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AUG 23 2012

DEPARTMENT OF
WATER RESOURCES

BEFORE THE 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 COMPANY

**TROUT UNLIMITED'S RESPONSE TO
PETITION TO REVIEW
PRELIMINARY ORDER AND
EXCEPTIONS TO
PRELIMINARY ORDER**

Protestant Trout Unlimited (TU) hereby submits its *Response to Twin Lakes Canal Company's Petition for the Agency Head to Review Preliminary Order Denying Application for Permit* ("Twin Lakes' Petition"); *Twin Lakes Canal Company's Exception to Preliminary Order Denying Application for Permit* (Twin Lakes' Exceptions); and *PacifiCorp's Exceptions to Preliminary Order* ("PacifiCorp's Exceptions").

The Director should deny Twin Lakes' Petition on the grounds that the issues raised in the Petition and Twin Lakes' Exceptions were fully and fairly considered by the Hearing Officer in his decision and Twin Lakes would simply have the Director second-guess the Hearing Officer's determinations. As further explained below, TU requests that in the event that the Director grants Twin Lakes' Petition that the Director provide an opportunity to fully brief the issues raised by Twin Lakes pursuant to I.C. §67-5245(5) and IDAPA 37.01.01.730.02.d.

TU supports and adopts the legal arguments and corrections expressed in PacifiCorp's Exceptions.

I. INTRODUCTION.

A careful reading of the *Preliminary Order Denying Application for Permit* ("Preliminary Order") reveals an admirably thorough and thoughtful review by the Hearing

Officer of the voluminous exhibits and oral testimony in this matter, documented in more than adequate findings of fact and conclusions of law. The Preliminary Order applies the appropriate legal standards for considering new water right applications; carefully stays within the discretionary bounds of the Idaho Department of Water Resources' ("IDWR's") authorities; and avoids, more than is even appropriate¹, treading on the legal authorities of other agencies with jurisdiction over Twin Lake's proposed project. Twin Lakes' Exceptions raises issues outside the factual record; would inject legal error into the Preliminary Order; and simply invites the Director to second guess the Hearing Officer—an employee of IDWR. Because Twin Lakes' Exceptions raise no true legal or factual errors by the Hearing Officer, the Director should deny Twin Lakes' Petition and Exceptions. The sections below correspond with the sections in Twin Lakes' Exceptions.

II. TWIN LAKES' INTRODUCTION AND BACKGROUND CONTAINS INACCURATE AND IRRELEVANT INFORMATION

On page 7-8 of Twin Lakes' Exceptions it questions why the Hearing Officer did not describe the exhaustive study plan development and implementation process. The relevance of this process to IDWR's decision in this matter is not apparent. Twin Lakes conducted the studies required by the FERC. TU and others agreed with the completeness and methodology of some of that study plan and disagreed with other parts. Some of TU's concerns were submitted into the record. See Exs. P302 and P303. How this procedural involvement is relevant to the substantive issues before IDWR is not explained. Although TU would not characterize its involvement the study plan process as "intimately involved," Twin Lakes' remarks in this regard are irrelevant.

III. TWIN LAKES STATEMENT OF EXCEPTIONS TO THE PRELIMINARY ORDER ON APPEAL WITHIN THE AGENCY DESCRIBES AN UNREALISTIC STANDARD FOR AGENCY DECISIONS.

Twin Lakes, on page 10 of its Exceptions, describes an unrealistic standard for the content of agency orders. Twin Lakes would require agencies to address all persuasive and unpersuasive evidence in each of their decisions. Apparently Twin Lakes would also have the Hearing Officer explicitly discuss all evidence presented at the hearing, whether insignificant to the final outcome or even irrelevant. TU request that IDWR permit additional briefing on

¹ See the legal argument made in PacifiCorp's Exceptions.
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this issue if it feels that the standards for agency decisions require such extreme levels of detail. Otherwise, the Director should quickly conclude that the very thorough decision by the Hearing Officer adequately covers the evidence presented at hearing.²

IV. TWIN LAKES' ARGUMENTS INJECT NEW FACTS INTO THE PROCEEDING, MISTATE THE LAW OR SIMPLY ARGUE THE FACTS.

A. Twin Lakes describes how its arbitrary 10 cfs mitigation flow would be administered for the first time in this section.

