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 DEPARTMENT OF
 WATER RESOURCES

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)	
NO. 01-07011)	
APPLICANT:)	RESPONSE IN OPPOSITION TO
Twin Falls Canal Company &)	PETITIONS TO INTERVENE
North Side Canal Company)	FILED BY GROUND WATER
_____)	USERS AND OTHER
)	IRRIGATION ENTITIES
)	

COME NOW, the North Side Canal Company and Twin Falls Canal Company, (hereinafter “Petitioners” or “Canal Companies”), by and through their undersigned attorneys, and hereby file this Response in Opposition to the Petitions to Intervene filed by Mud Lake Water Users, Independent Water Users, Jefferson Canal Company, Montevue Canal Company, Producer’s Canal Company and Fremont-Madison Irrigation District (Collectively the “Upper Snake Water Users”) by and through their counsel, Robert Harris of the law firm Holden, Kidwell, Hahn & Crapo, PLLC, and by Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Clark-Jefferson Ground Water District, Madison Ground Water District, and Aberdeen-Springfield Canal Company, by and through their counsel the law firm Racine Olson Nye Budge & Bailey, Chtd.

regarding the Idaho Department of Water Resources' ("IDWR") issuance of water right License No. 01-07011 on October 20, 2008, and the Petitioners' administrative appeal of certain conditions included in that License, which appeal is now proceeding before the Idaho Department of Water Resources.

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.

In early 2007 the parties presently petitioning the Department for intervention in these proceedings requested an opportunity for hearing on the subordination condition to be inserted in the Milner license. The Department granted their request requiring comments to be submitted on or before October 10, 2007. The comments of the parties seeking intervention were received, considered, and incorporated in the subordination condition by the Department, over the objections of Petitioners. The parties seeking intervention, despite receiving statutory notice, failed to protest the Canal Companies' application for permit at the time required by Idaho law.

Nonetheless, the Director allowed the comments to be filed and incorporated into the record prior to his issuance of the license.

On October 20, 2008, the water right license for the Milner project was issued by the Director along with a Final Order. On November 4, 2008 Petitioners filed their Protest and Petition for Hearing to appeal the Department's inclusion of the substantially modified subordination provision, as well as the condition reserving to the Department a right of review for water right at the time required for FERC renewal of the project license, and also a volume limitation not contemplated in the original application.

The parties who now seek intervention filed their Petitions to Intervene on December 2nd and 4th, 2008. They claim that their interests in this administrative appeal proceeding between the Canal Companies and IDWR are direct and substantial, and that their interests will not be adequately protected by the State during the administrative process. Petitioners will demonstrate that the interest claimed by the parties seeking intervention is neither personal to them, nor direct and substantial, that the parties seeking intervention pose a danger of unduly broadening the issues, and that the State's representation in the administrative proceedings will adequately protect any interest the parties seeking intervention claim.

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.

Additionally, every party who seeks to participate in a legal proceeding must demonstrate legal standing in the proceeding before the party’s participation may be granted. *Van Valkenberg v. Citizens for Term Limits*, 135 Idaho 121, 124, 15 P.3d 1129, 1132 (2000), *also see Miles v. Idaho Power Co.*, 116 Idaho 635, 637, 778 P.2d 757, 759 (1989). “To satisfy the case or controversy requirement of standing, a litigant must ‘allege or demonstrate an injury in fact and a substantial likelihood the relief requested will prevent or redress the claimed injury.’” *Boundary Backpackers v. Boundary County*, 128 Idaho 371, 375, 913 P.2d 1141, 1145 (1996). “This requires a showing of a ‘distinct palpable injury’ and ‘fairly traceable causal connection between the claimed injury and the challenged conduct.’” *Id.*

ARGUMENT

A. The Parties Seeking Intervention Do Not Have a Direct and Substantial Interest in these Proceedings, and They Cannot Demonstrate Legal Standing to Participate in these Proceedings:

The parties seeking intervention in this proceeding have stated only general, non-particularized reasons for their interest in the matter. The reasons stated by these parties are not personal to these parties, but rather apply to all junior water right holders upstream of Milner Dam. For this reason, the parties seeking intervention do not meet the standard required by IDAPA rule 37.01.01.351, and they should not be allowed to intervene in this matter.

