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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	**MEMORANDUM IN SUPPORTOF UPPER SNAKE WATER USERS' AND GROUND WATER DISTRICTS' MOTION FOR SUMMARY JUDGMENT**

Mud Lake Water Users, Independent Water Users, Jefferson Canal Company, Monteview Canal Company, Producer's Canal Company, and Fremont-Madison Irrigation District (collectively, the "Upper Snake Water Users"), and Aberdeen-American Falls Ground Water District, Bingham Ground Water District, and Bonneville-Jefferson Ground Water District (collectively, the "Ground Water Districts"), acting for and in behalf of their member water users, submit this *Memorandum in Support of Upper Snake Water Users' and Ground Water Districts' Motion for Summary Judgment.*

I. INTRODUCTION

The licensing of Water Right No. 01-7011 (the "Milner License") is the subject of this matter before the hearing officer. The Milner License was issued by the Idaho Department of Water Resources ("IDWR" or "Department") to the permit holders–Twin Falls Canal Company and North Side Canal Company (the "Canal Companies")–on October 20, 2008. The *Final Order* licensing the permit for Water Right No. 01-7011 (the "Milner Permit") included conditions which the Canal Companies objected to on November 4, 2008.

One of the conditions included by IDWR that is of substantial import to the Upper Snake Water Users and the Ground Water Districts is Condition No. 1:

> 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 of Idaho that are initiated later in time than the priority of this 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.[1]

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1 *Final Order* at 14-15.

Condition No. 1 embodies the principle of "zero minimum flow at Milner," a principle entrenched in the water policy and administration of water in the eastern Snake Plain for decades. The "zero minimum flow" principle is as fundamental as the prior appropriation doctrine itself in eastern and southern Idaho. This principle has been in place at least since the early part of the twentieth century, is specifically incorporated into the first and every subsequent State Water Plan, is part of the Swan Falls Agreement, has been codified in Idaho Code § 42-203B(2), and, by statute, must be considered by the Director of IDWR when issuing water right licenses.

The Canal Companies complain that their preferred version of Condition No. 1, which was negotiated behind closed doors without public involvement or input, is binding on the Department and the public. They assert that the Milner License must include their condition "[i]n the form agreed upon between the parties."[2] In an effort to further their hydropower interests, the Canal Companies would have the hearing officer believe that they have a vested right to negotiate away the bedrock zero minimum flow principle with IDWR, without public input, behind closed doors, and in violation of Idaho law.

For the reasons set forth below, the Milner License was necessarily, appropriately, and lawfully conditioned by the Director. Condition No. 1 should remain in the Milner License as set forth in the *Final Order*, and summary judgment on this issue should be granted.

II. STATEMENT OF UNDISPUTED FACTS

The Upper Snake Water Users and Ground Water Districts agree with and incorporate herein by reference the facts and procedural background set forth in the *Memorandum in Support of IWRB's Motion for Summary Judgment* on file herein.

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2 *Protest and Petition for Hearing*, at 2 (¶4).

III. ARGUMENT

A. Legal Standards

Summary judgment is proper when "the pleadings, depositions, admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[3] "All disputed facts are to be construed liberally in favor of the non-moving party, and all reasonable inferences that can be drawn from the records are to be drawn in favor of the non-moving party."[4] Yet, to withstand a motion for summary judgment, the opposing party's case must be anchored in something more solid than speculation. A mere scintilla of evidence is insufficient to create a genuine issue of material fact.

B. A Water Right Permit is Not a Perfected Water Right, But An Inchoate Right That May Ripen Into a Real Property Right Upon Issuance of a License. Accordingly, the Director has Authority to Condition a Water Right Upon Issuance of a License Consistent with Idaho Law.

A water right permit is personal property and not real property. Indeed, a water right permit is not a "perfected" water right, but has the potential to become one:

> A permit from the state engineer is not a water right, and this court has held that it is not an appropriation of the public waters of the state and is not real property. A permit merely expresses the consent of the state that the holder may acquire a water right, and if the holder of the permit substantially complies with all the requirements of the statute, to and including the actual application of the water to the beneficial use specified in the application for the permit, he may become the owner of a water right, the priority of which will relate back to the date of the permit; but until all the requirements have been complied with, including the actual application of the water, the holder of the permit has nothing but an inchoate right.[5]

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3 I.R.C.P. 56(c).

