposal that there will be an alteration of the existing license such as to warrant dismissal on section 6 grounds. The permit proposal does not propose any modification of the licensed project's major physical structures. Further project proposals at the permit stage are speculative and fluid, and any eventual application for license may differ in important respects from the proposal set forth in the permit application. Since the permit proposal includes a new dam, it is entirely possible that the proposed project could be designed as to avoid any effects on the upstream licensed project. Where it is not clear at the permit state that the proposed development would involve impermissible alteration of an existing license, the Commission will issue the permit.

Exhibit A10 at 5.

As described through the testimony of Clair Bosen, Nick Josten, and David Schiess, as well as the DLA (Exhibit A9), the proposed dam and reservoir will not inundate any of PacifiCorp's existing physical facilities. See, e.g., Exhibit A9 at 20 fn. 2 ("The Uppermost extent of the proposed Bear River Narrows Reservoir is approximately .3 mi. below the Oneida powerhouse tailrace and 0.7 mi. below Oneida Dam."). Because none of PacifiCorp's physical facilities will be inundated, the analysis then turns to whether or not loss of a recreation area used for whitewater, fishing, and other uses captured under an existing FERC license is an "impermissible alteration." FERC has stated that it is not categorically barred under these circumstances, but it would "be a matter of degree and might hinge on whether the proposed project would offer comparable facilities." Exhibit A10 at 5.

Nevertheless, PacifiCorp argues that the Twin Lakes project "will impermissibly alter PacifiCorp's project," and urges the Director to find accordingly. Yet, earlier in its briefing, citing to FERC cases, PacifiCorp acknowledges that whether or not there is an impermissible alteration is "fact-driven," and "[t]he degree of encroachment that makes an alteration

substantial is a case-specific determination.” *PacifiCorp’s Exceptions* at 2. PacifiCorp is asking the Director to step into the shoes of FERC and/or a reviewing federal district court to decide whether the Twin Lakes project will result in impermissible alterations to PacifiCorp’s existing facilities and operations. PacifiCorp argues that if the Director determines there is an impermissible alteration, the Twin Lakes project would be speculative because Twin Lakes would not be able to exercise eminent domain. These arguments before IDWR are misplaced, and do not address the criteria outlined under Idaho Code § 42-203(A)(5) and IDAPA 37.03.08 (Rules 40.05.e and 45.01.c).

At least on this issue, the Hearing Officer recognized “the Department does not have sufficient expertise in these areas to make a determination on their outcome[]” as to whether there will be an impermissible alteration to PacifiCorp’s license. *Preliminary Order* at 30 (¶58). On this issue, the Hearing Officer stated “[i]t would be improper for IDWR to approve or deny an application for permit based on IDWR’s interpretation or application of another agency’s or group’s rules.” *Id.*

As an initial matter, PacifiCorp’s attempts to have the Director now step into the shoes of a FERC official or a federal judge to make a determination on the “impermissible alteration” issue underscores and supports the arguments advanced by Twin Lakes in its exceptions brief that IDWR must exercise restraint on issues that are or will be addressed by the appropriate administrative agency, and defer to that agency’s expertise. *Twin Lakes’ Exceptions* at 30-40. When faced with an argument to assume the role of another federal or state agency, the Idaho Supreme Court has cautioned IDWR about its role vis-a-vis other administrative agencies:

[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.**

Shokal v. Dunn, 109 Idaho 330, 340-41, 707 P.2d 441, 451-52 (emphasis added). Thus, the questions for the Director to answer are not whether the Twin Lakes' project will result in an impermissible alteration to PacifiCorp's license, or whether it will receive a 404 permit, or a water quality certification, etc. These are issues left to the federal and state agencies with appropriate jurisdiction, and to ensure that the appropriate authorizations are received from those agencies, the Director could condition the water right permit on procurement of those authorizations.

