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FACSIMILE COVER SHEET

DATE: January 30, 2009

RE: *Canal Companies Appeal of Milner License No. 01-7011 Conditions*

TO: Randall Budge
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Director Tuthill

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FROM: Shelley M. Davis

NUMBER OF PAGES INCLUDING THIS COVER SHEET: 11

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MESSAGE:

Counsel: Enclosed is the Canal Companies' Response to IWRB's Petition to Intervene in the above listed appeal.

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Attorneys for North Side Canal Company and Twin Falls Canal Company

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

IN THE MATTER OF)	
APPLICATION FOR PERMIT & LICENSE)	RESPONSE IN OPPOSITION TO
NO. 01-07011)	THE GROUNDS ON WHICH
)	THE IDAHO WATER
APPLICANT:)	RESOURCE BOARD MOVES
Twin Falls Canal Company &)	FOR INTERVENTION
North Side Canal Company)	
)	
)	
_____)	

INTRODUCTION

COMES NOW, the North Side Canal Company and Twin Falls Canal Company, collectively the "Petitioners," by and through their counsel the law firm Barker Rosholt & Simpson, LLP, and submit this Response in Opposition to the Grounds on Which the Idaho Water Resource Board Moves for Intervention in this matter. The Idaho Water Resource Board (hereinafter "IWRB") seeks intervention in the appeal/protest filed by Petitioners relating to three conditions included in the license issued to Petitioners for the Milner Power Project for impermissible reasons. The IWRB alleges that it is the body responsible for formulating and implementing the Idaho State Water Plan and seeks intervention on the basis that the Board's

presence in the Petitioners' license appeal is necessary to protect the State Water Plan. The Idaho Water Resource Board has failed to state a direct and substantial interest in the Petitioners appeal/protest of License no. 01-07011, and the grounds on which the IWRB seeks intervention threatens to substantially and unduly broaden the issues appealed by Petitioner. For these reasons, the Idaho Water Resource Board's Petition to Intervene should be denied.

FACTUAL AND PROCEDURAL HISTORY

On March 30, 1977, the North Side Canal Company and the Twin Falls Canal Company filed an application for permit No. 01-7011 to appropriate water for the purpose of hydropower production. The application was amended in 1977 to add points of use, which amendment was approved on September 28, 1977. On June 1, 1987, the canal companies sought an extension of time to provide proof of beneficial use, the approval of which was conditioned by the Idaho Department of Water Resources on an agreement to a subordination provision to add to the water right permit. R. Keith Higginson, the Director of IDWR at the time, approved a subordination condition agreed upon by the parties on November 18, 1987, which subordinated the licensee to all subsequent upstream beneficial uses except hydropower and groundwater recharge. The Petitioners provided proof of beneficial use for the Milner project water right permit no. 01-7011 on October 29, 1993. Thereafter, some 21 years later, on October 20, 2008, the Idaho Department of Water Resources, (hereinafter "IDWR"), issued water right license no. 01-07011 containing several conditions which were not in accord with the agreement between the Petitioners and IDWR Director Higginson reached on November 18, 1987. The Petitioners filed this appeal/protest proceeding to address the non-conforming conditions added to License no. 01-07011.

The Petitioners Protest included three distinct bases for protest and appeal of the license.

The first matter appealed relates to license condition 5) which states:

The diversion and use of water for hydropower purposes under this license is subject to review by the Director after the date of expiration of Milner Project License No. 2899 (11/30/2038) issued by the Federal Energy Regulatory Commission. Upon appropriate findings relative to the interest of the public, the Director may cancel all or any part of the use authorized herein and may revise, delete or add conditions under which the right may be exercised.

The second matter appealed relates to license condition 1) which includes the state's newly included subordination to groundwater recharge. It states:

The diversion and use of water for hydropower purposes under this water right shall be subordinate to all subsequent upstream beneficial depletionary uses, other than hydropower, within the Snake River Basin of the state Idaho that are initiated later in time than the priority of this water right and shall not give rise to any right or claim against any junior-priority rights for the depletionary or consumptive beneficial use of water, other than hydropower, within the Snake River Basin of the state of Idaho initiated later in time than the priority of water right no. 01-7011.

The last matter appealed by the Petitioners relates to a newly added volumetric limitation which neither party had discussed or contemplated prior to issuance of the license in October 2008.

