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	**AMENDED FINAL ORDER**

I. INTRODUCTION

In 2008, the former Director of the Idaho Department of Water Resources issued a license for water right no. 01-7011, a water right for hydropower use at the Milner hydropower project on the Snake River. Three conditions of the license limited elements of the water right: a condition subordinating the water right to all subsequent upstream beneficial depletionary uses other than hydropower, a condition limiting the term of the license, and a condition limiting the volume of water that can be diverted. *Final Order* at 14-15 (Oct. 20. 2008). The holders of the water right, the Twin Falls Canal Company and the North Side Canal Company ("the Canal Companies"), objected to the conditions required by the *Final Order* and requested a hearing.

After conducting a hearing, the Hearing Officer recommended that the subordination condition of the *Final Order* be included in the license for water right no. 01-7011. *Opinion And Order Granting Motions For Summary Judgment And Recommendation* (Apr. 29, 2010) ("*First Recommendation*"). However, the Hearing Officer recommended that the license should not include the term condition or the volumetric limitation of the *Final Order. Findings Of Fact, Conclusions Of Law And Recommendation* (Jul. 30, 2010) ("*Second Recommendation*").

The interim director of the Idaho Department of Water Resources ("the Director") reviewed the record and the Hearing Officer's recommendations, and now issues this *Amended Final Order.* For the reasons discussed herein, the Director accepts the Hearing Officer's recommendations as to the subordination condition and the volumetric limitation but not as to the term condition. The Director orders that the license for water right no. 01-7011 shall include the subordination condition and the term condition of the *Final Order.* The Director also orders that the volume limitation in the *Final Order* be amended to authorize full diversion of the licensed flow rate year-round if the flow rate is available.

II. FINDINGS OF FACT

Procedural Background

1. The detailed procedural background of this matter as set forth in the *Final Order*, the *First Recommendation*, and the *Second Recommendation* is incorporated into this order as findings of fact and will not be recited in full here. The other factual findings in the *Final Order*, the *First Recommendation* and the *Second Recommendation* also are incorporated into this order as findings of fact, unless modified herein or inconsistent with the facts as recited herein.

2. The permit for water right no. 01-7011 ("Milner Permit"), as originally issued in 1977, did not include a subordination condition, a term condition or a limitation on the annual volume diverted. *Final Order* at 1 ¶¶ 1-4. However, a subordination condition was added to the permit in 1987 as a condition of the Department's approval of the Canal Companies' second request for an extension of time to provide proof of beneficial use. *First Recommendation* at 14 ¶ 1; *id.* at 16 ¶ 2; *Final Order* at 2 ¶ 6. The subordination condition provided, in relevant part, that the water right was subordinate to "all other rights to the consumptive beneficial use of water, other than hydropower and groundwater recharge, within the Snake River Basin . . . ." *Final Order* at 2 ¶ 6 (emphasis added).

3. The Canal Companies submitted proof of beneficial use for the permit in 1993. *Final Order* at 2 ¶ 9. Subsequently, the Canal Companies requested that the Department issue a license for water right no. 01-7011. In 2006, some water user organizations requested an opportunity to comment on the form of the subordination condition for the license. *Final Order* at 2-3 ¶¶ 10-11. On September 5, 2007, the former Director issued a *Notice of Intent To Issue License* ("*Notice*") stating that the Department was prepared to issue the license and would accept and consider written comments from the Canal Companies and other interested persons or entities on the form of the subordination condition to be included in the license. *Final Order* at 3 ¶ 12.

4. Rather than submitting comments, the Canal Companies filed a mandamus action in the Jerome County District Court seeking an order prohibiting the Director from considering comments submitted pursuant to the *Notice* and compelling the Director to issue a license that conformed to the permit. *Final Order* at 3 ¶¶ 14-15. The Canal Companies also asserted a "takings" claim. *Id.*

5. The District Court dismissed the mandamus action on January 25, 2008. (*Order Granting Motion to Dismiss Petition for Writ of Mandate* (Jan. 25, 2008), *North Side Canal Co., et al v. Tuthill*, (5th Jud. Dist., Jerome Co. Case No. CV 2007-1093) (hereinafter "*Writ Dismissal Order*").

6. The former Director issued the *Final Order* for the licensing of water right 01-7011 on October 20, 2008. In the *Final Order*, the former Director concluded that the form of the subordination condition in the license for water right no. 01-7011 was controlled by provisions of state law and the Idaho State Water Plan. *Final Order* at 7 ¶ 1. The subordination condition required by the *Final Order* did not elevate the senior priority hydropower water right

over later-in-time priority ground water recharge uses, but provided, in relevant part, that water right no. 01-7011 would be subordinate "to all subsequent upstream beneficial depletionary uses, other than hydropower, within the Snake River Basin . . . ." *Final Order* at 14-15 (Condition of Approval no. 1). In contrast to the amended Milner Permit, the license for water right no. 01-7011 subordinated the water right to ground water recharge uses.

7. The *Final Order* also required that the license for water right no. 01-7011 include a term condition providing, in relevant part, that the diversion and use of water under the license would be "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," and that 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." *Final Order* at 15 (Condition of Approval no. 5).

8. The *Final Order* further required that the license for water right no. 01-7011 include a "Diversion Volume" provision limiting the annual diversion volume to 2,390,000 acre-feet. *Final Order* at 14.

9. The Canal Companies objected to the *Final Order*'s subordination condition, term condition, and volumetric limitation. The Canal Companies requested a hearing on their objections and also requested that a Hearing Officer be appointed to preside over the hearing. *Protest and Petition for Hearing* at 1-3 (Nov. 4, 2008).

10. The former Director designated the matter a contested case and appointed Gerald F. Schroeder as Hearing Officer. *Order Designating Contested Case and Appointing Hearing Officer* at 1 (Nov. 13, 2008). The Hearing Officer granted intervention to the Idaho Water Resource Board, a group of water user organizations collectively known as the "Upper Snake Water Users," and to a number of ground water districts ("IGWA").[1] *Order Granting Petitions for Intervention* at 1 (Mar. 27, 2009).

11. The Idaho Water Resource Board, the Upper Snake Water Users, and IGWA moved for summary judgment seeking affirmation of the subordination condition in the *Final Order*. The Hearing Officer granted the summary judgment motions and recommended that the Director proceed in accordance with the *Final Order*. *First Recommendation* at 16-17 ("Conclusions" and "Order and Recommendation").

12. The Canal Companies then moved for clarification arguing that the *First Recommendation* did not resolve their objections to the term condition and the volumetric limitation. *Order Granting Motion For Clarification And Staying Certain Proceedings In Protest Of License No. 01-7011 And Setting Hearing Schedule* at 1-2 (May 26, 2010). The

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[1] The "Upper Snake Water Users" consist of the Mud Lake Water Users, Independent Water Users, Jefferson Canal Company, Monteview Canal Company, Producer's Canal Company and Fremont-Madison Irrigation District. The ground water districts are 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 Ground Water District. "IGWA" refers to the Idaho Ground Water Appropriators, Inc.