With specific regard to the legal standards to be addressed on the good faith criterion, Twin Lakes "must only demonstrate that it is diligently pursuing the FERC license." *Preliminary Order* at 24 (¶23), and as the question of diligence, the Hearing Officer found "[t]he thousands of pages of FERC filings included in the administrative record and millions of dollars spent on FERC required studies demonstrate an active, steady pursuit of a FERC license." *Id.* The Hearing Officer correctly analyzed this issue by recognizing IDWR's discretionary bounds, and by correctly understanding the burden of proof Twin Lakes must meet. As to the other issues pertaining to his analysis of mitigation of environmental and recreational concerns under the local public interest, the Hearing Officer should have remained consistent with this analysis and analyzed those issues as he did the good faith criterion.³

In short, it would not be appropriate for the Director to become a FERC official or federal judge and determine that eminent domain could not be exercised because there will be impermissible alterations to PacifiCorp's FERC license. FERC may very well decide the alterations are impermissible—although it does not appear this will be the case as described below—and if the decision is made and upheld on any subsequent appeal in federal court, the project will not be constructed. But as to the issue at hand, the Director should stick to IDWR's

³ The Hearing Officer's local public interest analysis is addressed in *Twin Lakes' Exceptions* previously submitted.

IDAPA rules, which only require the application to demonstrate that “appropriate actions are being taken to obtain the interest” in situations where “such interest can be obtained by eminent domain proceedings.” IDAPA 37.03.08.040.05.e.i. Twin Lakes’ active and steady pursuit within the FERC process clearly demonstrates that appropriate actions are being taken to obtain eminent domain authority. It is undisputed that Twin Lakes has substantially been involved in the FERC process. It is therefore accurate and appropriate for the Hearing Officer to conclude “[i]f TLCC were successful in obtaining a FERC license, it would acquire the authority to condemn the lands required to build and operate the project.” *Id.* at 24-25 (¶23). The FERC license would only be issued in the first place if FERC determined there were no impermissible alterations to PacifiCorp’s project, subject to an appeal to a federal district court. The Hearing Officer recognized he did not have the expertise to determine this “fact-specific” and FERC-specific issue, and appropriately did not exceed that expertise to make a determination based on this issue. The Director must find similarly.

As to the merits of PacifiCorp’s arguments that there will be impermissible alterations by Twin Lakes to its FERC license under federal law because PacifiCorp has not consented to the alteration of its recreational lands, this argument is not supported by federal case law. Federal courts have gone so far as to uphold issuance of FERC licenses for new projects even if there is interference with the actual physical facilities of an existing FERC license. This has been done under Section 6 of the Federal Power Act, even if the existing licensee does not consent to the alteration.

PacifiCorp argues if Twin Lakes’ project is approved, there would be an impermissible alteration to PacifiCorp’s project “within the meaning of FPA Section 6[.]” and “[n]ot only does the Federal Power Act say nothing about a new licensee condemning an existing licensee’s property, such condemnation authority would create an all-consuming exception to section 799, which categorically prohibits new projects that alter existing ones without the existing licensee’s consent.” *PacifiCorp’s Exceptions* at 3, 4. These arguments fail for reasons described in the federal cases cited to by PacifiCorp, *Pacific Gas & Electric Co. v. FERC*, 720 F.2d 78 (D.C. Cir. 1983), and *Fall River Rural Electrical Cooperative, Inc., v. FERC*, 543 F.3d 519 (9th Cir. 2008).