4 *Robert Comstock LLC v. Keybank Nat'l Assn.*, 142 Idaho 568, 130 P.3d 1106 (2006).

5 *Basinger v. Taylor*, 30 Idaho 289, ___, 164 P. 522, 524 (1917).

Until a license is issued, a permit is "merely a consent given by the state to construct and acquire real property."[6] In other words, a permit holder has an inchoate right "which may ripen into a vested interest following proper statutory adherence."[7] There is no dispute that prior to the *Final Order*, the Milner License was a water right permit only. Thus, the Canal Companies had nothing more than an inchoate right prior to the issuance of the *Final Order*.

As explained in *Basinger, supra,* prior to the issuance of a license, there is an additional step that must be taken by the Director. The Director must determine that the license fully complies with Idaho law, and if not, condition the license accordingly.

This principle has already been established in a related proceeding for the Milner License. Prior to the issuance of the *Final Order* for the Milner License, the Canal Companies attempted to perform an end-run around the Director by filing a mandamus action in 2007 in Judge Melanson's district court in Jerome County. The crux of the Canal Companies' argument was that once a permit was issued, and proof of beneficial use submitted therefore, the remaining duty of the Director to issue the license was ministerial only.[8] In rejecting the Canal Companies' argument, and granting the Department's Motion to Dismiss, Judge Melanson explained:

> Idaho Code § 42-219(1) requires an intermediate step prior to the issuance of the license. After all evidence is filed in relation to proof of beneficial use, IDWR is then charged with "carefully examining the same, *and if the department is satisfied*

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6 *Hardy v. Higginson*, 123 Idaho 485, 490, 849 P.2d 946, 951 (1993).

7 *Id.* at 491, 849 P.2d at 952.

8 *Order Granting Motion to Dismiss Petition for Writ of Mandate*, Case No. CV-2007-1093, Jerome County, January 25, 2008, at 5 ("The Petitioners argue that there are no more administrative remedies available because Idaho Code § 42-219 requires that the [Respondents] perform the ministerial function of issing the license after proof of beneficial use has been submitted."). This decision is attached to the *Affidavit of Luke H. Marchant In Support of Upper Snake Water Users Motion for Summary Judgment* (hereinafter, "Marchant Affidavit") as Exhibit A.

> *that the law has been fully complied with* . . . the department shall issue . . . a license confirming such use." I.C. § 42-219(1). The statute then provides that if IDWR finds that the applicant has not complied with the law or the conditions of the permit "it may issue a license for that portion of the use which is in accordance with the permit or *may* refuse issuance of the license and void the permit." I.C. § 42-219(8). **Because IDWR has some level of "discretion" in conjunction with making the compliance determination prior to issuing the license the duty of issuing the license is not a simple ministerial act.**[9] At this stage, IDWR has not made such a determination with respect to the form of the subordination language that should be included in the license despite the November 18, 1987, agreement between the Petitioner and IDWR. Simply because there is a prior agreement in place with respect to the form of the subordination remark does not make the duty to issue the license ministerial. If a determination is made contrary to the terms of the agreement then the issue of the effect and enforceability of the agreement can still be raised with the Director and through judicial review if necessary.[10]

Judge Melanson recognized the need for the license to be issued in accordance with Idaho law, and provided additional support for his decision with the Idaho Supreme Court case of *Cantlin v. Carter*:

> In *Cantlin v. Carter*, 88 Idaho 179, 397 P.2d 761 (1964), the state engineer approved the applicant's permit application. Eighteen months later the applicant completed the diversion works and submitted proof of completion. The applicant then sought to file proof of application of water to beneficial use. In the meantime, the state engineer received protests regarding the issuance of the license for the water right. As a result, the state engineer issued an order denying the proof submitted by the applicant and cancelled the permit on the basis that there was no available water for appropriation. *Id.* at 182, 397 P.2d at 764. The action of the state engineer was upheld by the Idaho Supreme Court. *Id.* at 187, 397 P.2d at 769.[11]

Finally, Judge Melanson discussed in detailed fashion an SRBA case dealing with the licensing of a hydropower water right:

> A similar issue also arose in the context of the SRBA. In ***Memorandum Decision and Order on Challenge; Order on State of Idaho's Motion to Dismiss Claimant's***

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9 *Id.* at 10 (italics in original) (bold emphasis added).

