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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.	)	**GREATER YELLOWSTONE COALITION'S COMMENTS TO TWIN LAKES CANAL COMPANY'S EXCEPTIONS TO PRELIMINARY ORDER DENYING APPLICATION FOR PERMIT**

Greater Yellowstone Coalition ("GYC") hereby submits *Greater Yellowstone Coalition's Comments to Twin Lakes Canal Company's Exceptions to Preliminary Order Denying Application for Permit*. These comments are being submitted to Gary Spackman, Director of the Idaho Department of Water Resources, pursuant to IDAPA 37.01.01.730.02.c.

Through the exceptions filed by Twin Lakes Canal ("Twin Lakes" or "TLCC"), Twin Lakes seeks to have the Preliminary Order amended to approve Application for Permit No. 13-7967 with conditions. It is GYC's position that Hearing Officer James Cefalo acted correctly in issuing the Preliminary Order based on information gathered prior to and during the March 5-9, 2012 hearing. GYC has argued throughout this petition process that granting the permit would not be in the public interest, as it would interfere with recreation, scenic values, and environmental resources, including wildlife and important riparian habitat. The Preliminary Order determined that "[b]ased on the evidence in the record, the proposed project does conflict

with the local public interest."[1] Twin Lakes now takes exception to this finding. For the reasons explained herein, we assert that the Hearing Officer was correct to find that the proposed project conflicts with the local public interest, and therefore the Preliminary Order should be upheld.[2]

I. TLCC is Incorrect that Permit No. 13-7967 is in the Local Public Interest.

a. IDWR Acted Within Its Jurisdictional Authority in Determining that the Proposed Project Would Conflict With Local Public Interest.

Twin Lakes argues 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."[3] To the contrary, however, the IDWR has not only the right, but in fact has a duty to make findings of fact and conclusions of law to determine if a permit application will conflict with the local public interest. See Idaho Code § 42-203A(5)(e) (stating that "[t]he director of the department of water resources shall find and determine ... [i]n all applications whether protested or not protested, whether the proposed use is such . . . (e) that it will conflict with the local public interest as defined in section 42-202B, Idaho Code . . . .") (emphasis added). Thus, it is not surprising that there are numerous cases exemplifying IDWR's duty to determine a variety of environmental considerations in order to determine whether a proposed project is in the local public interest. See, e.g., Final Order in the Matter of Application to Appropriate Water No. 61-12090 in the Name of Nevid, LLC, at 12 (IDWR 2009) (decreased availability of groundwater for domestic residential use not in public interest); Order Denying Petition for Reconsideration, Second Amended Preliminary Order, and Default Order in the Matter of Application to Appropriate Water No. 95-9360 in the Name of Tall Pine Lakeview

[1] Idaho Department of Water Resources, Preliminary Order Denying Application for Permit, at p. 28, ¶ 48.
[2] We hereby incorporate by reference all testimony provided by GYC and GYC's expert witnesses during the March 2012 hearing.
[3] Twin Lakes Canal Company's Exceptions to Preliminary Order Denying Application for Permit (hereinafter Exceptions), at 30.

Estates, LLC, at 4 (IDWR 2008) (the reduced ability of a waterway to support cutthroat trout not in public interest); Final Order in the Matter of Applications to Appropriate Water No. 65-13912, 65-13913, and 65-13986 in the Name of Carol Lynn MacGregor, at 2 (IDWR 2006) (discharge of pollutants and wastewater not in public interest); Recommended Decision and Order in the Matter of Application for Transfer 71607 in the Name of 4 Bros. Dairy, Inc., at 17 (IDWR 2006) (increased solid waste production at a dairy farm not in public interest).

Despite the clarity of Idaho code and relevant case law, Twin Lakes laboriously tries to make the case that the definition of "local public interest" should be so constrained that the term "local public interest" would be essentially meaningless. For example, Twin Lakes claims that if an issue is outside the expertise of the Hearing Officer, such as mule deer migration, then IDWR should not consider that issue in determining whether granting an application is in the local public interest.[4] This argument seems to ignore the purpose of a hearing, through which the Hearing Officer "shall find and determine from the evidence presented" the impacts of the proposed used, including impacts to the local public interest. See Idaho Code § 42-203A(5)(e). In the even that an issue of fact requires expertise, the IDWR allows for testimony from qualified expert witnesses to present the information to the Hearing Officer.[5]

b. FERC Cannot Replace IDWR in Determining the Local Public Interest.