TU did not assert in its protest that Twin Lakes' proposed water use would reduce the quantity under existing water rights and so has a limited response to this section. TU would note that the description of the 10 cfs that Twin Lakes agrees not to divert for environmental mitigation in the center paragraph on page 22 of Twin Lakes Exceptions is the first time that Twin Lakes fully explained how this environmental mitigation non-diversion would work. It is not contained in the record. TU would further note that when Twin Lakes' siphon is frozen and inoperable during the winter its agreement not to divert 10 cfs for environmental mitigation is meaningless.

B. Twin Lakes provides no legal or factual reason to re-visit the Hearing Officer's decision that Application for Permit No. 13-7697 is not in the local public interest.

1. IDWR's primary jurisdiction over Idaho's water resources is not pre-empted by FERC's jurisdiction over hydropower projects.

The State of Idaho, by and through IDWR, has primary jurisdiction over the State's water resources. When considering new appropriations of water the Idaho Legislature has described the standards that IDWR must apply:

The director of the department of water resources shall find and determine from the evidence presented to what use or uses the water sought to be appropriated can be and are intended to be applied. In all applications whether protested or not protested, where the proposed use is such: (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with

² It is instructive that in this same section Twin Lakes appears satisfied with the detail in the Preliminary Order regarding issues that were determined in its favor, even though under its proposed standards those determinations may well be vulnerable to challenge.

which to complete the work involved therein, or (e) that it will conflict with the local public interest as defined in section 42-202B, Idaho Code, or (f) that it is contrary to conservation of water resources within the state of Idaho, or (g) that it will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates; the director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.

I.C. §42-203A(5). Idaho Code §42-202(B)(3) defines the local public interest 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".

Nowhere in this language does the Idaho Legislature direct IDWR to defer to the FERC in making water right decisions, including the local public interest. This is especially true in the case of water right applications for "irrigation storage" and "irrigation from storage," which are outside the purview of FERC, as in the present case.

Additionally, Twin Lakes made no argument that Idaho's local public interest standard, which focuses solely on the interests of the people in the area directly affected by the proposed water use, is coincident with or even totally within the focus of the FERC's jurisdiction over hydropower. The studies conducted by Twin Lakes at the direction of FERC pursuant to the requirements of the National Environmental Policy Act, 42 U.S.C. 4321-4347 (NEPA) focus on many issues besides the issue narrowly defined by the local public interest definition.

Because Twin Lakes voluntarily chose to proceed with its water right application prior to completion of the FERC process, it left the Hearing Officer little choice but to evaluate the water resource impacts based upon the water use as proposed by Twin Lakes to IDWR—including the 10 cfs mitigation flow. IDWR cannot shirk its statutory responsibilities regarding the protection of the local public interest if an applicant decides to proceed with its application before the actual water use is fully defined.

If the Director does not reject this contention out of hand, TU requests the opportunity to brief the issue regarding the extent to which IDWR must defer to FERC when

making decisions regarding water right applications.

2. The Hearing Officer made complete and adequate findings regarding the local public interest.

The local public interest is defined very narrowly for purposes of water right applications:

"...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".

I.C. §42-202B(3). The focus is on the "interests...in the effects ...on the public water resource." The focus is not on the "secondary effects"-whether good or bad-of the proposed water use. See quote, Twin Lakes' Exceptions at p. 34. The effect on the public water resources was the focus of the Preliminary Order's consideration of the local public interest; which led to the many pages of findings regarding the effects on the public water resource to which Twin Lakes takes umbrage. Rather than concede the very restrictive definition of the local public interest, Twin Lakes, in the first instance, uses a juvenile comparison of page and sentence counts to criticize the decision. Twin Lakes Exceptions at 40. This is no good basis for the Director to revisit the Preliminary Order.

2.1 The local public interest standard precludes the Hearing Officer from considering "rub-off" or indirect economic impacts of the proposed water use.

Twin Lakes then launches into a long litany of the secondary economic and other rub-off benefits of the project, while conceding that the direct beneficiary of the project are Twin Lakes' shareholders. Twin Lakes' Exceptions at 41-43. Finally, it cites the Legislature's general support for new storage stated in legislation. At. 43-44. All of this information, whether true or not, lies outside the definition of the local public interest.