10 *Id.*

11 *Id.*

Notice of Challenge (Subcase 36-08099, River Grove Farms)(Jan 11, 2000) (River Grove Farms), an applicant filed a permit application for a hydropower right in 1982. The permit application was approved in 1983. The permit did not include a subordination remark for hydropower. Construction of the diversion works, the application of the water to beneficial use and the beneficial use examination were completed in 1985. The applicant received a letter from IDWR indicating that the licensing examination had been completed but that it would be awhile before the license was issued because of the pending Swan Falls dispute. Approximately six years elapsed before the license was ultimately issued in 1992. In the meantime the Idaho legislature enacted Idaho Code § 42-203B(6) authorizing IDWR to subordinate hydropower rights to future upstream consumptive uses. When the license was issued it included a subordination remark. The applicant failed to contest the inclusion of the remark after the license was issued but objected to the remark in the SRBA proceedings. One of the many arguments raised was that the water right vested at the time the water was applied to beneficial use and not upon the issuance of the license. Therefore I.C. § 42-203B(6) could not be retroactively applied to diminish the scope of the vested hydropower right. In essence the issuance of the license is more of a formality.

The Hon. R. Barry Wood, then presiding judge of the SRBA, disagreed. Judge Wood held that the water right vested at the time the license was issued. The Court relied on the holding in *Cantlin v. Carter*, the statutory scheme itself and various other cases holding that a water right is inchoate until the license is issued.[12] Judge Wood ruled:

> River Grove's assertion that a water right vests upon application to beneficial use, and not upon the issuance of the license by IDWR, may well be a correct statement of the law as to water rights made under the constitutional method (versus the permit method) and made prior to the 1971 statutory amendments making the permit process the exclusive method of appropriation. To the extent that the cases cited by River Grove correctly state the law as it existed prior to 1971, this aspect of the cases was legally altered by the legislature upon enactment of the aforementioned statutory amendments. Furthermore, the cases cited by River Grove are limited in that water

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12 The following cases were cited for the proposition that a right to use the waters of this state remains inchoate until a license is actually issued by IDWR. *Hardy v. Higginson*, 123 Idaho 485 (1993)(Director can properly impose conditions on request to amend water permit, because permittee only has an inchoate right, not a vested right); *Hidden Springs Trout Ranch v. Allred*, 102 Idaho 623 (1981)(Director could consider the "local public interest," even though authority to do so was not granted by legislature until after applicant had applied for permit, because vesting of applicant's right was "contingent upon future statutory adherence and issuance of a license"); *Big Wood Canal Co. v. Chapman*, 45 Idaho 380 (1927)(statutory amendments, which increased the time allowable to submit proof of application to beneficial use, were not unconstitutionally retroactive, because permittee has an inchoate right, not a complete appropriation). (Footnote in original)

right was acquired solely under the permit system . . . [I]t is clear that the legislature intended the issuance of the license to mark the point at which a water right becomes vested.

. . .

In 1971 the legislature amended I.C. § 42-103 and 42-201 to the effect that surface water rights could thereafter only be acquired by following the application, permit, and license procedures set forth in Title 42 of the Idaho Code. Chapter 2 of Title 42 sets forth the steps that must be completed before a water right comes into existence. Briefly, one who wishes to appropriate the unappropriated waters of this state must first make application to IDWR for a permit, and include certain information such as a source, point of diversion, purpose of use, etc. I.C. § 42-202. IDWR then publishes notice of the proposed diversion, inviting interested parties to protest the application. I.C. § 42-203A(1)-(4). IDWR then considers the application, protest or not, and makes various findings as to whether (a) the proposed diversion will reduce the quantity of water for existing water rights, (b) the water supply is sufficient for the proposed use, (c) the application is made in good faith, (d) the applicant has sufficient financial resources, (e) the proposal will not conflict with the local public interest, and (f) the proposal is not contrary to conservation of water resources. I.C. § 42-203A(5). Depending upon these findings, IDWR can approve, partially approve, approve upon conditions, or reject the application. *Id.* Upon approval, the applicant has a specified period of time to construct the proposed diversion works. I.C. § 42-204. Once the works are completed, the applicant must file proof of completion with IDWR, and IDWR will conduct a field examination thereof. I.C. § 42-217. IDWR is to then carefully examine the evidence proving beneficial use, and if satisfied, issues a license confirming the water right. I.C. § 42-219. If IDWR finds that the applicant has not fully complied with the law and the conditions of the permit, **IDWR may refuse to issue the license**. I.C. § 42-219(6). Once the license is issued, I.C. § 42-220 states that "[s]uch license shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein, and shall be prima facie evidence as to such right . . .." It is clear from this statutory scheme that it is the intent of the legislature that all of the steps – **including issuance of the license** – be completed before the water right vests, and until such time the right to use of water remains an inchoate right. Because I.C. § 42-219(6) gives IDWR the responsibility to find the facts as to whether the permit conditions were complied with, it is untenable to assert