In their Petition to Intervene, the Mud Lake Water Users, Independent Water Users, Jefferson Canal Company, Montevew Canal Company, Producer’s Canal Company, and Fremont-Madison Irrigation District claim that they “possess water rights which authorize the

diversion and beneficial use of ground water for irrigation and other purposes, which is used by [sic] the numerous members of these companies.” Petition to Intervene (Harris), at p. 2. The Mud Lake Water Users additionally allege that it “possess[es] Water Right Permit No. 31-7650, which is a water right for ground water recharge to use 730 cfs of water from Camas Creek for such recharge with a priority date of June 11, 1997.” *Id.* Notably, Camas Creek is not a surface water tributary to the Snake River therefore the Canal Companies’ water right will have no effect on the recharge permit held by the Mud Lake Water Users.

The Fremont-Madison Irrigation District states that it “has donated 5,000 acre-feet to be delivered to an area known as Quail Lake for recharge purposes.” *Id.* Donating water for recharge, while laudable since the District is apparently not short of water, does not give a party an interest in someone else’s administrative appeal of the conditions on a water right license. The parties seeking intervention summarize their interest in this administrative action as stemming from their participation in managed recharge efforts.

The Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Clark-Jefferson Ground Water District, Madison Ground Water District, and Aberdeen-Springfield Canal Company allege that they “are owners of water rights that divert from the Snake River or from groundwater sources tributary to the Snake River at locations upstream from Milner Dam.” Petition to Intervene (Budge), at p. 2. They also assert that the referenced rights are both senior and junior to the Milner licensed right and that the parties seeking intervention “have a substantial interest in future water use and development upstream from Milner Dam, particularly for recharge purposes.” *Id.* These parties seeking intervention then go on to state that “[r]emoval of the recharge subordination condition as requested by TFCC and NSCC would fatally impact recharge efforts on the ESPA,

undermining the CAMP and potentially devastate many businesses and industries across southern Idaho.” *Id.* at p. 3.¹

Neither of the Petitions for Intervention has adequately stated a “direct and substantial interest” of the parties seeking intervention in the hearing process that the Petitioners have requested with regard to License No. 01-7011. IDAPA Rule 37.01.01.351. 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.

It is clear that the parties seeking intervention limit their purported interest in this administrative proceeding to the second matter protested by Petitioners. Neither of the sets of

¹ It is unclear on what basis the parties seeking intervention claim that the repeal of the subordination to recharge clause would devastate many businesses and industries. It is further unclear whether these ostensibly devastated businesses and industries are represented by the parties seeking intervention.

parties has indicated any interest in either the volumetric limitation in the license or the protest to the Department's condition giving the Department the right to re-evaluate the license when the Petitioners are required to renew their FERC license. Most importantly, none of the parties seeking intervention has asserted any particularized, personal interest in the Petitioners' protest proceedings relating to their License. In fact they have asserted nothing more than a generalized concern that if the subordination provision relating to groundwater recharge is repealed then there could be administration of water rights above Milner pursuant to the prior appropriation doctrine. The concern that water rights above Milner that could be susceptible of groundwater recharge may be subject to priority administration is not a "direct and substantial" interest in the Petitioners' license appeal proceedings. If the relief requested by Petitioners is granted the parties seeking intervention will be in no different position than any other junior water right holder, which in turn means that these parties seeking intervention have failed to demonstrate the direct and substantial interest in these proceedings required for intervention and the Petitions to Intervene should be denied. Moreover, most of the parties seeking intervention hold no water rights at all, and only one of the parties seeking intervention, the Aberdeen-Springfield Canal Company, holds a water right that purports to allow the party to conduct recharge for irrigation. However, the priority date of that right is considerably senior to the priority date of the License being protested in this action so no injury can accrue to Aberdeen-Springfield.