Hearing Officer granted the motion and set a hearing schedule for those issues. *Id.* Following the hearing and filing of the Canal Companies' post-hearing brief, the Hearing Officer recommended that the term condition of the *Final Order* be deleted from the license for water right no. 01-7011, and that the volumetric limitation of the *Final Order* be either deleted from the license, or changed to be consistent with the diversion rate. *Second Recommendation* at 10 ¶¶ 1-2.

Recharge

13. Recharge[2] water rights "capture excess water that would otherwise pass beyond the Milner Dam to the Snake River by moving the water onto areas where it will enter the [Eastern Snake Plain] aquifer." *First Recommendation* at 2.

14. Recharge water rights help maintain desirable aquifer levels. *First Recommendation* at 11 ¶ 3. The maintenance of desirable aquifer levels enhances the reliability of the ground water supply for irrigation and municipal uses and aquaculture relying on spring flows. *Id.*

15. By maintaining desirable aquifer levels, recharge water rights create a form of storage to provide water for irrigation and municipal purposes and other possible proprietary uses of the same nature, including enhancing spring flows. *First Recommendation* at 11 ¶ 3. Recharge serves as a method of storing water in the Eastern Snake Plain Aquifer ("ESPA") for use on the Eastern Snake Plain, analogous to holding water in surface reservoirs. *Id.*; *id.* at 16 ¶ 9.

16. Water diverted upstream of Milner Dam for irrigation or recharge purposes sometimes is used on lands that drain to the Snake River downstream from Milner Dam. *First Recommendation* at 4 ¶ 3.

17. If not subordinated to recharge uses, water right no. 01-7011 could require that water be sent past Milner Dam to meet the water right's licensed diversion when such water otherwise could be held in the ESPA by recharge for beneficial use on the Eastern Snake Plain. *First Recommendation* at 16 ¶ 9. If not subordinated to recharge uses, the license for water right no. 01-7011 would interfere with and potentially preclude diversions of water upstream from Milner Dam for recharge of the ESPA much of the time in most years. *Final Order* at 4 ¶ 20; *id.* at 10-11 ¶ 16.

The Milner "Zero Minimum Flow"

18. Milner Dam was constructed in 1905 as a diversion dam and is owned by the Canal Companies, who divert water at the dam for irrigation purposes. Milner dam is located on the Snake River east of Murtaugh, where the geography of the river channel and associated canyon changes dramatically. Above Milner Dam, the Snake River is not deeply entrenched. Consequently, diversion from the river is practical across much of the Eastern Snake Plain.

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[2] For purposes of this order, the terms "recharge," "groundwater recharge," and "aquifer recharge" are used interchangeably.

Below Milner, the Snake River descends into a deep canyon. Diversion of water from the river within the deep canyon below Milner Dam for irrigation is largely impractical. *First Recommendation* at 4 ¶ 2.

19. The reliable natural flow of the Snake River above Milner Dam during the irrigation season was fully appropriated shortly after 1900. Subsequently, there have been significant reclamation projects constructed above Milner Dam to capture non-irrigation season flows and other excess, surplus, flood and high-runoff period waters and hold them in storage for beneficial uses, especially the irrigation of lands above Milner Dam. Some lands geographically below Milner Dam are irrigated by water diverted at Milner Dam, but the water is from sources above Milner Dam. Below Milner Dam, the river is replenished by spring discharges in the canyon and other flows not available for use above the dam. *First Recommendation* at 4 ¶¶ 3-4.

20. As a consequence of the differences in geography and the history of appropriations, the primary use of the water from the Snake River above Milner Dam has been irrigation, while the primary use of the water below Milner Dam has been hydropower production. These differences are the basis of what is frequently termed the "two rivers concept." *See, e.g., Canal Companies' Memorandum In Opposition To Idaho Water Resource Board, Upper Snake River Water Users' And Ground Water Districts' Motions For Summary Judgment* ("*Canal Companies' Summary Judgment Brief*") at 20 (referring to "the two rivers concept"). While this distinction is not absolute, it has played and continues to play a significant role in defining the development of the State's water policy, particularly the so-called "zero minimum flow" policy at Milner Dam. *First Recommendation* at 4 ¶ 4.

21. The Milner "zero minimum flow" refers to the long-established policy of conserving, capturing, and storing above Milner Dam, to the maximum practicable extent, all non-irrigation season flows and other excess, surplus, flood, and runoff waters that otherwise would spill past Milner Dam. An important element or corollary of the Milner "zero minimum flow" is that hydropower uses in the canyon below Milner Dam should not be allowed to establish the right to demand that water be sent past Milner Dam. *First Recommendation* at 4 ¶¶ 2-4; *see also Canal Companies' Summary Judgment Brief* at 22 (quoting Idaho Code § 42-203B(2) and resolution of Water District 1); *Affidavit of Shelley M. Davis In Support Of Canal Companies' Memorandum In Opposition To Idaho Water Resource Board, Upper Snake River Water Users' And Ground Water Districts' Motions For Summary Judgment* ("Davis Aff.") at Exhibit 32; *Affidavit Of Michael C. Orr In Support Of Idaho Water Resource Board's Motion For Summary Judgment* ("Orr Aff.") at Exhibit 16.[3]

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[3] Exhibit 32 of the Davis Aff. consists of examples of partial decrees for certain hydropower water rights that the State of Idaho and Idaho Power Company proposed for entry in the SRBA Consolidated Subcase No. 00-92023 pursuant to the March 25, 2009 "Framework Reaffirming The Swan Falls Settlement." Remarks in the partial decrees provide that for purposes of the determination and administration of the hydropower water rights defined therein, "no portion of the waters of the Snake River or surface or ground water tributary to the Snake River upstream from Milner Dam shall be considered." The history of the Milner "zero minimum flow" policy is discussed on pages 21-48 of Exhibit 16 of the Orr Aff., which is a copy of the *Memorandum In Support Of State Of Idaho's Motion For Partial Summary Judgment Re: Milner Zero Minimum Flow*, filed in the SRBA on October 16, 2009. In that proceeding, the Canal Companies informed the SRBA District Court that they largely agree with the representations made by the State concerning the historical treatment of the Snake River at Milner divide. There is

III. CONCLUSIONS OF LAW

The Idaho Code Requires The Director To Ensure That The License For Water Right No. 01-7011 Complies With State Law And Is Consistent With The Idaho State Water Plan.

1. Paragraphs nos. 1- 21 above are incorporated into the Director's conclusions of law by this reference and made a part of the Director's conclusions of law.