Secondly, Twin Lakes suggests that the second part of determining whether an issue can be considered as part of the local public interest in a water rights application is "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,

[4] Id. at 30-31.
[5] Note that Twin Lakes availed itself of its right to present expert witnesses at the hearing, particularly when the company called upon Dr. Hardy to discuss in great detail the intricacies of Bear River and Mink Creek fish and water quality issues.

etc.)."[6] Twin Lakes apparently believes that IDWR should leave all matters of local public interest up to a federal agency, the FERC, rather than allow an Idaho State agency to make a determination on what is in local public interest.

> 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.[7]

There are two problems with this proposition. First, as discussed above, IDWR has a duty to determine whether a proposed project is in the public local interest based on evidence presented by the parties. It cannot fulfill this duty by deferring to an outside federal agency that likely has little knowledge of local public interests in Idaho. Rather, IDWR itself must make this determination, as required by Idaho Code. To require IDWR to defer to FERC would essentially make IDWR's role in approving in denying water permit applications a meaningless exercise in paperwork.

Second, unlike Idaho law, there is no requirement that FERC give special consideration to the "local public interest" in its analysis. While many of the issues raised by Protestants in the Twin Lakes hearing might be analyzed to some degree in the FERC licensing process, including fisheries, water quality, wildlife, recreation, and economics, other issues such as the effects of a new dam on local individuals, water supply and delivery, or local organizations' and individual's recreational interests may not be. Perhaps more importantly, unlike IDWR, FERC is not under a duty to make a determination as to whether the proposed project conflicts with the local public interest, and thus FERC's analysis cannot be substituted for IDWR's required determination.

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[6] Id. at 35
[7] Id.

Twin Lakes erroneously assumes that because many of the Protestants are also intervenors in the FERC licensing process, IDWR need not concern itself with what is in the local public interest.[8] Twin Lakes goes to some length in trying to make the case that since Protestants such as GYC were afforded the opportunity to comment on the FERC required study plans, and the subsequent FERC study reports, the local public interest need not be addressed in Twin Lakes' water right application.

> 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-included 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.[9]

Similarly, Twin Lakes seems to suggest that IDWR does not have the right to deny a water permit, but rather only has the authority to grant a permit conditional upon approval from other agencies involved in the licensing process.[10]

As noted above, however, regardless of what determinations are made in the FERC licensing process, IDWR is under a separate duty to make its own determination pursuant to Idaho Code as to whether a proposed project would conflict with the local public interest. Idaho Code § 42-203A(5)(e). Although Twin Lakes may not be satisfied with the determination made, nevertheless this is an undeniable duty that cannot be skirted, transferred, or ignored based on a separate federal licensing process. Twin Lakes' attempt to strip this duty away from the IDWR simultaneously strips IDWR's authority over water permit applications. Surely no Idaho case law or legislative action intended such a result.

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[8] Id. at 7, 35, 37, 39.
[9] Id. at 7.
[10] Id. at 35, 37.

Finally, Twin Lakes' argument that IDWR should defer to state agencies with expertise in local public interest issues ignores the fact that a state agency with wildlife expertise did testify in this hearing. The Idaho Department of Fish and Game ("IDFG") testified as to the negative effects that this proposed project would have on wildlife and native fish, including impacts to riparian habitat that many animal species rely upon for food, cover, and nesting. Under Twin Lakes own argument, then, IDWR should defer to IDFG's testimony that the proposed project would conflict with the local public interest in protecting wildlife habitat.

II. IDWR's Determination of Environmental Considerations Was Reasonable.

a. IDWR's Determination Regarding Impacts to Fisheries Was Reasonable.

Contrary to findings by the Hearing Officer based upon evidence presented by GYC, Trout Unlimited, and IDFG, Twin Lakes continues here to argue that the proposed dam and the sought after water right would provide as good or even better opportunities for native Bonneville cutthroat trout than the free-flowing section of the Bear River that now courses the Oneida Narrows Canyon. IDFG, the state agency tasked to "preserve, protect, and perpetuate such wildlife … for the citizens of this state," makes clear however that this is not the case, and that the proposed dam would severely impact Bonneville cutthroat trout habitat in the Bear River.[11] IDFG made it clear in the March hearing that the long-term prospects for native Bonneville cutthroat trout are best served with a free-flowing Bear River through the Oneida Narrows Canyon, not the proposed dam and reservoir for which the water right is sought. How Twin Lakes can argue against the IDFG, or against IDWR's consideration of IDFG's evidence on this issue, is puzzling given Twin Lakes' own argument made earlier in its Exceptions document:

[11] See Idaho Department of Fish and Game, at http://fishandgame.idaho.gov/public/about/commission/?getPage=186 (last visited August 15, 2012).