In *PG&E*, the Calaveras County Water District (CCWD) applied for a FERC license to construct a facility near an existing hydropower facility owned by Pacific Gas & Electric

Company (“PG&E”). As proposed, the CCWD project “as licensed, will have certain adverse impacts on a hydroelectric dam and powerhouses operated by [PG&E] pursuant to prior license grants.” *Id.* at 80. These alterations included (1) CCWD’s proposal to “divert most of the water currently used at PG&E’s Angels and Murphys powerhouses to a new, CCWD-operated powerhouse . . . ;” (2) “CCWD’s project would somewhat raise the water level downstream of the Stanislaus powerhouse, and consequently reduce the power PG&E could generate there by about 0.3% of the powerhouse’s current output[;]” and (3) “CCWD proposed to erect a new dam at Spicer Meadow that would substantially increase the size of the existing reservoir at that location, inundate PG&E’s Spicer Meadow dam, and destroy PG&E’s associated facilities and conduits.” *Id.* at 81. PG&E refused to accept these alterations, and “maintained that FERC may authorize no encroachment on its licensed operations without PG&E’s consent,[]” and therefore, “placed principal reliance on section 6 of the FPA.” *Id.*

FERC determined, as to the first concern, that it would not allow CCWD to use water used for the existing PG&E facility. *Id.* This was a victory for PG&E’s existing project. As to the second impact, however, FERC permitted CCWD to raise the water level downstream of the Stanislaus powerhouse, but required compensation to PG&E for the lost power. *Id.* On the third impact, “subject to protection of PG&E’s interest in water now channeled to its powerhouses, CCWD is licensed to erect a new dam at Spicer Meadow.” *Id.* These latter two were victories for the CCWD’s proposed project. Petitions for review before the Ninth Circuit were then filed by both parties.

On appeal, the federal court affirmed FERC’s orders on this project. *Id.* at 93. The relevant portions of the analysis for our purposes rest with the court’s analysis of the second and third alterations. Exactly as PacifiCorp has argued, “PG&E insists that section 6 does not contemplate even a ‘de minimis’ exception—FERC simply may not approve a license that will have *any* adverse impact on one already issued.” *Id.* at 89 (italics in original) (compare with PacifiCorp’s position: “[n]ot only does the Federal Power Act say nothing about a new licensee condemning an existing licensee’s property, such condemnation authority would create an all-consuming exception to section 799, which categorically prohibits new projects that alter existing ones without the existing licensee’s consent.” *PacifiCorp’s Exceptions* at 3, 4.). The court held “PG&E’s interpretation of section 6 is not compelled by the language of that section,

and is unnecessary to its purposes. PG&E's interpretation would tilt the balance too far in favor of prior licensees, making it possible for PG&E and similarly situated licensees to undermine, perhaps significantly, the FPA's broader objective of encouraging comprehensive development of waterways." *Id.*

After noting the unpersuasiveness of PG&E's argument, the court noted that "altered" in the FPA is not self-defining, and under the facts of *PG&E*, without seeking to define common sense limits the court felt applied, the court was "persuaded that an unconsented 0.3% reduction in the generating capacity does not amount to a license 'alteration' prohibited by the explicit terms of section 6." *Id.* As explained many times at the hearing and in briefing, Twin Lakes' proposal will have no impact on PacifiCorp's ability to generate hydropower—there will not even be a .000001% reduction in PacifiCorp's hydropower generation.

The court then went further to describe the policy implications for its holding, which we find directly applicable to Twin Lakes' proposed project:

Section 6's goals are not eroded by this interpretation. Encouraging and protecting private investment in waterway development does not require FERC to disallow every conceivable adverse impact, no matter how slight, on existing licensees. Investor confidence can remain unshaken under a rule that allows the Commission to authorize de minimis interferences with the operation of an existing plant. Small encroachments on a license, comparable in their adverse impact to variations in conditions that investors might expect from other causes such as, for example, annual fluctuations in water supply, should be within FERC's authority to grant in implementing the design of Congress to promote, at the same time, development and stable investment incentives. It is implausible to suggest that a 0.3% reduction in generating capacity precipitated by FERC's approval of a new license constitutes interference of an order that will undermine investor confidence. PG&E's interpretation of the Act, FERC argues and we agree, "would inflate the rights of existing licensees far beyond any needs for protecting their investment or ensuring the continued operation of their projects."