2. The Canal Companies argued to the District Court and to the Hearing Officer that, by issuing the *Notice*, the Director used an unlawful licensing procedure and "re-opened" the Milner Permit to comment. *See, e.g., Petition For Peremptory Writ Of Mandate* ("*Mandamus Petition*") at 16, 18; *Canal Companies Response To Motion To Dismiss* at 2-3, 5, 9, 10-13; *Canal Companies' Summary Judgment Brief* at 4-5, 15, 32-33, 45.[4] The District Court held that "[t]he Notice did not reopen a protest period nor did it give those submitting comments party status," *Writ Dismissal Order* at 9; *see also First Recommendation* at 9 ¶ 1 (stating the District Court had determined that the *Notice* did not "reopen" the proceedings). This holding is binding on the parties, the Hearing Officer, and the Director, and the Hearing Officer determined that issuance of the *Notice* "is not a basis to invalidate the subordination condition." *First Recommendation* at 9 (header for part IV). The Hearing Officer also determined that the Director did not consider the comments submitted pursuant to the *Notice*, *id.* at 9-10 ¶ 2, and therefore the question of "[w]hether the Director should have or should not have allowed comments is moot." *First Recommendation* at 10 ¶ 3; *see also Final Order* at 7 ¶ 1 (" . . . they were not considered by the Director."). The Director adopts the Hearing Officer's rational in this order.

3. Idaho Code § 42-219 applies in licensing water right no. 01-7011, and provides that after the Department has received all evidence relating to proof of beneficial use,

> 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.

Idaho Code § 42-219(1).

4. The Canal Companies argued to the District Court and the Hearing Officer that once the Canal Companies submitted proof of beneficial use, Idaho Code § 42-219(1) imposed a ministerial duty on the Director to issue a license for water right no. 01-7011 that "conformed in

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little doubt that the concept of 'two rivers' has long been understood among the agricultural and hydropower users on the Snake River above and below the Milner Dam.

Canal Companies' Memorandum In Opposition To State Of Idaho's Motion For Partial Summary Judgment Re: Milner Zero Minimum Flow, In Re SRBA, Subcase Nos. 00-92002GP, 02-0200, 02-0201, 02-0223 and 02-0224 (Nov. 5, 2009).

[4] The Canal Companies filed their mandamus petition and "Response to Motion to Dismiss" with the Jerome County District Court in *North Side Canal Co. v. Tuthill*, Case No. CV2007-1093 (5th Jud. Dist.). The *Canal Companies' Summary Judgment Brief* was filed in the administrative proceedings before the Hearing Officer.

all respects" to the Milner Permit. *Canal Companies' Memorandum In Opposition To Idaho Water Resource Board, Upper Snake Users' And Ground Water Districts' Motions For Summary Judgment* at 15 (Mar. 5, 2010) ("*Canal Companies' Summary Judgment Brief*"). The District Court held that Idaho Code § 42-219 charges the Department with determining, as part of licensing, whether "'the law has been fully complied with,'" and if it has not, the Department "'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.'" *Writ Dismissal Order* at 10 (quoting Idaho Code § 42-219) (italics in *Writ Dismissal Order*). The District Court further held:

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

Id. at 10, 12. The District Court dismissed the Canal Companies' mandamus petition. *Id.* at 13. The District Court's holdings on Idaho Code § 42-219 are binding on the parties, the Hearing Officer, and the Director. *First Recommendation* at 8 ¶ 19 (stating the District Court had concluded "that the issuance of a license was not a ministerial act").

5. The Canal Companies' contention that the District Court's holdings were not binding because the questions of the *Notice* and whether Idaho Code § 42-219 required the Director to issue a license conforming to the Milner Permit were not ripe in the District Court proceedings, *Canal Companies' Summary Judgment Brief* at 16, is incorrect because the District Court's holdings "were necessary to the ultimate disposition of the case" presented by the Canal Companies' mandamus petition. *Sun Valley Ranches, Inc. v. Prairie Power Co-op., Inc.*, 124 Idaho 125, 129, 856 P.2d 1292, 1296 (Ct. App. 1993).

6. Idaho Code § 42-1734B applies in licensing water rights and requires the Director to issue water right licenses that are consistent with the "comprehensive state water plan":

> 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 . . . . licenses . . .; 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.

Idaho Code § 42-1734B(4). The "comprehensive state water plan" referenced in Idaho Code § 42-1734B(4) is the Idaho State Water Plan ("State Water Plan"), which is the constitutionally-authorized plan "for optimum development of water resources in the public interest" that is formulated and implemented by the Idaho Water Resource Board, subject to approval and/or amendment by the Idaho Legislature. Idaho Const. art. XV § 7; *see also* Idaho Code § 42-1734A(1) (similar).

7. The Hearing Officer determined that Idaho law requires the Director, in licensing water right no. 01-7011, "to assure that the terms of the license are consistent with the law and the State Water Plan," *See First Recommendation* at 14 ¶ 3, and that the Director "must condition the license consistent with State law, including the policies of the State Water Plan." *Id.* at 16 ¶ 2. The Director agrees with and adopts these determinations in this Order.

The State Law And State Water Plan Policies Applicable To Licensing Water Right No. 01-7011.

8. In order to ensure that the license for water right no. 01-7011 complies with state law and is consistent with the State Water Plan, as required by Idaho Code §§ 42-219(1) and 42-1734B(4), the Director must first identify the provisions of Idaho law and the State Water Plan that are applicable to water right no. 01-7011 and the disputed licensing conditions, and then must determine whether any conditions must be included in the license to ensure that it complies with applicable state law and is consistent with the State Water Plan.

9. Water right no. 01-7011 is a water right for hydropower use at the Milner hydropower project. The Canal Companies object to license conditions addressing the following: (a) Subordination to recharge, (b) a term limit on the license, and (c) a limitation on the volume of water used each year. Various provisions of Idaho law and the State Water Plan define the relationship of a hydropower water right to other water rights and also impose conditions that limit the elements of the hydropower water right.

10. The Idaho Constitution provides that the State "may regulate and limit the use [of water] for power purposes," Id. Const. art. XV § 3. Idaho Code § 42-203B "specifically implement[s] the state's power to regulate and limit the use of water for power purposes." Idaho Code § 42-203B(1). Idaho Code § 42-203B includes provisions applicable to the subordination of hydropower water rights, term limits on hydropower water rights, and to the Milner Dam. *See* Idaho Code § 42-203B(2), (6), (7). Idaho Code § 42-234 includes provisions pertaining to recharge. The license the Director issues for water right no. 01-7011 must comply with these provisions of Idaho law. Idaho Code § 42-219(1); *First Recommendation* at 14 ¶ 3; *id.* at 16 ¶ 2

11. The State Water Plan establishes policies pertaining to the Milner "zero minimum flow," recharge, and hydropower water rights, including the licensing and subordination of hydropower water rights. State Water Plan at 6, 7, 14, 17, 19 (Policies 1F, 1J, 4D, 5B, 5H). The license the Director issues for water right no. 01-7011 must be consistent with these policies of the State Water Plan. Idaho Code § 42-1734B(4); *First Recommendation* at 14 ¶ 3; *id.* at 16 ¶ 2

Water Right No. 01-7011 Must be Subordinate to Recharge in Order to Comply with Applicable State Law and be Consistent with Applicable Policies of the State Water Plan.