For IDWR to go down the road of broadening its conception of the local public interest to include a sweeping examination of the regional and statewide social, economic and political benefits of proposed water uses would thwart the effort made to narrowly focus the examination of water right applications to those issues within the agency's expertise. As soon as IDWR decides it is going to make decisions about the broad economic benefits of new industries or facilities, it will also have to make decisions about the broad environmental, economic and social externalities of those industries—such as air pollution, noise pollution, and land use impacts.

Instead, the Hearing Officer focused on the impacts of the proposed water use on the current use of the public water resource—the Bear River. Again, if the Director does not summarily reject Twin Lakes’ attempt to broaden the local public interest considerations to include secondary economic impacts, TU requests an opportunity to brief this issue.

2.2 Twin Lakes points to no error in the Preliminary Order regarding environmental uses of Bear River water, it simply argues that the Director should second-guess the Preliminary Order.

Twin Lakes primary argument in this section is that the Hearing Officer did not correctly analyze the impact of the proposed project on Bonneville Cutthroat Trout (“BCT”). This is hardly the case. In the first instance, every resource manager and non-governmental organization working on the conservation and restoration of BCT opposes this project. See Ex. P805.3 Further, the errors asserted by Twin Lakes are hardly that:

--Twin Lakes asserts that the Hearing Officer erred by calling the Oneida Narrows section a “free flowing river.” Twin Lakes’ Exceptions at 46. There are no dams or structures significantly impeding the flow of the river through the canyon—it is free flowing. This does not require re-examination by the Director.

--Twin Lakes asserts that the Hearing Officer erred by finding that any flow buffering by the dam will provide little benefit, especially on the ramp up. Twin Lakes’ Exceptions at 46-47. The State of Idaho, the Idaho Department of Fish and Game, TU and many others agreed in 2002 that the ramping restrictions on PacifiCorp in its new license were adequate. See Settlement Agreement, at 3.3, Ex. P205 at 20. In fact, Twin Lakes own fisheries expert, testified that rapid ramping up of flows is less significant than rapid down-ramping. Testimony of Hardy #2 at 55:40. This does not require re-examination by the Director.

--Twin Lakes asserts that the Hearing Officer erred by not analyzing potential conflicts between the Idaho Department of Fish and Games’ fish stocking program in the Oneida Narrows and the use of the Narrows by BCT. Twin Lakes’ Exceptions at 47-48. The question is: why is this important? Both BCT and non-native fish occupy the Narrows, and are fished for in a riverine environment. There is no dispute in this regard, unless IDWR

3 Significantly, Twin Lakes would have the Director completely defer to other agencies regarding resource decisions on the Bear River, but ignores the unanimous opposition of fish and wildlife agencies to this dam. TROUT UNLIMITED’S RESPONSE TO PETITION TO REVIEW PRELIMINARY ORDER AND EXCEPTIONS TO PRELIMINARY ORDER ==PAGE 6

wishes to suggest a different fisheries management strategy. Further, there is no dispute that the proposed dam would destroy the use of the Narrows by both the stocked and native fish populations and destroy the riverine fishery. This issue does not call for re-examination by the Director.

--Twin Lakes asserts that the Oneida Narrows is not a wild BCT fishery. Twin Lakes' Exceptions at 48-49. This assertion is directly contradicted by observations in Twin Lakes' own study that the majority of radio-tagged BCT spent most of the study period in main stem Bear River habitats. In fact, 90% of the telemetry locations for the 23 radio-tagged BCT occurred in the Bear River (637 of 711 total locations) and spanned all months of the year, including multiple locations during late spring through early fall. In addition, roughly 300 of those fish locations were within the proposed inundation zone. See Ex. P303. Twin Lakes would unnecessarily have the Director second-guess the Hearing Officer's consideration of this information.

--Twin Lakes extraordinarily asserts that "if people want to get serious about enhancing BCT populations, there should be widespread support of the Mink Creek reconnect and the Twin Lakes project." Twin Lakes Exception at 49. In fact, the opposite is true. There is near unanimous opposition to the Twin Lakes dam project by BCT managers, see Ex. P805, and Twin Lakes' own witness, Dr. Hardy, does not even know how the 10 cfs flow proposal for Mink Creek was derived, although he is sure that it will provide some benefit. Testimony of Hardy #2 at 16:00. TU may support reconnect projects on Mink Creek, but not at the expense of destroying the best and only mainstem BCT habitat on the Bear River. Twin Lakes would unnecessarily have the Director second-guess the Hearing Officer's consideration of this information.

