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DEPARTMENT OF
WATER RESOURCES

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BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF LICENSING WATER
RIGHT PERMIT NO. 01-7011 IN THE
NAME OF TWIN FALLS CANAL
COMPANY AND NORTH SIDE CANAL
COMPANY

PETITION TO INTERVENE

Mud Lake Water Users, Independent Water Users, Jefferson Canal Company, Montevieu Canal Company, Producer's Canal Company, and Fremont-Madison Irrigation District (collectively, the "Upper Snake Water Users"), by and through counsel, hereby petition to intervene in the above-captioned proceeding pursuant to the Department's *Order Designating Contested Case and Appointing Hearing Officer* (November 12, 2008) and Rules 350 through 354 of the Rules of Procedure of the Idaho Department of Water Resources (IDAPA 37.01.01.350-354).

The Department's Rules of Procedure provide that "[p]ersons not applicants or claimants or appellants, petitioners, complainants, protestants, or respondents to a proceeding who claim a direct and substantial interest in the proceeding may petition for an order from the presiding officer

granting intervention to become a party, if a formal hearing is required by statute to be held in the proceeding.” IDAPA 37.01.01.350. The petition must be filed “at least fourteen (14) days before the date set for the formal hearing, or by the date of the prehearing conference, whichever is earlier, unless a different time is provided by order or notice.” *Id.* at 37.01.01.352. A timely-filed petition for intervene shall be granted if the petition “shows direct and substantial interest in any part of the subject matter of a proceeding and does not unduly broaden the issues, ... unless the applicant's interest is adequately represented by existing parties.” *Id.* at 37.01.01.353.

Mud Lake Water Users, Independent Water Users, Jefferson Canal Company, Montevieu Canal Company, and Producer’s Canal Company are all organized canal companies existing under the laws of the State of Idaho, which exist in Jefferson County, Idaho. These companies possess water rights which authorize the diversion and beneficial use of ground water for irrigation and other purposes, which is used by the numerous members of these companies. Each has a substantial interest in preserving and enhancing ground water availability under their water rights, which includes ground water recharge. Additionally, Mud Lake Water Users possesses 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. This permit is awaiting the issuance of a license.

Fremont-Madison Irrigation District (“Fremont-Madison”) is an irrigation district duly organized and existing under the laws of the State of Idaho, Title 43, Idaho Code, with its principal office in St. Anthony, Fremont County, Idaho. Fremont-Madison owns storage rights to the waters of the Snake River, which it stores in Island Park Reservoir. Fremont-Madison has a substantial interest in ground water recharge, and is currently participating in a pilot recharge project near St. Anthony, Idaho, wherein Fremont-Madison has donated 5,000 acre-feet to be delivered to an area

known as Quail Lake for recharge purposes. The recharge is currently being monitored by the Idaho Water Resources Research Institute. Information regarding this project is available from Fremont-Madison, or from the Department.

The Upper Snake Water Users represent numerous irrigators, municipalities, and commercial and industrial entities operating within the State of Idaho. They are all owners of water rights that divert from sources that are tributary to reaches of the Snake River upstream from Milner Dam. Their water rights have priority dates both senior and junior in priority to the hydropower water right that is the subject of this proceeding (March 30, 1977). As set forth above, the Upper Snake Water Users have a substantial interest in future water use and development upstream from Milner Dam, particularly for recharge purposes.

The Water Right that is the subject of this case, No. 01-7011, issued by the Department on October 20, 2008, includes various conditions, including that the water right shall be subordinate to “all subsequent upstream depletionary uses, other than hydropower....”¹ (Water Right No. 01-7011, Condition No. 1.) This condition prevents Twin Falls Canal Company (TFCC) and North Side Canal Company (NSCC) from curtailing junior-priority water rights, including many of the Upper Snake Water Users, in order to increase the supply of water for their hydropower facility at Milner Dam. Additionally, the condition also assures that the water right will not be wielded by TFCC and NSCC to destroy important efforts to recharge the East Snake Plain Aquifer (ESPA).