Id. at 90 (citations omitted).

Thus, *PG&E* demonstrates PacifiCorp's interpretation of section 6 is much too narrow when considering the purposes of the Federal Power Act. Allowing Twin Lakes to further accomplish "the FPA's broader objective of encouraging comprehensive development of waterways[]" would not be lost on FERC.

The Twin Lakes project would not result in any physical alterations of PacifiCorp's facilities, nor would it change the operations of the project as to how the flows are managed and used at PacifiCorp's Oneida Dam. See, e.g., *Gas & Elec. Dep't of Holyoke*, 21 FERC ¶ 61,357, 61,927 (1982) (“[T]here are two types of interference with the licensed project that we must consider: (1) physical alterations to the existing project works; and (2) impacts on the operation of the project.”). As explained at the hearing and in Twin Lakes' numerous exhibits, PacifiCorp will be able to continue operating its facility as it has historically, or even with the enhanced ability to return to “peaking” and generate more hydropower revenue because Twin Lakes' proposed reservoir could be operated to buffer those peaks. See A9 at ES-2 (“The amount of water that would flow through the proposed Bear River Narrows Hydroelectric Project will be determined by releases made from Oneida Dam. Oneida releases are set by PacifiCorp for power production, flood control, irrigation delivery, facility maintenance, and other reasons. The many agreements regulating movement of water through the system provide some surety that future flows will be similar to historic flows. The project would be operated as a modified run of the river plant, where the outflows would match inflows and the reservoir would maintain a constant water level except during irrigation water withdrawals. Alternatively, the new reservoir could be used to buffer flow variation in the discharge from upstream Oneida Reservoir, providing potential benefits to downstream aquatic habitat.”). PacifiCorp indicated that it may be interested in returning to a more peaking-type operational regime if the Twin Lakes project is approved. Testimony of Connelly Baldwin. Improving consistency of water flows associated with irrigation releases was also important to the Bear River Water Users Association. *Stipulation for Withdrawal of Protest of Bear River Water User's Association, Inc. and Settlement Agreement*, December 14, 2011.

Another case cited to and briefly discussed by PacifiCorp, *Fall River Rural Electrical Cooperative, Inc., v. FERC*, 543 F.3d 519 (9th Cir. 2008), illuminates the fact that the proposed Twin Lakes project will not result in an impermissible alteration to PacifiCorp's Oneida Dam physical facilities and its operations. In *Fall River*, the applicant proposed to install a hydroelectric facility on the existing Hebgen Dam in Montana, which has no hydroelectric facilities. Hebgen is used as a water storage and release facility, but these irrigation releases “provide head and flow to the Missouri-Madison Hydroelectric Project's eight other downstream

developments.” *Id.* at 522. Ultimately, FERC denied Fall River’s proposal because it would require “substantial” alterations to Hebgen Dam, which would impact the existing operations of Pennsylvania Power and Light Montana, LLC (PPL). *Id.* at 525. The physical alterations at Hebgen Dam consisted of “installation of new gates and screens on the intake tower, excavation of a large area of the dam in order to reconfigure and reline the outlet conduit [3,100 square feet of soil], and installation of a valve house and a new penstock for the dam.” *Id.* at 526. As to impermissible operational problems that would be caused by the applicant, FERC identified “(1) use of the spillway for all discharges during approximately three months of the construction period as potentially impacting PPL’s ability to meet its flow requirements; (2) releasing water below the tailwater’s surface rather than allowing the water to drop into the tailwater as potentially affecting PPL’s ability to maintain appropriate dissolved oxygen levels; and (3) the possibility of having to install finer screening at the intakes as potentially impacting PPL’s ability to meet its flow requirements.” Because of the physical alterations and operational problems, the 9th Circuit denied the review petition of Fall River and upheld FERC’s determination that there would be a substantial alteration of PPL’s existing FERC license. *Id.* at 531.