The Idaho Water Resource Board filed its Petition to Intervene on January 29, 2009. The Petition does not list any interest of the Idaho Water Resource Board in any of the three issues being appealed/protested by Petitioner. Instead, the IWRB broadly alleges that the purpose of its "intervention would be to support the application of the policies of the State Water Plan, as adopted and amended by the Idaho Legislature, to the Licensing of Water Right Permit No. 01-7011." IWRB Petition at p. 4. The Board goes on to state "[i]n all likelihood, Water Right Permit No. 01-7011 will be the most important water right licensed by the Department in which the Department considers proper application of the elements of the State Water Plan quoted

above.” *Id.* The IWRB goes on to allege that because it is the body responsible for formulation and implementation of the plan, then its intervention is necessary to see to it that “the Department of Water Resources [includes] conditions in the license for Water Right Permit No. 01-7011 for Milner Dam that reflect the requirements of the State Water Plan.” *Id.* In its prayer for relief that Board seeks “that the license awarded to the applicants North Side Canal Company and Twin Falls Canal Company for Water Right No. 01-07011 contain all conditions necessary to comply with the State Water Plan.” *Id.*

The IWRB through its intervention apparently seeks to raise issues in these proceedings relating to all 10 of the Snake River policies included in the current version of the State Water Plan, as adopted in 1996. However, it has failed to state whether it is requesting additional conditions to be inserted in the License or whether it seeks intervention on the basis of the Petitioners objections to the conditions already included in the License. If that is the case, then the IWRB’s Petition is untimely as any objection to the License by non-licensees should have been raised after the IDWR published its Notice of Intent to Issue License issued on September 5, 2007, setting the deadline for comments at October 10, 2007. Furthermore, based on the allegation of the IWRB in its Petition to Intervene, the Board appears to be making the argument that they are an aggrieved party based on the terms of the license as issued. As such, pursuant to the Department’s Rule of Procedure 740, the IWRB should have filed its own Motion for Hearing within 15 days of issuance of the License on October 20, 2008. Based on the allegations and prayer for relief stated in the IWRB’s Petition for Intervention the IWRB’s presence in the Petitioners appeal/protest proceedings will unduly broaden the issues before this tribunal. Additionally, the IWRB is adequately represented in these proceedings as the IDWR in its Final Order issuing License no. 01-07011 stated at paragraph 31 that the Department acknowledged in

issuing the License its obligation to exercise its duties in a manner consistent with the State Water Plan per Idaho Code § 41-1734B(4). Lastly, the IWRB's interest in seeing to it that the Department issue the License in conformance with the State Water Plan is not a direct and substantial interest in these proceedings initiated by Petitioner. For these reasons, the IWRB Petition for Intervention should be denied.

STANDARD OF REVIEW

Parties seeking intervention in an administrative hearing process before the Idaho Department of Water Resources must conform to the Department's Rules of Procedure sections 37.01.01.350-354. Specifically the party seeking intervention must demonstrate "a direct and substantial interest...in the proceeding" which cannot be "adequately represented by the existing parties." IDAPA 37.01.01.351 and 353. If the hearing officer determines "that an intervenor has no direct or substantial interest in the proceeding, the presiding officer may dismiss the intervenor from the proceeding." IDAPA 37.01.01.353.

ARGUMENT

A. The Idaho Water Resource Board Has Not Stated a Direct and Substantial Interest in These Proceedings, the Board's Intervention Will Unduly Broaden the Issues Being Appealed/Protested by Petitioners, and the Interests of the Board are Already Represented in the Proceedings:

The IWRB seeks intervention on the basis that they are the constitutionally and legislatively mandated entity responsible to formulate and implement the State Water Plan. IWRB Petition. Specifically "[t]he Board shall, subject to legislative approval, progressively

formulate, adopt and implement a comprehensive state water plan for conservation, development, management and optimum use of all unappropriated water resources and waterways of this state in the public interest.” I.C. § 42-1734A(1). The IWRB then goes on to cite every policy that the State Water Plan contains having anything to do with the Snake River as the basis for its intervention and alleges that the Board’s participation is necessary to “support the application of the policies of the State Water Plan...to the licensing of Water Right Permit No. 01-7011,” in what the Board contends “will be the most important water right licensed by the Department in which the Department considers *proper application* of the elements of the State Water Plan[.]” IWRB Petition, p. 4, *emphasis added*.