As these parties seeking intervention have petitioned to intervene only on the basis that they are junior priority water right holders with an interest in ground water recharge, they lack legal standing to participate in the Petitioner's administrative appeal of its License no. 01-07011. In order to participate in the Petitioner's protest the parties seeking intervention are required to "demonstrate an injury in fact and a substantial likelihood the relief requested will prevent or

redress the claimed injury.” *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002), citing *Van Valkenburgh v. Citizens for Term Limits*, 135 Idaho 121, 124, 15 P.3d 1129, 1132, (2000). The generalized interest that the parties seeking intervention claim is insufficient because demonstration of an injury in fact “requires a showing of a ‘distinct and palpable injury’ and a ‘fairly traceable causal connection between the claimed injury and the challenged conduct.’” *Id.*, citing *Miles v. Idaho Power Co.*, 116 Idaho 635, 639, 778 P.2d 757, 763 (1989).

Furthermore, the Idaho Supreme Court has held that the inquiry the fact-finder must make to determine whether a party has legal standing to participate in an action centers on the individuals who make up an organization seeking to participate in the action, and not on the organization or issue being raised. “Standing focuses on the party seeking relief and not on the issues the party wishes to have adjudicated.” *Young v. City of Ketchum*, 137 Idaho at 104, 44 P.3d at 1159 (2002). An organization only has standing to sue when its members would otherwise have standing to sue in their own right. *Glengary-Gamlin Protective Assoc. v. Bird*, 106 Idaho 84, 87-88 (Ct.App. 1984). The parties seeking intervention in this action do not hold water rights that can be harmed by any decision that results from these Petitioners appeal and protest of their water right License no. 01-07011. Most of the parties seeking intervention hold no water rights for recharge at all, and the one party who does hold a water right for recharge purposes has an earlier priority date than the date of the Petitioners license. The parties seeking intervention do not have a distinct and palpable injury, or even threat thereof, that is capable of redress in the Petitioners license protest proceeding. *Young v. City of Ketchum*, 137 Idaho at 104, 44 P.3d at 1159 (2002), citing *Miles v. Idaho Power Co.*, 116 Idaho 635, 639, 778 P.2d 757, 763 (1989). The parties seeking intervention do not meet the standard for participation in these proceedings pursuant to IDAPA 37.01.01.351, nor can they demonstrate legal standing to

participate in the action even if they could meet the IDAPA standard. For these reasons, the Petitions of the parties seeking intervention should be denied.

B. The Interests of the Parties Seeking Intervention are Already Adequately Represented in the Protest Proceedings and Granting the Petitions to Intervene Will Unnecessarily Expand the Scope of the Issues:

IDAPA 37.01.01.353 further provides that even if a petitioner for intervention demonstrates a direct and substantial interest in the administrative proceeding, if the petitioner's interest is already adequately represented in the proceedings, then intervention is inappropriate. In this case the alleged interests of the parties seeking intervention have already been represented to the Idaho Department of Water Resources prior to the issuance of the License and are part of the agency record. Additionally, the parties seeking intervention assert a concern that the repeal of the subordination condition could upend the Comprehensive Aquifer Management Plan ("CAMP") currently being developed by the Idaho Water Resource Board (the "Board"). As the CAMP is under the care and control of the Board, the parties seeking intervention's interests are already adequately represented by the participants in the License protest process making their intervention unnecessary. The State has a vested interest in the implementation of the CAMP, as evidenced by the activity of the Idaho legislature this session. Additionally it is deeply speculative for the parties seeking intervention to allege that CAMP will fail or not fail because of this condition on the water right. As the Idaho Water Resource Board holds the recharge water rights intended to be used for the CAMP process then it may be the appropriate intervenor, if there is any appropriate intervenor, to these proceedings.²

² The Petitioners do not concede that the Idaho Water Resource Board may appropriately intervene in these proceedings. As the Board is advised by, and essentially staffed by, the Idaho Department of Water Resources, which is responsible to issue the license, the Petitioners are concerned that the Board's intertwinement with the Department may pose an insurmountable conflict.

At the beginning of the Surface Water Coalition call proceedings before the Idaho Department of Water Resources in 2005, Idaho Power sought intervention in the process alleging many of the same rights of participation that the parties seeking intervention in this License protest claim. The Department denied Idaho Power's intervention in that process on two occasions. Importantly the State Agency Ground Water User's argued in opposition to Idaho Power's claims that the surface water coalition call proceedings could effect "its vested water rights" by alleging that Idaho Power was situated the same as "every user of Snake River water downstream of Milner, and that therefore "Idaho Power was but a bystander to the SWC's rights and has no standing regarding them." On that basis the Department found that Idaho Power did not have a direct and substantial interest in the proceedings, and that the Company's interest in the call proceedings was already adequately represented by the Surface Water Coalition.