The Twin Lakes project will not require any physical alteration of PacifiCorp’s Oneida Dam, nor will it require any change to its flow operations. Consequently, there cannot be a finding that it will impermissibly alter PacifiCorp’s existing project because there will be no such alterations. As to the recreational components of the project, it is anticipated that FERC will require mitigation for these impacts, which Twin Lakes would undertake in order to provide comparable facilities. See Exhibit A9 at ES-2 through ES-3 (summarizing Twin Lakes’ recreational mitigation and Riparian Habitat Development Plan). None of the cases cited to by PacifiCorp state that impacts to recreational and environmental areas surrounding an existing project are, *de facto*, impermissible alterations of the project. The cases demonstrate that impermissible alterations consist of alteration to physical facilities of the project, and changes to flow regimes associated with the project (the “operational” concerns).

Importantly, even if there will be some impact to PacifiCorp’s FERC license, we note PacifiCorp’s FERC license and its associated settlement agreement provisions provide that this license remains open for modification by FERC: “The Agreement provides for possible

modifications to project structures and operations during the license term. . . . The Commission is charged with determining what amendments will meet the “comprehensive development/public interest[“] standard of FPA Section 10(a)(1), which continues to govern regulation of a project throughout the term of its license. For this reason, the articles of this license provide for Commission review and approval of any material changes to the project.” P204 at 8 (§26). The license was granted “subject to the terms and conditions of the Federal Power Act[.]” *Id.* at 23 (§76A), which includes comprehensive development of waterways, as described above.

Throughout the FERC license, FERC states many times that it reserves the right to make changes to the article, and after FERC approval, the licensee is required to implement the changes. See P204 at 35, 37, 38, 39, 40, 42, 43, 44, 47, 49, 50, 51, 53, 56, and 57 (Articles 401, 403, 404, 405, 406, 407, 409, 410, 411, 415, 416, 417, 418, 420, 421, 424, 425, and 426). The language in these articles does not limit changes caused by PacifiCorp’s existing project alone, and therefore, changes caused by a future project could be implemented into the PacifiCorp license. This interpretation is supported by the “force majeure” provision found on page 40 of the settlement agreement (P205), which states “[n]o party shall be liable to any other party for breach of this Agreement as a result of a failure to perform or for delay in performance of any provision of this Agreement if such performance is delayed or prevented by force majeure.” P205 at 40. “Force majeure” is then defined in the agreement with many typical so-called “acts of God,” but then includes this critical item:

“. . . orders of any court or agency having jurisdiction of the Party’s actions, . . .”

Id.

Thus, FERC retains jurisdiction over PacifiCorp’s actions under the terms of the license, and could order an amendment of PacifiCorp’s license if Twin Lakes’ FERC license is issued. This would be a “force majeure” under which the parties have no control. In this event, the parties specifically contemplated that there could be actions by a third party, such as Twin Lakes, to further develop hydropower on the Bear River system dominated by PacifiCorp. They included this provision allowing a party to opt out of 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.

Id. at 33 (Section 5.3.6) (emphasis added).

In short, PacifiCorp's claim that Twin Lakes cannot obtain eminent domain authority under the FPA because of its existing license is not persuasive, even if the Director believes he can consider the merits of this issue. Twin Lakes maintains this is a matter FERC will determine—subject to review in federal court if necessary—and the Director should defer to that process. Twin Lakes' application for water right permit was submitted and pursued in good faith under Idaho law. The analysis of whether Twin Lakes meets this criterion is found in Rules 40 and 45 of the Department's Water Appropriation Rules. Rule 40.05.e provides that an application is made in good faith if possessory interests in the lands necessary for all project facilities can be acquired by eminent domain, but the applicant "must show that appropriate actions are being taken to obtain the interest." IDAPA 37.03.08.40.05.e.i. There is no dispute that Twin Lakes has actively engaged in the FERC process for nearly a decade, which demonstrates appropriate actions are being taken to obtain the ability to exercise eminent domain.