The Milner "Zero Minimum Flow"

12. With respect to the Milner Dam and the Milner "zero minimum flow," Idaho Code § 42-203B provides, in relevant part:

> For the purposes of the determination and administration of rights to the use of the waters of the Snake river or its tributaries downstream from Milner dam, no portion of the waters of the Snake river or surface or ground water tributary to the Snake river upstream from Milner dam shall be considered.

Idaho Code § 42-203B(2). The legislative history of this provision demonstrates that it was intended to clarify and codify the Milner "zero minimum flow" policy of the State Water Plan as confirmed pursuant to the Swan Falls settlement. *Statement of Purpose – RS12550* (1986 Senate Bill 1358); *Minutes – Senate Resources and Environment Committee* (Feb. 19, 1986).[5] The purpose of the Milner "zero minimum flow" is "to allow for full development of the River above Milner." *Order On Petition For Judicial Review, Clear Springs Foods, Inc. v. Idaho Ground Water Appropriators, Inc.* (Fifth Jud. Dist., Gooding County Dist. Ct.) (Case No. 2008-444) (Jun. 19, 2009), at 40 n.12 (Melanson, J.). Further, as the Hearing Officer found, the Milner "zero minimum flow" policy "is intended to promote the development of agricultural uses . . . ." *First Recommendation* at 13 ¶ 2.

13. The State Water Plan describes the Milner "zero minimum flow": "The exercise of water rights above Milner Dam has and may reduce flow at the dam to zero." State Water Plan at 17 (Policy 5B). The Legislature added this provision to the State Water Plan by a direct legislative amendment of the plan. 1997 Idaho Sess. Laws 71. The original State Water Plan and all subsequent revisions of the State Water Plan have included the Milner "zero minimum flow" provision or policy. *Final Order* at 5-7 ¶¶ 26-33.

14. In the *Final Order*, the former Director concluded that the subordination condition of the Milner Permit: (a) did not comply with the Milner "zero minimum flow" provision of Idaho Code § 42-203B(2); (b) is inconsistent with the Milner "zero minimum flow" policy of the State Water Plan and Chapter 38 of the 1997 Idaho Session Laws; and therefore

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[5] The history of this statutory provision is set forth in detail on pages 15-21 of Exhibit 16 of the Orr Aff. *See supra* note 3. Reconfirmation of the Milner "zero minimum flow" was one of the elements of the Swan Falls Agreement. *See Swan Falls Agreement* at Exhibit 6 ("The executive branch of the State of Idaho and Idaho Power Company agree to recommend that the following positions be incorporated into policy 32 of the state water plan. . . . The minimum daily flow at the Milner gauging station shall remain at zero c.f.s."). This aspect of the Swan Falls settlement was again confirmed in last year's *Framework For Reaffirming The Swan Falls Settlement* between the State of Idaho and Idaho Power Company:

> [T]he Swan Falls Settlement reconfirmed that the minimum daily flow at Milner Dam shall remain at zero, and that for the purposes of the determination and administration of rights to the use of the waters of the Snake River or its tributaries downstream from Milner Dam, no portion of the waters of the Snake River or surface or ground water tributary to the Snake River upstream from Milner Dam shall be considered. . . .
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> [T]he Swan Falls Settlement recognized that the establishment of a zero minimum flow at Milner Dam allowed existing uses above Milner to continue and for some additional development above Milner, and further recognized that the zero minimum flow means that river flows downstream from Milner Dam to Swan Falls Dam at times may consist entirely of ground-water discharge and that therefore the Eastern Snake Plan Aquifer (ESPA) must be managed as an integral part of the Snake River."

Framework For Reaffirming The Swan Falls Settlement, Exhibit 2 at 1.

could not be included in the license for water right no. 01-7011. *Final Order* at 10, 12-14 ¶¶ 14-15, 20, 22-23.

15. The Canal Companies argued to the Hearing Officer that the subordination condition of the Milner Permit was consistent with the Milner "zero minimum flow" provisions of Idaho Code § 42-203B(2) and the State Water Plan because the flows used for hydropower generation at the Milner power plant are diverted out of the river just above Milner Dam, at the same point of diversion the Twin Falls Canal Company uses to divert irrigation water. *Canal Companies' Summary Judgment Brief* at 2, 17-18.

16. The Hearing Officer concluded that "[u]se below the Milner Dam for irrigation with water from the Dam is consistent with the zero flow policy. The policy is intended to promote the development of agricultural uses, and the use of water in areas below the Milner Dam for irrigation is consistent with that policy." *First Recommendation* at 13 ¶ 2.

17. The Hearing Officer also determined that the question of whether the Milner hydropower project is consistent with the Milner "zero minimum flow" provisions of the Idaho Code and the State Water Plan is not limited to consideration of the physical location of the Milner power plant and its diversion facilities.[6] Rather, the Hearing Officer determined that consistency with the Milner "zero minimum flow" policy depends on whether water passes Milner Dam as a result of "incidental" drainage or, in contrast, pursuant to a legal "right requiring passage of water": "Any water that reenters the Snake River after being diverted for irrigation is incidental to its use for irrigation and not by a right requiring passage of water from the Snake River beyond the Milner Dam." *First Recommendation* at 13 ¶ 2. This analysis is consistent with Idaho Code § 42-203B(2), which does not bar the "incidental" passage of flows over or past Milner Dam, but rather only bars the establishment or administration of a water right that can demand flows be sent over or past Milner Dam. *See* Idaho Code § 42-203B(2) (providing that "[f]or the purposes of the determination and administration" of rights to the use of the waters of the Snake River or its tributaries downstream from Milner Dam, "no portion of the waters of the Snake river or surface or ground water tributary to the Snake river upstream from Milner Dam shall be considered." The Hearing Officer concluded: "The use of water for the hydropower project is a non-consumptive use that passes water that might otherwise be captured for agricultural or municipal use. It is this aspect of the hydropower project that is inconsistent with the zero flow policy, not the physical location of the project." *First Recommendation* at 13 ¶ 3.