> that a water right may vest prior to this step in the permit and licensing process.

River Grove Farms at 24-25. Although the decision was never appealed from, this Court finds it to be on point and persuasive.[13]

After the above thorough discussion from Judge Melanson, he granted IDWR's Motion to Dismiss, holding as follows:

> This Court holds that following the beneficial use examination the issuance of the license is not a ministerial act. **The Department must first make a determination whether the use complies with the law and the terms of the permit.**[14]

The question for the hearing officer in this matter therefore becomes whether the Director correctly determined whether the permit's use (1) complies with Idaho law, and (2) that the Canal Companies complied with the terms of the permit.[15] As set forth below, the Director correctly recognized the law, and appropriately amended the secretly negotiated Milner Permit condition to comply with Idaho law.

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13 Marchant Affidavit, Exhibit A at 10-12 (emphases in original).

14 Marchant Affidavit, Exhibit A at 12 (emphases added).

15 There is another recent district court case from the 3rd Judicial District which held that IDWR did not have the authority to condition a hydropower license in the Hells Canyon project. See *Idaho Power Company v. Idaho Department of Water Resources, In the Matter of Licensed Water Right No. 03-7018 in the Name of Idaho Power Company*, Case No. CV-2009-1883, Jan. 14, 2010, *Memorandum Decision and Order on Appeal.* However, this license was not subject to the zero flow at Milner principle, and there are further factual and legal distinctions contained in the decision.

C. The Director Correctly Recognized Idaho Law in the Licensing of the Milner License, and Accordingly Conditioned the Milner License to Comply With Idaho Law.

Because the Director is required to have his licensing determinations made in accordance with Idaho law,[16] the question then becomes what is the Idaho law the Director must consider?

First, Article XV, § 3 of the Idaho Constitution provides that "[t]he right to divert and appropriate the waters of any natural stream to beneficial uses, shall never be denied, **except that the state may regulate the limit and use thereof for power purposes**."[17] Thus, the Director has constitutional authority to condition hydropower licenses.

Secondly, there are several statutory provisions that directly address hydropower water rights, which are found at Idaho Code §§ 42-203B through C. One of these provisions, Idaho Code § 42-203B(6), provides:

> The director shall have the authority to subordinate the rights granted in a permit or license for power purposes to **subsequent upstream beneficial depletionary uses**. A subordinated water right for power use does not give rise to any claim against, or right to interfere with, the holder of subsequent upstream rights established pursuant to state law. The director shall also have the authority to limit a permit or license for power purposes to a specific term.[18]

This statutory provision was enacted effective July 1, 1985, and the only limit to its application was that it was not to be applied "to licenses which have already been issued as of the effective date [July

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16 Idaho Code § 42-219(1): Upon receipt by the department of water resources of all the evidence in relation to such final proof, it shall be the duty of the department to carefully examine the same, and if the department is satisfied **that the law has been fully complied** with and that the water is being used at the place claimed and for the purpose for which it was originally intended, the department shall issue to such user or users a license confirming such use. (emphasis added). See also *Final Order* at 7.