B. The Director should reject PacifiCorp's exceptions regarding the Hearing Officer's findings and conclusions that Twin Lakes has satisfied the sufficient financial resources criterion under Idaho law.

Next, PacifiCorp takes exception to a number of findings relating to Twin Lakes' plans to have its project financed by the Idaho Water Resource Board ("IWRB"). See *PacifiCorp's Exceptions* at 5-6 (exceptions to Findings of Fact #35 and Evaluation Criteria #28). These exceptions are apparently directed towards the Hearing Officer's findings and conclusions that Twin Lakes has satisfied the sufficient financial resources criterion. PacifiCorp's assertions on this issue are misplaced, and do not address the burden Twin Lakes is required to meet under Idaho law.

IDAPA 37.03.08.45.05.d.i. provides that an application will be found to have sufficient financial resources upon a showing that it is “reasonably probable” that funding will be available for project construction. See also *Preliminary Order* at 25 (¶26). Similarly, IDAPA 73.03.08.40.05.f.i. states that an applicant has the option of submitting a current financial statement, or “other evidence to show that it is reasonably probable that financing will be available to appropriate the water and apply it to the beneficial use proposed.” Thus, as the Hearing Officer found, “[a]n applicant is not required to have financing in place at the time an application for permit is filed or even by the time the Department issues a permit. For large water developments, financing is generally not available until all of the critical permits are obtained.” *Id.* (¶27). This is a correct statement of the law.

PacifiCorp’s exceptions offer no legal argument on this point, but appear to attach legal significance to the fact that Twin Lakes has not yet submitted an application for financing to the IWRB, which is true. No such application has been submitted because the IWRB will not go down the bonding road without the necessary permits and licenses in hand, including a FERC license. The IDAPA rules do not require submission of such an application for Twin Lakes to meet its burden. These rules only require a showing that funding is “reasonably probable.” A review of the testimony at the hearing demonstrates that former IDWR Director Tuthill directed Twin Lakes to the IWRB, Clair Bosen has met with the IWRB to discuss the project and financing of it, Mr. Bosen often provided updates to the IWRB on the project, and the IWRB will be interested in financing the project once an application is submitted only after the necessary permits and licenses are obtained. Testimony of Clair Bosen and David Tuthill.

IWRB’s position requiring Twin Lakes to submit an application for bonding only after it has the necessary approvals is typical for hydropower projects. Ted Sorensen testified on behalf of Twin Lakes regarding financing of hydropower projects, and the following exchanges occurred between Sorensen, Twin Lakes’ counsel, and the Hearing Officer:

10:48: Harris: In your experience, before you could get financing, do you have to have all of your permits in hand before they would agree to finance a project?

Sorensen: Yes.

Harris: And, have you ever had an instance where they’ve told you, ‘we won’t finance you unless you’ve got these permits in hand?’

Sorensen: Yes.

Harris: Would you consider that a chicken or the egg problem at times?

Sorensen: It's a major chicken or the egg problem. Most everybody wants to be the last one on the wagon. Um, for example, the power companies, many of the power companies, umm, PacifiCorp's a prime one, if you sell to PacifiCorp under PURPA, I signed a contract this spring with PacifiCorp under PURPA, I had to show them the FERC license, the power sales agreement, excuse me, water rights, I had to show them all the permits that I had control of. You won't get a power purchase agreement unless you have all those in place.

13:53: Hearing Officer Cefalo: My only question is, phrasing a question maybe a little bit differently than Mr. Harris did: have you ever acquired financing for a hydropower project prior to obtaining permits- necessary permits?

Sorensen: I've had statements of interest, but the answer is no.

Hearing Officer Cefalo: OK.

Sorensen: They will not come (inaudible) with a signed commitment letter that obligates them to come forth with money. The answer is no.