> 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.[12]

IDWR appropriately relied on the agency with the most expertise in determining what is in the best interest of Bonneville cutthroat trout and hence what is in the best local public interests that depend on healthy populations of native fish and wildlife.

b. IDWR's Determination Regarding Impacts to Recreation Was Reasonable.

In two instances in its Exceptions document, Twin Lakes suggests that recreational aspects of the local public interest will be met when its proposed dam inundates the Oneida Narrows Canyon and creates yet another reservoir in Franklin County—a reservoir that would be accessible to the public in only a couple of places. Twin Lakes refers to their proposed new flat-water reservoir as "a narrow, pristine lake at the bottom of the canyon"[13] and notes that Twin Lakes would provide expanded camping capacity for floating activities.[14] Twin Lakes fails to mention, however, that the section of the river upon which the company would provide expanded floating capacity currently receives little use since the public has a strong preference for floating the canyon section of the river that would be inundated.

Additionally, while Twin Lakes states that "[t]he shoreline of the new reservoir would be easily reachable for those traveling on foot,"[15] Twin Lakes fails to mention that the entire section of the Bear River that would be inundated by the proposed dam is currently accessible to the

[12] Exceptions at 35 (emphasis added).
[13] Id. at 5 and 45.
[14] Id.
[15] Id.

public via PacifiCorp's private road. Furthermore, it is disingenuous to suggest that the shoreline of the new reservoir would be easily reachable given that most of the shoreline would be miles from the nearest publicly accessible road and often would require those wishing to access the reservoir shore by foot to obtain trespass permission from other private landowners. This shoreline thus does not compare to the current recreational opportunities afforded along this section of the Bear River.

GYC takes exception to Twin Lakes' contention that its proposed dam and reservoir will provide similar and adequate public recreational facilities and opportunities in comparison to existing public recreational facilities and opportunities. The Hearing Officer rightly considered recreation in terms of the local public interest and correctly determined that Twin Lakes' application should be denied because it was not in the local public interest.

III. IDWR Correctly Determined The Importance of The 2002 PacifiCorp Settlement Agreement.

In seeking to downplay the importance of the 2002 PacifiCorp Settlement Agreement ("SA"), Twin Lakes once again would have IDWR defer to the FERC licensing process rather than acknowledge that the decision of whether to grant Twin Lakes' water right application would significantly affect the SA and PacifiCorp's subsequent license. The SA was the product of six years of negotiations between PacifiCorp and federal and state agencies, the Shoshone-Bannock Tribes, and conservation and recreation non-profits. This was a true collaborative process, not at all like the FERC process that Twin Lakes wrongly describes as "collaboration".[16] As we see it, Twin Lakes would have IDWR ignore the collaboratively constructed SA and all the benefits it brings to the local public interest, yet accept the non-collaborative FERC licensing process that Twin Lakes is involved in as a surrogate for IDWR's responsibility to consider the

[16] Id.

local public interest. GYC's position is that IDWR appropriately consider the SA in determining what was in the best local public interest.

IV. Conclusion

In conclusion, IDWR appropriately determined that the local public interest is broader than the highly constrained definition of the local public interest that Twin Lakes creates in its Exception document. Additionally, IDWR had a duty to determine impacts from the proposed project to local public interest, and IDWR's assessment of those was reasonable given the evidence presented. Further, GYC believes the Hearing Officer appropriately consider the effects of the water right application on Bonneville cutthroat trout, recreation, and the PacifiCorp Settlement Agreement. Therefore, GYC believes that the Director should reject Twin Lakes' request to reconsider Application for Permit No. 13-7697 and should make a final determination to deny that application.

Dated this 23rd day of August, 2012.

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Greater Yellowstone Coalition

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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 23rd day of August, 2012.

DOCUMENT SERVED: **GREATER YELLOWSTONE COALITION'S COMMENTS TO TWIN LAKES CANAL COMPANY'S EXCEPTIONS TO PRELIMINARY ORDER DENYING APPLICATIONS FOR PERMIT**

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