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

IN THE MATTER OF APPLICATION FOR PERMIT NO. 13-07697 IN THE NAME OF TWIN LAKES CANAL COMPANY	**IDAHO DEPARTMENT OF FISH AND GAME'S RESPONSE TO TWIN LAKES CANAL COMPANY'S EXCEPTIONS TO PRELIMINARY ORDER DENYING APPLICATION FOR PERMIT**

The Idaho Department of Fish and Game ("IDFG"), by and through the Office of the Attorney General, hereby responds to *Twin Lakes Canal Company's Exceptions to Preliminary Order Denying Application for Permit* ("Exceptions"). Twin Lakes Canal Company ("Twin Lakes") filed its Exceptions contemporaneously with its *Petition for the Agency Head to Review Preliminary Order Denying Application for Permit* on August 9, 2012. IDFG submits this response pursuant to IDAPA 37.01.01.730.02.c.

The purpose of this response is to clarify issues discussed in Twin Lakes' Exceptions. IDFG is participating in this proceeding to assist the Idaho Department of Water Resources by

providing technical information addressing potential effects of the proposed project on fish and wildlife resources and how any adverse effects might be mitigated. It is not the purpose of IDFG to support or oppose the project proposed by Twin Lakes. Exhibit P708 at 1; Testimony of David Teuscher. By filing this response, IDFG continues to offer technical information.

At the hearing on Twin Lakes' application for a permit, IDFG offered testimony and documentary evidence on the potential effects of the proposed project on fish, wildlife, and recreation under the local public interest criteria in Idaho Code § 42-203A(5). In support of its Petition for Review, Twin Lakes submitted Exceptions to the Hearing Officer's analysis of the local public interest criteria. In this response, IDFG provides technical information on the fish and recreation issues raised in Twin Lakes' Exceptions.

I. Bonneville Cutthroat Trout Habitat in the Oneida Narrows

A central issue at the hearing was that the Oneida Narrows Canyon on the Bear River, which is the location of Twin Lakes' proposed project, provides habitat important to the conservation of Bonneville cutthroat trout ("BCT"). The Hearing Officer found that "[t]he Oneida Narrows is a critical section of primary aquatic habitat for current BCT populations and for the rehabilitation of BCT in the Riverdale section of the Bear River." Preliminary Order at 12 (¶80) (citation omitted). Further, the Hearing Officer found that fluvial BCT "use the mainstem of the Bear River for rearing and maturing, then use tributaries for spawning." *Id.* at 12-13 (citation omitted). In its Exceptions, however, Twin Lakes characterizes the main stem of the Bear River, which includes the Oneida Narrows, as a "migratory corridor" used by BCT "during spawning or for short term holding." Twin Lakes' Exceptions at 49. This characterization is inconsistent with evidence in the record.

Twin Lakes' BCT telemetry study shows that the Oneida Narrows reach of the Bear River is important habitat for BCT. Describing the Bear River only as a migration corridor or

habitat used for short time holding only contradicts the majority of data collected and reported in Twin Lakes' fishery studies. Exhibit P708 at unnumbered page 5. First, the telemetry results show that the majority of BCT tagged used the reach of the Bear River that would be-affected by the proposed dam. Exhibit A12 at 109. Second, many of those BCT spent several months at a time in the canyon. Exhibit P303 at unnumbered pages 1-2. Similar to other large-river cutthroat trout populations, Twin Lakes' fishery studies shows BCT utilizing the river for most of the year and migrating into tributaries to spawn. *Id.*; Exhibit A9 at 150-151. Therefore, the Hearing Officer's finding on this issue is consistent with the evidence in the record.

II. Recreation and Fish Stocking in the Oneida Narrows

In its Exceptions, Twin Lakes argues IDFG's fish stocking efforts in the Oneida Narrows have a negative impact on BCT. However, Twin Lakes' discussion in support of this assertion omits critical information on the nature of the fish stocking activities.

IDFG offered evidence that the Oneida Narrows is the most heavily used fishing location in Franklin County based on surveys of anglers. Exhibit P714 at 2. IDFG stocks rainbow trout in the Oneida Narrows to meet anglers' demand for fishing opportunities. Exhibit P700 at 13. It is important to note the stocked rainbow trout are sterile and cannot reproduce. Testimony of David Teuscher (audio recording #3 at 27:26). "Since 2001, all rainbow trout stocked in the Bear River system have been treated to induce sterility." Exhibit P711 at 362. This fact is recognized in Twin Lakes' fisheries habitat study report: "Present stocking efforts of the [IDFG] support a non-reproducing population of introduced rainbow trout that provides a popular recreational fishery in the Bear River below Oneida Reservoir." Exhibit A12 at 31.

Ideally, IDFG would like to meet angler demands for fishing opportunities using native fish species. Where native fish populations cannot meet the angling demands, IDFG uses fish

from its rainbow trout stocking program. This is the case in the Oneida Narrows, as explained in IDFG's Management Plan for Conservation of Bonneville Cutthroat Trout in Idaho:

> Currently, due to low densities of Bonneville cutthroat trout in the Bear River, angling demands cannot be met without IDFG stocking sterile rainbow trout or via other non-native game fish management. Therefore, during the Bonneville cutthroat trout restoration process, angling opportunities will continue to be met with the judicious use of non-native game fish (i.e., supplementation with sterile rainbow trout) in reaches where there is high demand for harvest and minimal impacts to Bonneville cutthroat trout. . . . Management direction will vary in each section of the river and will likely change over time as enhancement projects provide increased angling opportunity for growing Bonneville cutthroat trout populations.