18. The Hearing Officer further determined: "Water may pass beyond Milner Dam with no violation of State policy when there is an excess. The zero flow policy comes into play when there are claims for use of the water above the Milner Dam, including recharge rights at issue in this proceeding." *First Recommendation* at 14 ¶ 3. The Hearing Officer also determined

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[6] As the Hearing Officer observed, "the physical location" of the Milner power plant below Milner Dam, "by itself," does not violate the Milner "zero minimum flow" policy. *First Recommendation* at 13 (header for Part VII). It should be noted that the Milner hydropower project includes two power plants: the main power plant is adjacent to the Snake River approximately 1.6 miles downstream from Milner Dam, and a smaller "auxiliary" power plant is located at the downstream toe of the dam. The *Final Order*, the parties' briefing, and the Hearing Officer's analysis focused almost exclusively on the main power plant.

that it would be inconsistent with the Milner "zero minimum flow" policy to license a hydropower water right so that it could force water "that might otherwise be captured for agricultural or municipal use" to be sent past Milner Dam, where it would not be available "for full development of the Eastern Snake Plain." *Id.* The Hearing Officer further determined:

> If not subordinated to recharge rights, the hydropower right could require that water be delivered to meet its licensed amount and pass beyond Milner to the Snake River when it otherwise could be held in the aquifer by recharge for the beneficial use on the Eastern Snake Plain. Some of that water might by-pass Milner Dam in the aquifer for enhancement of the springs below Milner, but that is not inconsistent with the State Water Plan. In many respects recharge serves as a method of storage for use on the Eastern Snake Plain, analogous to holding water in reservoirs. The hydropower right would be subordinate to such a method of storage if developed further, paralleling the result of subordinating the hydropower right to recharge rights.

First Recommendation at 16 ¶ 9.

19. The Hearing Officer concluded it would be "inconsistent with State law and policy if [the Director] were to license the hydropower right with the subordination condition sought by the Canal Companies," and that "[t]he Final Order entered on October 20, 2008, is consistent with State law and policy" with respect to the subordination condition. *First Recommendation* at 16 ¶ 3.

20. The Director adopts the reasoning of the Hearing Officer as outlined in parts VI, VII and IX of the *First Recommendation* (pages 11-14).

Recharge

21. The State Water Plan provides: "It is the policy of Idaho that managed recharge be encouraged, pursuant to state law." State Water Plan at 7 (Policy 1J). The "Comment" to this policy states, in part: "Managed aquifer recharge may enhance spring flows and maintain desirable aquifer levels." *Id.*

22. The State Water Plan further provides that it is state policy "to seek to maintain spring flows in the American Falls and Thousand Springs reaches of the Snake River which will sustain beneficial uses of surface and ground water supplies in accordance with state law." State Water Plan at 19 (Policy 5H). The "Comment" to this policy states, in part: "Maintaining these [spring] discharges should be the goal of water managers. Managed recharge of the aquifers and continued efforts to efficiently use ground water are two strategies for maintaining spring discharges in these reaches." *Id.*; *see also id.* at 6 ("Aquifers, in turn, serve as underground reservoirs, and can stabilize stream discharges during dry periods.") (Policy 1F, "Comment").

23. In the *Final Order*, the former Director concluded that including the subordination condition of the Milner Permit in the license for water right no. 01-7011 would be inconsistent with the recharge polices of the State Water Plan. *Final Order* at 10-11 ¶¶ 16-18.

The Canal Companies did not object to or challenge these conclusions in the proceedings before the Hearing Officer. The Hearing Officer also determined that licensing water right no. 01-7011 with the subordination provision of the Milner Permit would be inconsistent with the policies of the State Water Plan favoring recharge rights, *First Recommendation* at 16 ¶ 3. The Director agrees and adopts this determination.

24. Idaho Code § 42-234 discusses the use of water for recharge purposes in the context of the state policy of promoting the optimum use and full realization of the state's water resources:

> It is the policy of the state of Idaho to promote and encourage the optimum development and augmentation of the water resources of this state. The legislature deems it essential, therefore, that water projects designed to advance this policy be given maximum support. The legislature finds that the use of water to recharge ground water basins in accordance with Idaho law and the state water plan may enhance the full realization of our water resource potential by furthering water conservation and increasing the water available for beneficial use.

Idaho Code § 42-234(1).

25. Including the Milner Permit's recharge exception in the subordination condition of the license for water right no. 01-7011 would be contrary to the state policy of promoting and encouraging the optimum development and augmentation of the State's water resources as explained by the Legislature in Idaho Code § 42-234(1).

Preventing "Another Swan Falls"

26. Idaho Code § 42-203B "specifically implement[s] the state's power to regulate and limit the use of water for power purposes," Idaho Code § 42-203B(1),[7] and authorizes the Director "to subordinate the rights granted in a permit or license for power purposes to subsequent upstream beneficial depletionary uses." Idaho Code § 42-203B(6).

27. Idaho Code § 42-203B was enacted in 1985 as part of the legislative implementation of the settlement of the Swan Falls hydropower subordination controversy. 1985 Idaho Sess. Laws 25-26; *see also Miles v. Idaho Power Co.*, 116 Idaho 635, 637, 778 P.2d 757, 759 (1989) ("our legislature enacted legislation to implement the agreement. *See* 1985 Idaho Sess.Laws, ch. 14-17; ch. 18, §§ 1, 3, 4; ch. 162, 204, pp. 20-31, 437, 514."). As the Hearing Officer stated, "[t]he potential of hydropower rights limiting the further development of agriculture, as well as limiting the agricultural water rights acquired subsequent to the Idaho Power rights, became a possibility in the Swan Falls controversy." *First Recommendation* at 12 ¶ 7. The legislative history of Idaho Code § 42-203B establishes that the subordination authority of Idaho Code § 42-203B(6) was intended to be exercised so as to prevent "another Swan Falls." *Final Order* at 9 ¶ 12; *id.* at 11-12 ¶ 19.

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[7] *See* Id. Const. art. XV § 3 (providing that "the state may regulate and limit the use [of water] for power purposes").

28. In the *Final Order*, the former Director determined that if the license included the subordination condition of the Milner Permit, hydropower use under water right no. 01-7011 could preclude recharge uses upstream of Milner Dam, which would be contrary to the legislative objective of preventing "another Swan Falls." *Final Order* at 12 ¶ 19. The Canal Companies did not challenge these determinations in the proceedings before the Hearing Officer.

29. It is also undisputed that, while the Canal Companies are the owners of the water right for the Miner hydropower project, Idaho Power Company operates the project pursuant to an agreement with the Canal Companies, and also is named as a co-licensee on the project's Federal Energy Regulatory Commission license. *First Recommendation* at 3 ¶ 3; 45 FERC ¶ 61,423; *Mandamus Petition* at Attachment C ("Agreement Regarding The Ownership, Construction, Operation And Maintenance Of The Milner Hydropower Project By And Between The Twin Falls Canal Company, North Side Canal Company, Limited And Idaho Power Company").

30. Including the subordination condition of the Milner Permit in the license for water right no. 01-7011 would be contrary to the subordination provisions of the Swan Falls settlement as ratified by the Legislature, Idaho Code § 42-203B(5), which bars Idaho Power Company from requiring that water from above Milner Dam be sent past Milner Dam for purposes of hydropower production below Milner Dam. Idaho Code § 42-203B(2).[8] Including the subordination provision of the Milner Permit in the license for water right no. 01-7011 would be contrary to the Swan Falls settlement as ratified by the Idaho Legislature.