17 Emphasis added.

18 Idaho Code § 42-203B(6) (emphasis added).

1, 1985] of this act."[19] Thus, this statutory provision was in full force and effect in when the Department approved the Canal Companies' second (in 1987), third (in 1990), and fourth (in 1992) requests for extension of time to submit proof of beneficial use, and when proof of beneficial use was finally submitted by the Canal Companies on November 1, 1993.[20] Thus, the Director had clear statutory authority to subordinate the Milner License to subsequent upstream beneficial depletionary uses at the time proof of beneficial use was submitted. Such upstream beneficial depletionary uses include ground water recharge, a fact not challenged by the Canal Companies in their *Protest and Petition for Hearing.*[21]

Thirdly, in addition to the Director's statutory ability to subordinate hydropower to "subsequent upstream beneficial uses" discussed above, the Director is further required to make his licensing determinations consistent with the Idaho State Water Plan pursuant to Idaho Code § 42-1734B(4):

> All state agencies shall exercise their duties in a manner consistent with the comprehensive state water plan. These duties include but are not limited to the issuance of permits, licenses, and certifications; provided, however, that nothing in this chapter shall be construed to affect the authority of any state agency with respect to activities not prohibited by the comprehensive state water plan.

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19 Idaho Code § 42-203B(6).

20 *Final Order* at 2.

21 See *Final Order* at 11. The Canal Companies' *Protest and Petition for Hearing* challenged the inclusion of Condition No. 1, (*Protest and Petition for Hearing* at 1-3), but did not challenge the Director's determination that "[t]he reference to 'subsequent upstream beneficial depletionary uses for managed recharge which may deplete flows in the Snake River at Milner Dam." *Final Order* at 14.

The Idaho State Water Plan (first adopted in 1977) has always provided for a zero flow at Milner. The current Idaho State Water Plan was adopted in December 1996.[22] Of significant importance is Policy 5B of that Plan, which contains the zero minimum flow at Milner principle: "[t]he exercise of water rights above Milner Dam has and may reduce the flow to zero."[23]

The zero minimum flow at Milner Dam was recently challenged by the Canal Companies in the SRBA in Subcase No. 00-92002GP et al. In that subcase, the State of Idaho filed with the SRBA court a *Memorandum in Support of the State of Idaho's Motion for Partial Summary Judgment RE: Milner Zero Minimum Flow*.[24] Since the Canal Companies' recollection of the history and development of the zero minimum flow at Milner had apparently faded, the State provided extensive historical background and documentation to refresh the Canal Companies' memory. This brief contains the best summary of the zero minimum flow principle, its development, importance, and meaning, and is incorporated herein by reference.

While it may appear that the zero minimum flow at Milner principle is self-explanatory, the Canal Companies seek a Milner License that would *not* maintain a zero minimum flow at Milner Dam. Had the Director not included Condition No. 1 in the Milner License, he would have violated his mandate under Idaho Code § 1734B(4). The zero minimum flow at Milner *is* Idaho law. This fact was clearly recognized by the Director:

> Much of the time in most years, the Milner Permit subordination conditions would require flows arising upstream of Milner Dam and otherwise available for recharge to instead be delivered to the Snake River downstream from Milner Dam. The result

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22 The current state water plan is found at: http://www.idwr.idaho.gov/waterboard/WaterPlanning/StateWaterPlanning/PDFs/SWP1996.pdf

23 *See also* 1997 Idaho Session Laws 71, attached to the Marchant Affidavit as Exhibit B.

24 Marchant Affidavit at Exhibit C.

> is that water rights for recharge above Milner Dam would not be allowed to divert unless water right no. 01-7011 was first being satisfied, requiring a flow of 5,714 cfs to be available for diversion around Milner Dam for delivery to the downstream power plant on the Snake River below the dam. Thus, including the subordination condition of the Milner Permit in the license for water right no. 01-7011 **would be contrary** to the plain language of section 1 of chapter 38 of the 1997 Idaho Session Laws, and **would not be consistent** with Policy 5B of the Idaho State Water Plan.[25]

Lastly, the Director has an obligation to assure that the Milner License complies with Idaho Code § 43-203B(2), which provides that in terms of administration of water rights in the Snake river, "no portion of the waters of the Snake river or surface or ground water tributary to the Snake river upstream from Milner dam should be considered." Without Condition No. 1 of the Milner License, the Canal Companies could (and apparently would) demand that flows arising above Milner Dam be delivered to the Canal Companies' and Idaho Power's hydropower facility located below Milner Dam. This type of water administration would run afoul of the mandate found at Idaho Code § 43-203B(2), which the Director correctly recognized:

> The subordination condition in the Milner Permit would effectivley bridge the statutory divide the Legislature expressly created in Idaho Code § 42-203B(2), and undermine the Legislature's unambiguous directive that the Snake River upstream from Milner Dam and the Snake River downstream from Milner Dam be administered as separate sources and systems.[26]

It is clear that Condition No. 1 of the Milner License is consistent with Idaho law, and is therefore appropriately included as one of its elements by the Director. Any argument from the Canal Companies otherwise would ignore the plain language of the statutes discussed above and the Idaho State Water Plan.