--Twin Lakes asserts that its Mink Creek proposal is comparable to the tributary reconnect on Badger Creek in the Little Lost River drainage. Twin Lakes' Exceptions at 50. There is absolutely nothing in the administrative record regarding the Badger Creek project. That project is absolutely distinguishable from the Twin Lakes' Mink Creek proposal, not the least of which being it did not involve a trade of the improved fishery on Badger Creek for a dam on the Little Lost River. Consideration of evidence outside the record is no basis for re-examination of the Preliminary Order, but if the Director would like TU to put on evidence

regarding the Badger Creek project in a supplemental hearing it stands ready to do so.

The bottom line is that the Hearing Officer did consider all of the evidence regarding environmental uses of the Bear River water at the site of Twin Lakes' proposed project. When looking at the trade-off between the Twin Lakes' dam and BCT use of the mainstem Bear River, he found the testimony of Warren Colyer of TU to be persuasive. Preliminary Order at 11 (¶68). The Director is simply being asked to second-guess the weighing of the evidence by the Hearing Officer because Twin Lakes disagrees with the Hearing Officer. Twin Lakes can show no legal or factual errors in the Hearing Officer's decision.

2.3 Twin Lakes would have the Director ignore the PacifiCorp Settlement Agreement because of a third-party clause and because it lies under FERC's jurisdiction.

Twin Lakes raises two issues arguing that the Hearing Officer erred in his consideration of the 2002 PacifiCorp Settlement Agreement: first, that a clause that allows parties to withdraw from the Settlement Agreement because of the actions of third parties allows IDWR to ignore the significant benefits of the Settlement Agreement in the present case; and because the Settlement Agreement lies under FERC's jurisdiction IDWR should have ignored the benefits of that Agreement in the Preliminary Order. Twin Lakes' Exceptions at 51-53.

The first contention is simply wrong. Section 5.3.6, cited by Twin Lakes, allows parties to the Agreement to withdraw if there is an order from FERC or a court order modifying operation of the "Projects." Those "Projects" are defined in Recital A of the Agreement as PacifiCorp's projects on the Bear River. Ex. P205 at 1. The Governor of the State of Idaho signed the Settlement Agreement and the State of Idaho and the Bear River has received significant benefits from it. Nothing in the Agreement authorizes IDWR to ignore those benefits when examining Twin Lakes' water right application.

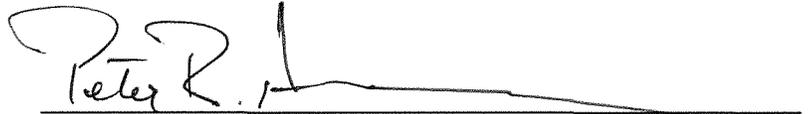
The second contention would have IDWR to ignore the benefits of the Settlement Agreement simply because the FERC will decide whether there is a conflict between the Agreement and Twin Lakes' proposed hydropower license. FERC well may have primary authority over that conflict, but the actual, on-the-ground benefits to the Bear River deriving from that Agreement certainly lie within IDWR's jurisdiction to consider. The Governor of

the State of Idaho signed the Settlement Agreement in anticipation of receiving those benefits. It would have been error for the Hearing Officer not to consider them. This is no basis for the Director to re-examine the Preliminary Order.

CONCLUSION

For the reasons set forth above the Director should decline to re-examine the Preliminary Order based upon the contentions of Twin Lakes and allow the decision to deny the Application for Permit No. 13-7697 to stand.

DATED this 23rd day of August, 2012.

A handwritten signature in black ink, appearing to read "Peter R. Anderson", written over a horizontal line.

Peter R. Anderson
Attorney for Protestant Trout Unlimited

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the following described pleading or document on the parties listed below by the method marked below, with the correct postage thereon, if applicable, on this 23rd day of August, 2012.

DOCUMENT SERVED: TROUT UNLIMITED'S RESPONSE TO PETITION TO REVIEW PRELIMINARY ORDER AND EXCEPTIONS TOPRELIMINARY ORDER

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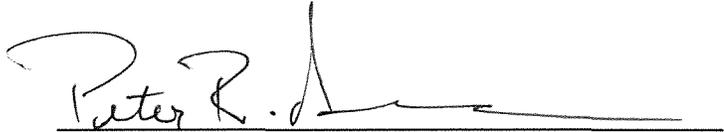
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DATED this 23rd of August, 2012



Peter R. Anderson