Testimony of Ted Sorensen (recording at 10:48, 13:53). Earlier, Mr. Sorensen testified that he has been involved in the development of over ten hydroelectric facilities. It is interesting to note that Sorensen's very recent experience with PacifiCorp, the very party taking exception to the Hearing Officer's findings on this issue, was that no agreement could be reached with them until all necessary permits and licenses were in hand. In other words, PacifiCorp—like everyone else—wanted to be the “last one on the wagon.” Sorensen further testified that he assisted in the preparation of the revenue projection spreadsheet prepared by Schiess & Associates, and in his opinion, based on those figures, it was reasonably probable Twin Lakes would obtain financing for the project. See Exhibits A54 and A55. None of the parties cross-examined Sorensen on his testimony and vast experience, and as a result, there is nothing in the record to dispute his experience on the financial end of these projects. Accordingly, the exceptions on this issue are without merit.

The IWRB has an ongoing interest in the project and has directed Twin Lakes to submit an application once the necessary permits and licenses are in hand. Based on the specific facts of this matter, it is clear this demonstrates financing of the project is “reasonably probable” under the standards of this criterion. The Director should adopt the Hearing Officer's analysis on this issue, and reject *PacifiCorp's Exceptions* as to the sufficient financial resources criterion.

C. Twin Lakes disagrees with some of the remaining exceptions asserted by PacifiCorp.

As to PacifiCorp's exception to Finding of Fact No. 121 regarding the BCT restoration plan and telemetry study to be performed by PacifiCorp, we believe the Hearing Officer's finding is accurate because it was not offered at the hearing. The record is now closed, and introduction of it now, without Twin Lakes' ability to review it and ask questions about it in a hearing, would prejudice Twin Lakes. Accordingly, the Director should not consider this evidence.

Additionally, PacifiCorp asserts different dollar figures in relation to Finding of Fact #122 without citing to where these revised figures come from. Twin Lakes' recollection is that the figures included by the Hearing Officer are accurate, and absent clear evidence in the record otherwise, believes the figures should remain in the final order forthcoming from the Director.

Lastly, PacifiCorp takes exception to the finding that Twin Lakes' FERC studies are complete, specifically, the water quality study. The Hearing Officer's finding is accurate because the study is complete, but remains subject to further FERC review and work as FERC continues to perform its role, which has been done. In other words, the study is complete, but has not yet been finalized.

Since Twin Lakes has submitted the completed study, in consultation with EPA and IDEQ, these agencies have identified some potential additional issues they would like addressed. This should not be viewed as problematic or that the studies are incomplete, but instead, it highlights the thorough and deliberative FERC process. It demonstrates that FERC is serious about its job to address local public interest concerns. EPA and IDEQ, just like all of the other 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 applicant consulted in preparing the FERC and associated environmental documents); *Id.* at A-1 through A-22 (Appendix A to Draft License Application showing a log of meetings and correspondence with interested groups). 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.*

Presently, based on their own review and comments from others, EPA and IDEQ desire additional work by Twin Lakes to ensure matters are completely and thoroughly addressed. This does not mean the water quality study was “not completed.” It was completed, but has not yet been finalized.

The FERC study process is exhaustive, and it is not surprising to Twin Lakes that the agencies involved are approaching this project carefully and thoroughly and requesting additional work prior to finalization of the report. This provides further support for Twin Lakes’

position that the Hearing Officer went beyond his discretionary bounds when analyzing the local public interest. IDWR must exercise restraint on issues that are or will be addressed by the appropriate administrative agency, and defer to that agency's expertise. *Twin Lakes' Exceptions* at 30-40.

In conclusion, the Director should not amend the factual Finding of Fact #25. The Hearing Officer's statements on this subject are accurate.