The same is true of the ground water and irrigation districts seeking intervention in this case. Since any water right, be it for ground water, surface water, or storage pursuant to the terms of the CAMP is susceptible of being used for ground water recharge efforts in some capacity, then the parties seeking intervention in this case have no greater interest in these proceedings than any other junior water right holder above Milner dam. As agreed to by the Department in 1987, the Canal Companies' water right was subordinated to all water rights for beneficial use, except recharge and hydropower. Accordingly, even if the condition unlawfully removed by the Director is reversed on appeal, any water rights held by the intervenors that are junior to the Canal Companies' water right are protected. The only rights that would be subordinated would be rights to the Snake River for "recharge" purposes junior to 1977, which none of the intervenors' hold. The only permits to develop "recharge" water rights that fall into that category are held by IWRB. If the Board feels that such a condition would aggrieve its

permits to develop junior “recharge” water rights, the Board could seek to intervene. Simply stated, the intervenors have no basis to raise the Board’s water right as a reason to participate in this matter.

Moreover, in its Final Order issuing the Petitioner’s License for hydropower at Milner Dam the Department explained in great detail its policies and reasons for issuing the subordination clause in the License. The Department obviously will be present and representing its position regarding the subordination. The Department’s position and that of the parties seeking intervention do not conflict and appear to overlap entirely. Therefore, as the parties seeking intervention’s interests are already adequately represented in this Petitioner’s protest, then intervention is inappropriate pursuant to IDAPA 37.01.01.353.

IDAPA rule 37.01.01.353 also states that intervention is inappropriate where the intervenors’ interests will unduly broaden the issues in the administrative action. Here, there is a substantial danger that allowing these parties seeking intervention into the protest process will unduly broaden the issues. Most of the parties seeking intervention in this process are already participants in SRBA sub-case no. 00-92023 dealing with the litigation between Idaho Power Company and the State of Idaho relating to the Swan Falls Agreement. Presently, the SRBA court is deliberating on the matter of whether or not Idaho Power Company subordinated its water rights to subsequent upstream beneficial uses, which the State and the parties seeking intervention in this action have alleged include ground water recharge. It is substantially likely that the parties seeking intervention in this action will conflate the matter being protested by the Petitioners in this administrative action with the issues presently before the SRBA court, and unduly broaden the issues in this administrative action. Such an action would amount to “forum shopping” and would unduly broaden the scope of this water right appeal between the Canal

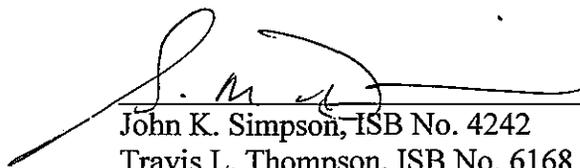
Companies and IDWR. For this additional reason, allowing the parties seeking intervention to participate in the Petitioner's protest action is inappropriate.

CONCLUSION

The parties seeking intervention in this action have no more direct and substantial interest in this protest proceeding than any other junior water right holder above Milner Dam. Whatever interest they do claim in preserving the possibility that any water rights they hold may be used for ground water recharge is already adequately represented by the participants in the administrative action. Further, because of their participation in the Swan Falls proceedings before the SRBA court addressing the status of ground water recharge as a beneficial use, allowing these parties to intervene runs the risk of unduly broadening the issues to be addressed in this administrative action. For these reasons, Petitioners request that the Petitions to Intervene be denied.

Dated this 30th day of January, 2009

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of January, 2009, I served a true and correct copy of the foregoing document, **RESPONSE IN OPPOSITION TO PETITIONS TO INTERVENE**, upon the following persons via the method indication below:

Director David K. Tuthill, Jr.
Idaho Department of Water Resources
322 E. Front St.
Boise, Idaho 83720-0098

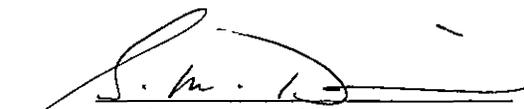
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