Exhibit P712 at 42. At the hearing, David Teuscher, IDFG Regional Fisheries Manager, provided an example from the Bear River where fish stocking decisions have changed due to improvements in BCT populations. Testimony of David Teuscher (audio recording #4 at 17:20). Upstream of the Oneida Narrows, IDFG historically stocked rainbow trout in the Thatcher reach of the Bear River, but IDFG no longer stocks rainbow trout in the Thatcher reach because BCT are available to meet angling demands. The change in management is due to IDFG's BCT conservation hatchery program. The conservation hatchery program provides hatchery-raised BCT that are released into the Thatcher reach. IDFG has been able to provide angling opportunities in the Thatcher reach using BCT from the conservation hatchery program, while meeting its conservation objectives to restore native BCT. IDFG has concluded it can do the same in the Oneida Narrows. Testimony of David Teuscher (recording #4 at 17:20).

IDFG's sterile rainbow trout stocking programs "do not diminish the importance of restoring habitat in the Bear River to sustain native BCT populations." Exhibit P700 at 13. Stocking sterile rainbow trout in the Oneida Narrows is an interim management measure to meet angling demand until the native BCT population is able to meet the demand. The Hearing Officer recognized these facts in the Preliminary Order:

> The Oneida Narrows is such a popular recreational fishery, IDFG stocks 12,000 sterile rainbow trout at sites below Oneida Dam every year. (Exhibit P700, page 13) "[P]ast and present stocking programs help meet angler demands that cannot be met by native species alone such as BCT and mountain whitefish." (Id.) As the BCT population within the Oneida Narrows is restored, the rainbow trout stocking program will change. (Exhibit P712, page 42)

Preliminary Order at 17 (¶112).

III. Fluctuations in Bear River Flow below Oneida Dam

At the hearing, evidence was offered on the fluctuations in the flow of the Bear River below PacifiCorp's Oneida hydroelectric project. On this issue, the Hearing Officer found that after the Oneida Dam was relicensed in 2003, PacifiCorp's Federal Energy Regulatory Commission ("FERC") license requires "a minimum flow of 250 cfs below Oneida Dam, unless inflow to Oneida Reservoir is less than 250 cfs." Preliminary Order at 19 (¶ 127). The Hearing Officer further found:

> Prior to relicensing, large, immediate flow fluctuations occurred downstream of Oneida Dam. (Exhibit P701, page 12 (doc. Page 4); Exhibit P704, Figures 1 and 2) 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.)

Preliminary Order at 19 (¶ 128). Twin Lakes takes exception to the Hearing Officer's findings on flows below Oneida Dam. Citing to an IDFG document, Twin Lakes asserts that fluctuations in Bear River flows remain an issue and continue to impact trout habitat.

In 2007, during the FERC process on Twin Lakes' proposed project, IDFG reviewed data for river flows below Oneida Dam and concluded that since 2003 flow fluctuations below Oneida Dam have reduced from their historic levels. IDFG's conclusion was based on Oneida Dam flow data provided by PacifiCorp, as well as 20 years of data from a United States Geological Survey gage station downriver of Oneida Dam. The data showed that flow fluctuations below Oneida Dam have been moderated since relicensing in 2003. Exhibit P704 at

unnumbered pages 9-10. For example, "[i]n 1996, there were 194 days where minimum flows dropped below 250 cfs compared to only 5 such events in 2005." *Id.* at 9. In light of the information provided to IDFG in the FERC process in 2007, IDFG concluded: "Although flow management in this reach was historically a concern, the more current data indicate that 'peaking flows' are no longer a significant issue and that the proposed project would have minimal effect on moderating flow fluctuations in this reach." Exhibit P701 at consecutive page 12 (page 4 of IDFG Comments on Pre-Application Document). The Hearing Officer's finding on this issue is consistent with evidence in the record.

IV. Mink Creek

Twin Lakes has proposed releasing 10 cfs past its diversion on Mink Creek to mitigate for impacts to aquatic habitat due to the proposed hydroelectric project. Preliminary Order at 13 (¶ 86). This proposal is discussed in Twin Lakes' Exceptions as a reconnection of Mink Creek to the Bear River. The record indicates that under existing conditions Mink Creek is connected to the Bear River.

Mink Creek has ample spring flows during the critical BCT migration and spawning period. BCT generally begin migrations in April and spawn in May and June. Exhibit A9 at 90; Exhibit P708 at unnumbered page 7. During this period of time, average flows passing Twin Lakes' diversion and flowing downstream to the Bear River range from five to 20 times more than the proposed 10 cfs flow. Exhibit A9 at 35.

According to the available flow data for Mink Creek, flows downstream from Twin Lakes' diversion are reduced during summer months, but the flows never reach zero. *Id.* Downstream of the diversion, groundwater adds to the flow in Mink Creek. Exhibit A14 at 7. The flows in the lower reach of Mink Creek support a strong trout population. Some of the highest trout densities recorded in Mink Creek were observed downstream from Twin Lakes'

diversion. Exhibit A14 at 46. Therefore, while the 10 cfs proposal will likely supplement flows during the summer months, the data indicates there is a year-round flow from Mink Creek into the Bear River. Exhibit A9 at 35; Testimony of David Teuscher (audio recording #2 at 49:24-51:30).

RESPECTFULLY SUBMITTED this 23rd day of August, 2012.

Tyson K. Nelson
Deputy Attorney General

CERTIFICATE OF SERVICE

I certify that on the 23rd day of August, 2012, I caused to be served the original or copy of this IDAHO DEPARTMENT OF FISH AND GAME'S RESPONSE TO TWIN LAKES CANAL COMPANY'S EXCEPTIONS TO PRELIMINARY ORDER DENYING APPLICATION FOR PERMIT on each of the following persons by the indicated method.

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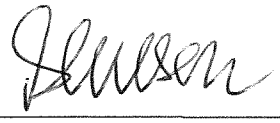

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