D. Twin Lakes agrees with some of the remaining exceptions asserted by PacifiCorp.

PacifiCorp asserted changes to a number of other minor factual matters associated with the *Preliminary Order*, which Twin Lakes agrees with. We agree that the FERC submission from Twin Lakes is a draft license application (not a license application), and the Twin Lakes siphon exists above the river as it transports water across the Bear River. *PacifiCorp's Exceptions* at 4. We also take PacifiCorp at its word that the road access to Oneida Narrows is a private road owned by PacifiCorp, although Twin Lakes had presumed the road was public based on comments from many parties at the hearing. *Id.* at 5. Also, the identified typographical errors in the *Preliminary Order*—something everyone is guilty of—should be corrected. *Id.*

III. CONCLUSION

As to the specific issues raised by PacifiCorp, Twin Lakes has satisfied the good faith and sufficient financial resources criteria under Idaho law. The Director should reject the exceptions filed by PacifiCorp on these issues. It would not be appropriate for the Director to become a FERC official or federal judge and determine that eminent domain could not be exercised because there will be impermissible alterations to PacifiCorp's FERC license. Idaho law only requires the application to demonstrate that "appropriate actions are being taken to obtain the interest" in situations where "such interest can be obtained by eminent domain proceedings. IDAPA 37.03.08.040.05.e.i. Twin Lakes' active and steady pursuit within the FERC process clearly demonstrates that appropriate actions are being taken to obtain eminent domain authority.

It is undisputed that Twin Lakes has substantially been involved in the FERC process. It is therefore accurate and appropriate for the Hearing Officer to conclude "[i]f TLCC were

successful in obtaining a FERC license, it would acquire the authority to condemn the lands required to build and operate the project.” *Id.* at 24-25 (para. 23). The FERC license would only be issued in the first place if FERC determined there were no impermissible alterations, subject to an appeal to a federal district court. The Hearing Officer recognized he did not have the expertise to determine this “fact-specific” and FERC-specific issue, and appropriately did not exceed that expertise to make a determination based on this issue. The Director must find similarly.

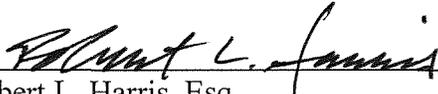
In the alternative, and on the merits of this issue, the Twin Lakes project will not require any physical alteration of PacifiCorp’s Oneida Dam, nor will it require any change to its flow operations. Consequently, there cannot be a finding that it will impermissibly alter PacifiCorp’s existing project because there will be no such alterations. As to the recreational components of the project, it is anticipated FERC will require mitigation for these impacts, which Twin Lakes would undertake. See Exhibit A9 at ES-2 through ES-3 (summarizing Twin Lakes’ recreational mitigation and Riparian Habitat Development Plan). None of the cases cited to by PacifiCorp state that impacts to recreational and environmental areas are, *de facto*, impermissible alterations of the project. The cases demonstrate that impermissible alterations consist of alteration to physical facilities of the project, and changes to flow regimes associated with the project (the “operational” concerns).

As to the financial resources criterion, IDAPA 37.03.08.45.05.d.i. provides that an application will be found to have sufficient financial resources upon a showing that it is “reasonably probable” that funding will be available for project construction. See also *Preliminary Order* at 25 (¶26); See also IDAPA 73.03.08.40.05.f.i. Twin Lakes has satisfied this criterion based on evidence submitted at the hearing, particularly the testimony of Ted Sorensen, which was not challenged at the hearing.

Lastly, for the reasons explained above, there are certain remaining exceptions that Twin Lakes does not agree with, and others which they do agree with. The Director’s findings should reflect Twin Lakes’ position accordingly.

Overall, 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, rather than deny it outright as the Hearing Officer has determined.

DATED this 22nd 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 RESPONSE TO PACIFICORP'S EXCEPTIONS TO PRELIMINARY ORDER

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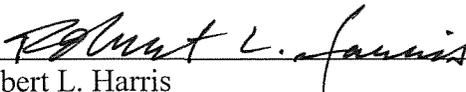
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DATED this 22nd day of August, 2012.



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