The IWRB has completely failed to demonstrate how the Board’s general duty to formulate and implement the State Water Plan translates to a direct and substantial interest in the Petitioners appeal/protest action. Generalized allegations that this License “will be the most important water right licensed by the Department in which the Department considers proper application of the elements of the State Water Plan,” is a deeply ambiguous statement. *Id*. Furthermore, there is no authority in the Board to enforce the State Water Plan. Importantly, once the plan has been submitted and approved by the legislature “[a]ll state agencies shall exercise their duties in a manner consistent with the state water plan. These duties include but are not limited to the issuance of permits, licenses and certifications[.]” I.C. § 42-1734B(4). In fact, in its prayer for relief the IWRB seeks to intervene in this proceeding to ensure that the license “contain[s] all of the conditions necessary to comply with the State Water Plan.” IWRB Petition, p. 4. Based on the scope of the IWRB’s constitutional and legislative authority, as compared to the obligations of the Idaho Department of Water Resources, it appears from the IWRB petition that it seeks intervention simply to second guess or oversee the Department as it

considers the License. The statement that the IWRB needs to intervene in the proceedings to oversee the "proper application" of the State Water Plan to the Petitioners license certainly supports the petitioners contention that the IWRB intends to second guess the Department's ability to issues the license. IWRB Petition, p. 4. The IWRB's attempt to direct the Department in the Department's duties, does not constitute a direct and substantial interest in these proceedings and if it does have a direct and substantial interest in the Petitioners appeal, it has failed to state what that interest is.

The ambiguity of the IWRB's Petition to Intervene, in that it simply claims to need to be present to enforce all of the Snake River policies of the State Water Plan, and make certain all conditions necessary to carry out that enforcement are contained in the license, also suggests that the Board's intervention will unduly broaden the scope of the proceedings. The scope of the Petitioners appeal is limited to three issues set forth in the Petitioners Protest and Petitions for Hearing, namely 1) the Petitioners objection to the inclusion of a volumetric limitation in the license, 2) the Petitioners objection to the inclusion of a license re-opener at the time the Petitioners must re-license the facility with the FERC, and 3) the Petitioners objection to the modification to the condition agreed upon by the state and Petitioners regarding an unsubordinated position with respect to ground water recharge. The petition of the IWRB to intervene fails to make any reference to any of these issues on appeal. Instead the IWRB wants the License to "contain all conditions necessary to comply with the State Water Plan." IWRB Petition, p. 4. It is unclear whether the IWRB requests the inclusion of additional conditions, in which case the Petition is untimely since the IWRB did not comment within the time prescribed by the Department in response to the Notice of Intent to Issue License. It is unclear if the IWRB feels that the conditions in the License to do not comply with the State Water Plan. It is entirely

impossible to know why the IWRB seeks to intervene in these proceedings, since the duty to comply with the State Water Plan in the issuance of license lies with the Idaho Department of Water Resources. I.C. § 42-1734B(4). For these reasons, the intervention of the IWRB poses a substantial risk of unduly broadening the issues on appeal in this matter.

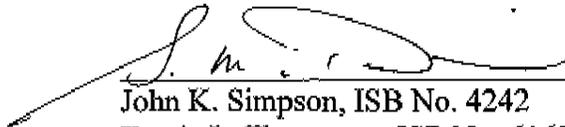
Lastly, it is the duty of the IDWR to ensure that License No. 01-7011 complies with the State Water Plan. I.C. § 42-1734B(4). The Department will necessarily be present and represented in this appeal. Therefore, the Idaho Water Resource Board's stated interest in these proceedings will be fully represented by the Department and the IWRB's intervention is unnecessary.

CONCLUSION

The Idaho Water Resource Board's Petition to Intervene in these proceedings does not state a direct and substantial interest in the matters at issue in these proceedings, the ambiguous allegation and prayer for relief present a substantial risk to unduly broaden the scope of the proceedings, and the interests stated by the IWRB are already represented by the Idaho Department of Water Resources in these proceedings. In their response in opposition to the Petitions to Intervene filed by the parties who purported to have interests in ground water recharge, the Petitioners stated that because the IWRB is the holder of ground water recharge permits with priority dates junior to the Milner License, then it might have been an appropriate intervenor in these proceedings. However, because the IWRB has sought intervention on the broad and ambiguous grounds that they seek to make certain the license complies with the State Water Plan, the Petitioners object to the Intervention of the Idaho Water Resource Board and request that the Petition to Intervene be denied.

Dated this 5th day of February, 2009

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of February, 2009, I served a true and correct copy of the foregoing document, **RESPONSE IN OPPOSITION TO THE GROUNDS ON WHICH THE IDAHO WATER RESOURCE BOARD MOVES FOR INTERVENTION**, upon the following persons via the method indication below:

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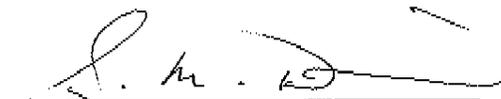
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