D. The Canal Companies Have No Contractual Right to Require that Illegal Conditions Be Included in the Milner License.

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25 *Final Order* at 10.

26 *Id.*

Because Condition No. 1 of the Milner License complies with Idaho law, the question now becomes whether the Canal Companies' agreement with IDWR personnel to only partially subordinate the Milner Permit is binding and enforceable such that Idaho law can be ignored. The Canal Companies object to Condition No. 1 of the Milner License because "[t]his material change is in contravention of the parties' agreement. . . ."[27] It is their position that IDWR and the Canal Companies are entitled to negotiate non-public sweetheart deals for water right conditions that violate Idaho law, and thereafter require that such illegal conditions to be included in the licensing of that water right. Not only does such a claim violate notions of fundamental fairness, but it is contrary to established Idaho law.

In Idaho, whether a contract is illegal is a question of law for the court to determine from all the facts and circumstances of each case.[28] An illegal contract is one that rests on illegal consideration consisting of any act or forbearance which is contrary to law or public policy.[29] The general rule is that a contract "which is made for the purpose of furthering any matter or thing prohibited by statute . . . is void."[30] This rule applies to every contract that authorizes an action that is prohibited by statute. The Idaho Court of Appeals has explained that "where a statute intends to

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27 *Protest and Petition for Hearing* at 2 (¶4).

28 *Trees v. Kersey*, 138 Idaho 3, 6-7, 56 P.3d 765, 768-69 (Idaho 2002) (citations omitted).

29 *Id.*

30 *Id.* (quoting *Kunz v. Lobo Lodge, Inc.*, 133 Idaho 608, 611, 990 P.2d 1219, 1222 (Ct.App.1999) (quoting *Porter v. Canyon County Farmers' Mut. Fire Ins. Co.*, 45 Idaho 522, 525, 263 P. 632, 633 (1928)).

prohibit an act, it must be held that its violation is illegal, without regard to the reason of the inhibition ... or to the ignorance of the parties as to the prohibiting statute."[31]

As set forth above, Condition No. 1 of the Milner License complies with Idaho constitutional and statutory authorities. In contrast, any iteration of Condition No. 1 that does not totally subordinate the Milner License to upstream depletionary beneficial uses would be in contravention of Idaho law. Since the inside "agreement" that the Canal Companies allured from IDWR personnel was for a condition that contradicts statutory authority and the Idaho State Water Plan, it is not enforceable. At a minimum, the agreement should not be enforced because it was made behind closed doors without public notice or participation, and therefore violates public policy.

Suppose the non-public condition negotiated by the Canal Companies also included a provision that excused the Milner License from complying with the prior appropriation doctrine. Such a condition would clearly be illegal and unenforceable. So too is a condition that seeks to circumvent another pillar of Idaho water law – the long-established zero minimum flow at Milner Dam. The long-established policy of zero minimum flow at Milner Dam is such an ingrained and important principle of Idaho water administration that it is akin to the prior appropriation doctrine itself. While the Canal Companies' attempt to downplay the significance of the Milner zero flow, the inconvenience of extensive written records, recorded hearings, and meeting transcripts creates an obstacle the Canal Companies cannot overcome. Because the Canal Companies' agreement is illegal, it is therefore unenforceable, and does not override the Director's obligation to ensure that water right licenses comply with Idaho law.

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31 *Id.* (quoting 17A Am.Jur.2d *Contracts* § 251 (1991)).

III. CONCLUSION

For the reasons set forth above, summary judgment should be entered in favor of the Upper Snake Water Users and the Ground Water Districts to protect the currently-imposed conditions of Water Right Number 01-7011, which are so critical to the vitality of irrigated agriculture in southern Idaho and to the current and future health and management of the ESPA.

DATED this 12th day of February, 2010.

Robert L. Harris

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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 12th day of February, 2010.

DOCUMENT SERVED: MEMORANDUM IN SUPPORT OF UPPER SNAKE WATER USERS AND GROUND WATER DISTRICTS' MOTION FOR SUMMARY JUDGMENT

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