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Attorneys for Proposed Intervenor Pioneer Irrigation District

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF RIVERSIDE'S
PETITION FOR DECLARATORY RULING
REGARDING NEED FOR A WATER
RIGHT TO DIVERT WATER UNDER
RESUE PERMIT NO. M-225-01

Docket No. P-DR-2020-001

**PIONEER IRRIGATION DISTRICT'S
OPPOSITION TO IDAHO POWER
COMPANY'S PETITION TO INTERVENE**

Proposed Intervenor Pioneer Irrigation District ("Pioneer" or "District"), by and through undersigned counsel of record and pursuant to the Director's *Order for Setting Deadline for Responses; Notice of Continued Prehearing Conference* (May 7, 2020), hereby responds in opposition to Idaho Power Company's ("Idaho Power") *Petition to Intervene* (Apr. 22, 2020) ("Petition").

Pioneer opposes Idaho Power's Petition on the following grounds:

1. As Idaho Power correctly states in its Petition, the substantive standard of review governing its intervention request is two-fold: (a) demonstration of a "direct and substantial interest" in the matter; and (b) participation that "does not unduly broaden the issues" pending in the matter. IDAPA 37.01.01.353.

2. Idaho Power asserts six (6) reasons why it believes it has a “direct and substantial interest” in this proceeding. Petition, p. 3. Pioneer addresses each of them in turn:

a. Idaho Power states that it operates 17 hydroelectric facilities in the Snake River Basin, with corresponding hydropower generation water rights, “[a] number of [which]” are downstream of the Boise River Basin. Idaho Power does not explain how these facts comprise a direct and substantial interest in *this* proceeding. The seeming implication of Idaho Power’s assertion is that the City of Nampa’s (“Nampa”) proposed discharge to Pioneer’s Phyllis Canal would injure or diminish Idaho Power’s hydropower generation potential at some unidentified “number” of facilities located downstream of the Boise River Basin. But, as Idaho Power later acknowledges, its hydropower generation rights are subordinate to the exercise of upstream consumptive rights (including those of Nampa). Petition, p. 3; *see also*, I.C. § 42-203B. Thus, to the extent an injury allegation can be read into Idaho Power’s otherwise generalized statement, Idaho Power has no colorable injury claim to make during this proceeding.

b. Next, Idaho Power cites to “other water rights throughout its service territory” that “aid in the delivery of electricity and in [its] operations.” Again, Idaho Power does not explain how these otherwise unidentified water rights located within its larger “service territory” stand to be impacted by the outcome of *this* proceeding—more specifically, Nampa’s discharge of its municipal wastewater to Pioneer’s Phyllis Canal rather than to Indian Creek. Likewise, Idaho Power identifies no generation facility it operates on Indian Creek, or water rights sourced therefrom, and Idaho Power neglects to mention that typical Riverside Irrigation District, Ltd. (“Riverside”) operations intercept the entirety of Indian Creek flows where the Creek and the Riverside Canal intersect. In other words, Idaho Power fails to

substantiate any tributary relationship between the Creek and its unidentified water rights throughout its larger “service territory,” let alone tributary to its unidentified “number” of facilities “downstream of the Boise River Basin.”

c. After acknowledging the subordinated nature of its hydropower generation water rights, Idaho Power states that its power generation operations depend, in part, on “reach gains” in the various “source[s]” identified in its water rights portfolio. Like subparagraph (a) above, the implication of Idaho Power’s generalized statement is seemingly one of alleged injury. But, Idaho Power does not expressly state as much, let alone contend that it has colorable injury claims given its subordinated water rights and the well-settled rule that water users cannot compel others to continue wasting water for their benefit.

d. Idaho Power next states that many of its water rights are “downstream of municipal, industrial, and irrigation returns . . . similar to the discharge described in the Riverside petition.” That may be, but Idaho Power fails to explain why this matters. Perhaps, Idaho Power benefits from the waste streams of others (*e.g.*, operational spills of irrigation entities or the wastewater discharges of municipalities). So do countless other water users, including Pioneer and its drain-based water rights. But absent some modicum of substantive explanation, or colorable injury assertions, the mere downstream location of some unidentified subset of Idaho Power water rights throughout its massive service territory is irrelevant and incredibly vague.

e. After acknowledging that the tributary hydrology in this proceeding (or, more accurately, the lack thereof) has no bearing on Swan Falls operations and associated minimum stream flows upstream of the dam, Idaho Power nonetheless alleges that this proceeding “may” trigger minimum stream flow analysis under the Swan Falls Agreement. The hydrology of this proceeding has no bearing upon Swan Falls minimum stream flows of concern

to Idaho Power, and any attempt Idaho Power might make to inject that issue or potential into this proceeding unduly broadens the issues in this proceeding in derogation of Procedure Rule 353 (IDAPA 37.01.01.353). If and when other proceedings with a direct bearing on Swan Falls minimum stream flows arise, Idaho Power is welcome to pursue those issues there. This proceeding is not the proper place or time.

f. Finally, Idaho Power asserts that the outcome of this proceeding “may impact the Company’s generation and planning.” As with its other assertions, it offers no explanation supporting this “may impact” assertion. For the reasons discussed above, Pioneer fails to see or understand *how this particular proceeding, and Nampa’s specific, proposed discharge to Pioneer’s Phyllis Canal* will have any bearing on Idaho Power operations. And that is the problem, all involved are left speculating over what Idaho Power’s connection to this matter is (or can be) given the Company’s dearth of explanation and substantiation.

3. Even taken together as a whole, Idaho Power’s generalized statements do not demonstrate a direct and substantial interest as required by Procedure Rule 353 (IDAPA 37.01.01.353). Idaho Power nakedly concludes that it “meets the requirements as specified in the Department’s Rules.” Pioneer disagrees.

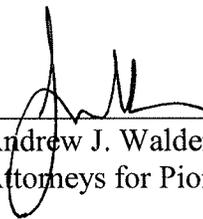
If granted intervention Idaho Power should be required to better and fully explain its “direct and substantial interest” in *this* particular proceeding: located on a creek not tributary to the Boise or Snake Rivers during the Reuse Permit irrigation season of use (due to Riverside’s interception of the Indian Creek at its canal for its own irrigation uses); located on a creek without connection to Swan Falls Dam operations or minimum stream flow requirements upstream of the dam; and absent the ability to assert colorable injury concerns owing to its subordinated power generation rights and inability to compel Nampa to continue wasting water

for its benefit (assuming there ever was a benefit). And, therein lies Idaho Power’s threshold failing—any clarifying statement(s) of direct and substantial interest solicited later necessarily concedes the Company’s failure to meet the applicable legal standards on the frontend.

Pioneer respectfully submits that Idaho Power Company’s Petition be denied for its failure to satisfy the applicable “direct and substantial interest” test, and for its stated potential to inject issues (*e.g.*, reach gains and/or minimum stream flow analyses) unduly broadening the scope of this proceeding.

DATED this 13th day of May, 2020.

SAWTOOTH LAW OFFICES, PLLC

By  _____
Andrew J. Waldera
Attorneys for Pioneer Irrigation District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of May, 2020, I caused a true and correct copy of the foregoing **PIONEER IRRIGATION DISTRICT'S OPPOSITION TO IDAHO POWER COMPANY'S PETITION TO INTERVENE** to be served by the method indicated below, and addressed to the following:

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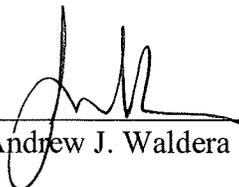
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