TFCC and NSCC filed a *Protest and Petition for Hearing* on Nov. 4, 2008, seeking to have certain of the conditions in Water Right No. 01-7011 amended or removed entirely, including the subordination condition involving groundwater recharge. This could potentially upend current and

¹ Water Right No. 01-7011, Condition No. 1.

future recharge of the ESPA—now recognized as a central component to sustaining the viability of both surface and ground water rights that are hydraulically connected to the ESPA.

In the recently issued draft Comprehensive Aquifer Management Plan (CAMP) presented by the Idaho Water Resource Board, which is currently open for public comment, the plan calls for managed recharge of the ESPA. Specifically, the Plan calls for the following:

- Implement 80 kaf Annual Average over 5 years
 - 20 kaf of recharge above Blackfoot on the Egin Bench including both fall and spring recharge efforts. Implement a fall 2008 recharge pilot project using storage water based on Committee of Nine approval and with consideration of Henry's Fork winter flows.
 - 30 kaf recharge above American Falls on Jensen Grove, Aberdeen Springfield Canal, and New Sweden systems, and with consideration of South Fork River springtime flows.²

Managed recharge is clearly a crucial component of the CAMP, and the removal of the subordination condition as requested by TFCC and NSCC would fatally impact recharge efforts on the ESPA.

The Upper Snake Water Users have a direct and substantial interest in supporting and defending the conditions of Water Right No. 01-7011 as issued by the Department. As discussed above, Mud Lake Water Users possesses a yet-to-be licensed permit for recharge that would be directly impacted in the subordination condition challenged by TFCC and NSCC is removed and Fremont-Madison is currently participating in a managed recharge effort that could be impacted in the subordination condition is removed. The Upper Snake Water Users are in the best position to represent their interests and to know and understand the specific impacts that would result to their water rights and recharge efforts if TFCC and NSCC were successful in changing the conditions of

² See *Draft Comprehensive Aquifer Management Plan*, November 6, 2008, at 23. The plan is available at: http://www.idwr.idaho.gov/ESPAPlan/ESPA_CAMP_Plan/FINALESPADRAFTPLAN11-12-08.pdf

Water Right No. 01-7011. Indeed, the Upper Snake Water Users previously participated as *amicus curiae* in a district court action brought by TFCC and NSCC in relation to Water Right No. 01-7011. The Upper Snake Water Users argued that the State of Idaho's motion to dismiss should be granted, which the court eventually did.³

Now that the license for this water right has been issued and challenged, the Upper Snake Water Users' are seeking to intervene before the contested case on this matter to represent their direct and substantial interests in this matter. The Upper Snake Water Users do not intend to introduce any additional issues in this matter, but only seek to protect the currently-imposed conditions. Therefore, the Upper Snake Water Users will not unduly broaden the issues before the hearing officer. Additionally, there is no party who adequately represents the Upper Snake Water users that is currently a party to this proceeding.

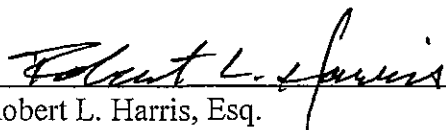
Because no formal hearing or prehearing conference has been yet established in this matter, the Upper Snake Water Users' Petition to Intervene is timely as it is being filed more than fourteen days before the date of the formal hearing or prehearing conference, as required by IDAPA 37.01.01.352.

Additionally, in the Department's *Order Designating Contested Case and Appointing Hearing Officer* in this matter, it specifically states that "any petition for intervention in this proceeding shall be considered only if the persons or entities seeking intervention agree to accept the appointed hearing officer." The Upper Snake Water Users hereby accept the appointment of Gerald F. Schroeder as the hearing officer in this matter.

³ The case was numbered CV-2007-1093.

In sum, the Upper Snake Water Users meet all of the standards and requirements imposed by the Department's Rules and Orders, and therefore respectfully request an order granting their intervention in this matter.

DATED this 4th day of December, 2008.



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CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, a true and correct copy thereof on this 4th day of December, 2008.

DOCUMENT SERVED: PETITION TO INTERVENE

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