The Former Director's 1987 Letter

31. The Canal Companies argued to the District Court and to the Hearing Officer that the 1987 letter from former Director R. Keith Higginson to the Canal Companies constituted an enforceable "subordination agreement" that was binding on the Director and required that the subordination condition of the Milner Permit be included in the license for water right no. 01-7011. *Mandamus Petition* at 3, 15; *Canal Companies' Response To Motion To Dismiss* at 4, 8, 13; *Canal Companies' Summary Judgment Brief* at 2, 4, 8-9, 11-12, 25, 31-32, 34, 37.

32. The District Court did not resolve the question of whether the 1987 letter constituted a binding "subordination agreement," but, in dismissing the Canal Companies' mandamus petition the District Court, held that such a "subordination agreement" would not have imposed a ministerial duty on the Director to include the Milner Permit's subordination condition in the license for water right no. 01-7011:

> 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 and effect of enforceability of the agreement can still be raised with the Director and through judicial review if necessary.

Writ Dismissal Order at 10.

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[8] *See supra* page 9 ¶ 17 & note 5.

33. The Hearing Officer determined that "[t]he letter does not constitute a binding agreement upon the current Director who must condition the license consistent with State law, including the policies of the State Water Plan." *First Recommendation* at 16 ¶ 2. The Hearing Officer further determined that the 1987 letter did not constitute a final order determining the terms of the license when issued, but rather "was a step in the process of obtaining a license with vested rights. . . . there were additional steps necessary before any rights became vested, including proof of beneficial use and review by the Director before issuance of a license to assure that the terms of the license are consistent with the law and the State Water Plan." *First Recommendation* at 14 ¶ 3. The Director adopts these determinations of the Hearing Officer.[9]

34. Even if the 1987 letter was found to be a binding contract, such an agreement would be void and unenforceable as contrary to Idaho Code §§ 42-219(1) and 42-1734(B), which require the Director to ensure that the subordination condition in the license for water right no. 01-7011 complies with state law and is consistent with the State Water Plan. *See Barry v. Pacific West Constr. Inc.*, 140 Idaho 827, 832, 103 P.3d 440, 445 (2004) ("Illegal contracts are void . . . ."). Further, the argument that the Department should be estopped from applying and complying with Idaho Code §§ 42-219(1) and 42-1734(B) as a result of the 1987 letter is contrary to Idaho law because it implies that the Department's agents may expand the Department's powers and effectively amend its governing statutes without legislative action. *Kelso & Irwin, P.A. v. State Ins. Fund*, 134 Idaho 130, 137-138, 997 P.2d 591, 598-599 (2000).

Vested Right

35. The Canal Companies argued to the District Court and to the Hearing Officer that the Canal Companies obtained a vested and compensable right to the use of water as set forth in the Milner Permit upon submission of proof of beneficial use, and therefore the Director was required to issue a license for water right no. 01-7011 that included the subordination condition of the Milner Permit. *Mandamus Petition* at 15, 17; *Canal Companies' Summary Judgment Brief* at 5, 15, 19, 21, 31, 38-45.

36. The District Court determined that the Canal Companies did not have a vested, compensable interest in the Milner Permit. The District Court quoted an SRBA decision holding that while the assertion that a water right vests upon application to beneficial use rather than upon issuance of a license by the Department "'may well be a correct statement of the law as to

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[9] The Canal Companies argued that recharge was not a beneficial use prior to 1994, *Canal Companies' Summary Judgment Brief* at 26, 35, and the Hearing Officer determined that recharge was specifically addressed as a beneficial use in a 1994 under Idaho Code § 42-234(2), and that the Legislature had specifically authorized specific instances of recharge prior to 1994. *First Recommendation* at 15 ¶ 7. The Director does not understand these determinations of the Hearing Officer as constituting a determination that recharge was precluded as a beneficial use under Idaho law prior to 1994, and does not so interpret Idaho Code § 42-234(2). "The fact that Idaho enacted a groundwater recharge statute in 1978 in no way signifies it declined to recognize recharge as a beneficial use before then, especially in light of the Idaho Water Resource Board's stated objective in 1974 [of following a broader definition of the term 'beneficial use of water' to include all water uses, both consumptive and non-consumptive]." *Order Granting Aberdeen-Springfield's Motion For Summary Judgment And Denying Surface Water Coalition's Motion For Summary Judgment And Motion To Strike Affidavits*, In re SRBA, Subcases Nos. 01-23B, 01-297, 35-2543 and 35-4246 (Aberdeen-Springfield Canal Co.), at 10 (Jun. 11, 2009).

water rights made under the constitutional method,'" that this is not the case under the statutory method of appropriation:

> [I]t is clear that the Legislature intended the issuance of the license to mark the point at which a water right becomes vested. . . . 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 water right remains an inchoate right. Because I.C. § 42-219(6) gives IDWR 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.

Writ Dismissal Order at 12 (quoting *Memorandum Decision And Order On Challenge; Order On State Of Idaho's Motion To Dismiss Claimant's Notice Of Challenge* (In re SRBA, Subcase No. 36-08099, River Grove Farms) at 24-25 (Jan. 11, 2000) (emphasis in *River Grove Farms*). The District Court stated that while the quoted SRBA decision had not been appealed, "this Court finds it to be on point and persuasive." *Writ Dismissal Order* at 12. These holdings were binding on the Hearing Officer and the parties, and are binding on the Director.

37. The Hearing Officer also concluded that the Canal Companies had no vested rights in the Milner Permit: "there were additional steps necessary before any rights became vested, including proof of beneficial use and review by the Director before issuance of a license to assure that the terms of the license are consistent with the law and the State Water Plan." *First Recommendation* at 14 ¶ 3. The Hearing Officer also determined: "The delay in the permit process and licensing does not preclude the Director from conditioning the license as provided in the October 20, 2008, Final Order. Had the licensing occurred earlier it should have contained the subordination condition presently included in the Director's Final Order." *Id.* at 16-17 ¶ 4. These determinations of the Hearing Officer are adopted by the Director.

38. Even if Canal Companies had held a vested, compensable interest in the Milner Permit, as a matter of law, such an interest would not require the Director to issue a license conforming to the Milner Permit because, as the Hearing Officer recognized, "hydropower rights do occupy a special status constitutionally and by their treatment in the Legislature." *Second Recommendation* at 6 ¶ 15.

39. Hydropower water rights are expressly subject to regulation and limitation by the State under the Idaho Constitution and the Idaho Code. Id. Const. art. XV § 3; Idaho Code § 42-203B(6); *see also* State Water Plan at 14 (Policy 4D) (subordination authority: "Hydropower water rights may be limited to a specific term and subordinated to upstream depletionary uses [Idaho Code, 42-203B(6) and (7)]." State Water Plan at 14 (Policy 4D) (brackets in State Water Plan).

40. Idaho Code § 42-203B specifically authorizes the Director to subordinate a hydropower water right at the time of licensing, regardless of whether the water right holder has a vested or compensable interest in the underlying permit. See Idaho Code § 42-203B(6)

(authorizing the Director to subordinate "a permit or license for power purposes") (emphasis added).

41. Regardless of whether the Canal Companies have a vested or compensable interest in the Milner Permit, the Director is authorized by the Idaho Constitution and the Idaho Code to subordinate the license for water right no. 01-7011. The Canal Companies' remedy, if they believe the imposition of the subordination provision affects a vested right, is to seek compensation through an inverse condemnation action.

The FERC License

42. The Canal Companies argued to the Hearing Officer that the 1988 Federal Energy Regulatory Commission ("FERC") licensing order for the Milner hydropower project precluded the Director from requiring that the license for water right no. 01-7011 include the subordination condition of the *Final Order*, because FERC denied the Department's request (in 1985) that the federal license include a broad subordination condition. *Canal Companies' Summary Judgment Brief* at 27-31. The Hearing Officer determined that FERC's licensing order "does not prevent the Director from conditioning the license with the subordination provision at issue in this case." *First Recommendation* at 10 (title to part V). The Hearing Officer further determined that, while FERC's licensing order was subject to its own interpretation, "nothing in that action precludes the State of Idaho from including the subordination condition included by the Director in issuing the license." *Id.* at 10 ¶ 1.

43. The Hearing Officer also determined that, while any claim by the Canal Companies that the subordination condition of the *Final Order* interfered with the terms of the FERC license "ultimately would be resolved by FERC and the federal courts" under federal law, it appears that "those standards allow the subordination condition in dispute." *First Recommendation* at 10 ¶ 1.

44. The Hearing Officer's analysis and determinations in part V of the *First Recommendation* (pages 10-11 ¶¶ 1-3) are adopted by the Director. [10]

45. The Hearing Officer determined: (a)"[t]he Director would act inconsistent with State law and policy if he were to license the hydropower right with the subordination clause sought by the Canal Companies," *First Recommendation* at 16 ¶ 10; (b) the subordination condition of the *Final Order* is consistent with state law and policy, *id.* at 16 ¶ 3; and the Director should include the subordination condition of the *Final Order* in the license. *Id.* at 17 (Order and Recommendation). The Director adopts this determination.

The Term Condition.

[10] The *First Recommendation* refers to the "FERC's action in licensing the hydropower right." *First Recommendation* at 10 ¶ 1 (emphasis added). The Director deems the Hearing Officer's use of the term "right" in this sentence to be a scrivener's error, because as a matter of federal and state law FERC issues federal licenses for hydropower projects, not for hydropower water rights. The Director therefore understands and interprets this sentence as referring to 'FERC's action in licensing the hydropower project.'

46. The Milner Permit, as issued in 1977 and amended in 1987, did not include a term condition.

47. The *Final Order* required that the license for water right no. 01-7011 include a term condition. The term condition provides, in relevant part, that the diversion and use of water under the license would be "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," and that 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." *Final Order* at 15 (Condition of Approval no. 5).

48. Idaho Code § 42-203B authorizes the Director to add a term condition at the time of licensing. Idaho Code § 42-203B provides, in relevant part: "The director shall also have the authority to limit a permit or license for power purposes to a specific term." Idaho Code § 42-203B(6).

49. Subsection (7) of Idaho Code § 42-203B outlines criteria the Department shall consider when determining the length of term conditions for new permits and provides, in part: "The term of years shall be determined at the time of issuance of the permit, or as soon thereafter as practicable if adequate information is not then available." The Canal Companies argued to the Hearing Officer that the Director violated Idaho Code § 42-203B(7) by including a term condition in the license because there had been several opportunities to add a term condition prior to licensing. *Canal Companies' Summary Judgment Brief* at 9, 12.

50. The Canal Companies also argued the Department's Water Appropriation Rule 50.03 precludes the addition of a term condition at licensing. Water Appropriation Rule 50.03 addresses "Applications and Existing Permits" for hydropower purposes, and provides, in relevant part: "A permit issued for hydropower purposes shall contain a term condition on the hydropower use in accordance with Section 42-203B(6), Idaho Code." IDAPA 37.03.08.050.03. The Canal Companies argued that because this rule addresses only permits, it precluded the Director from including a term condition in the license for water right no. 01-7011. *Canal Companies' Summary Judgment Brief* at 13.

51. The Hearing Officer determined that Idaho Code § 42-203B(7) puts "restraints in terms of time on the exercise of the authority" of the Director to impose a term condition on a hydropower water right, and "sets a standard for the exercise of the Director's discretion." *Second Recommendation* at 4 ¶9. The Hearing Officer further determined: It was practical to make the determination [as to a term condition] as soon as the FERC license was issued in 1988," and that "[h]ad the there been notice of the term limit prior to construction the Canal Companies could have made a determination of whether that condition affected the feasibility of the project and could have appealed the issue prior to construction." *Id.* at 5 ¶ 11. The Hearing Officer concluded: "the Department had 'adequate information' to determine a term limit prior to construction and years before licensing," and the failure to set a term limit within the constraints of the statute precludes including the term limit in the license. The Hearing Officer recommended that Conclusion of Law 7 in the *Final Order* be deleted." *Id* at 5 ¶¶ 11-12.

52. Under the Hearing Officer's interpretation of subsection (7), the Director has "adequate information" to determine a term condition for a hydropower water right, and therefore it is "practicable" to set the term, when the FERC license issues. Further, the Hearing Officer's interpretation of subsection (7) requires the Director to determine a term condition "prior to construction" of a hydropower project, so that the water right holder has an opportunity to appeal the condition before building the project.

53. The Hearing Officer's interpretation of subsection (7) of Idaho Code § 42-203B eliminates consideration of part of the statutory language. Subsection (6) expressly authorizes the Director to include a term condition in either "a permit or license" for power purposes. Idaho Code § 42-203B(6) (emphasis added). The first sentence of Subsection (7) explains how "a permit or license" may be conditioned by the Director. Idaho Code § 42-203B(7) (emphasis added). If the Department were required to set the term condition when the FERC license issues and before construction begins, as suggested by the Hearing Officer, the Department would effectively be barred from ever setting the term condition at licensing. This is because the FERC license is always issued before the hydropower water right license is issued and construction always begins before the hydropower water right license is issued.[11] If the Department were required to set the term condition when the FERC license issues and prior to construction, the term "or license" is effectively deleted from the statute. As a result, the Hearing Officer's interpretation of the statute creates a conflict or ambiguity in the statutory language.

54. It is appropriate to consult the legislative history of Idaho Code § 42-203B to determine the intent of the statute for purposes of resolving the conflict or ambiguity arising under the Hearing Officer's interpretation of the statute. *Hausladen v. Knoche*, 149 Idaho 449, 452, 235 P.3d 399, 402 (2010).

55. As originally enacted under 1985 Senate Bill 1008, I.C. § 42-203B contained only six subsections, and the Director's authority to subordinate and/or impose term conditions on hydropower permits or licenses was in subsection (6). 1985 Idaho Sess. Laws 25-26. The provision that ultimately became subsection (7) was not part of the original bill but was added later in the same legislative session, under 1985 House Bill 186. 1985 Idaho Sess. Laws 537-39.

56. In the committee hearings on Senate Bill 1008 (which did not contain subsection (7)), Senator William Ringert pointed out that, because the statute authorized the Director to subordinate "a permit or license" for hydropower use, the Director would have the authority to subordinate the license for a hydropower water right even though the permit was not

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[11] Under Idaho law a water right holder cannot obtain a license without first proving beneficial use. Idaho Code §§ 42-217, 42-219(1). Under federal law, however, beneficial use at a private hydropower project cannot be shown until after the FERC license issues and the project has been constructed, because federal law prohibits construction of such a project before FERC has issued a license. 16 U.S.C. § 817. Further, in the case of a major hydropower project, such as the one at issue in this matter, construction may take a significant amount of time, and thus it may not be possible to show beneficial use until several years after the FERC license issues. Thus, interpreting subsection (7) as requiring the Director to determine a term condition after the FERC license issues and before construction begins (so that the water right holder has an opportunity to appeal the condition), as the Hearing Officer did in this case, *Second Recommendation* at 4-5, effectively bars the Director from including a term condition at the time of licensing.

subordinated.[12] The proponents of the legislation explained the statute had been so drafted intentionally, to give the State the authority to revisit then-existing unsubordinated permits for hydropower uses at the time of licensing, and add subordination conditions at that time.[13] Further, while an attorney representing small hydropower interests observed that the statute "grandfathered" existing hydropower licenses and requested that the statute be amended to also "grandfather" existing permits, the State opposed such an amendment.[14]

57. This legislative history demonstrates that the provision in subsection (6) authorizing the Director to add a subordination condition to "a permit or license" for hydropower use was intended to allow the Director to revisit, at licensing, unsubordinated permits for hydropower uses that were existing when Idaho Code § 42-203B was enacted, and add subordination conditions to the licenses.

58. Because subsection (6) similarly authorizes the Director to add a term condition to either "a permit or license" for hydropower use, it follows that this authority also allows the Director to revisit at licensing hydropower permits that were existing when the time of licensing any hydropower permits that were existing when Idaho Code § 42-203B was enacted, and add term limit conditions to the licenses.

59. The Milner Permit was an existing hydropower permit when Idaho Code § 42-203B was enacted in 1985. Subsection (6) authorizes the Director to add a term condition to the license for water right no. 01-7011.

60. The legislative history of subsection (7) further demonstrates that the foregoing conclusion is not contrary to the intent of subsection (7). Subsection (7) was added to the statute after the small hydropower interests had expressed concerns that if the Director were to set a term condition when a permit was first issued, the condition might inadvertently restrict the length of time necessary for an adequate return on investment.[15] To address this concern, the small hydropower interests, the State, and Idaho Power Company jointly proposed adding subsection (7) to Idaho Code § 42-203B via House Bill 186.[16] The bill expressly recognized the Director had authority to add term limit conditions to "permits or licenses" for hydropower purposes,[17] and the proposed amendments were intended "to make sure the director does not inadvertently set too short a period of time in the permit or license, thus preventing the financing of small hydropower projects."[18] In supporting the amendments, the attorney for the small

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12 Transcript of Senate Resources and Environment Committee Meeting (Feb. 1, 1985), at pp. 33-34.

13 *Id.*

14 Attachment to Senate Resources and Environment Committee Minutes (Jan. 21, 1985), titled "*Revised and Supplemented Testimony By John L. Runft Before the Idaho Senate Committee on Resources and Environment January, 21, 1985,*" p. 5; Attachment to Senate Resources and Environment Committee Minutes (Jan. 25, 1985) titled "Supplemental Testimony of Attorney General Jim Jones before the Idaho Senate Committee of Resources and Environment," pp. 1, 3.

15 *Revised and Supplemented Testimony by John L. Runft* at 3-4.

16 Because the Swan Falls Agreement was contingent upon the enactment of Idaho Code § 42-203B as proposed under the Agreement, subsection (7) could not be added directly to Senate Bill 1008 but rather had to be added under a separate bill, House Bill 186.

17 Idaho H. 186, 1985 Leg., 48th Sess. 1.

18 ANALYSIS OF HOUSE BILL 186 1: *Attachment to Minutes of H. Comm. On Res. & Conservation,* 1985 Leg., 48th SESS., 1 (Mar. 6, 1985).

hydropower interests explained the amendments were intended to address a "procedural problem" related to when the term of years would begin to run, and also recognized the Director would have authority to "limit such a permit or license to a specific term of years."[19]

61. This legislative history establishes that subsection (7) was not intended to prevent the Director from adding a term condition at licensing, but rather was intended "[t]o provide factors the Director of the Department of Water Resources is to consider in limiting permits or licenses for power purposes to a specific term,"[20] and to allow the term length to either be set or adjusted at the time of licensing based upon when the water was first put to beneficial use. The Hearing Officer's reading of subsection (7) requiring that the term condition be established at the time the FERC license issues and before construction begins results in the very situation that the small hydropower users were trying to prevent in getting subsection (7) added to Idaho Code § 42-203B. Setting the length of the term at the time the FERC license issues and prior to construction could significantly restrict the water user's ability to derive an adequate return on investment.

62. The legislative history of Idaho Code § 42-203B resolves the potential conflict or ambiguity that arises under the Hearing Officer's interpretation of subsection (7), and supports inclusion of a term condition in the license for water right no. 01-7011. The Director therefore declines to accept the Hearing Officer's determinations, conclusions, and recommendations with regard to the term condition.

63. The Hearing Officer did not address the Canal Companies' argument that the Water Appropriation Rule 50.3 barred the Director from adding a term condition to the license for water right no. 01-7011 because the rule provides for a term condition to be inserted in the permit for a hydropower water right, but not in the license. Water Appropriation Rule 50.3 by its terms applies only to permits for hydropower water rights. The rule does not purport to define the Director's authority to add a term condition to a license. Even if Water Appropriation Rule 50.3 were interpreted as meaning that the Director lacks authority to add a term condition to the license for a hydropower water right, such an interpretation would be contrary to Idaho Code § 42-203B(6), which expressly authorizes the Director to add a term condition to the license for a hydropower water right. *See Idaho County Nursing Home v. Idaho Dep't. of Health & Welfare*, 120 Idaho 933, 937, 821 P.2d 988, 992 (1991) ("When a conflict exists between a statute and a regulation, the regulation must be set aside to the extent of the conflict.")

64. The Canal Companies argued that the Director may not add a term condition to the license for water right no. 01-7011 because Idaho Power Company or the Canal Companies have a vested or compensable property interest in the Milner Permit, *see, e.g., Post-Hearing Briefing In Support Of Canal Companies' Protest Of Term Limit And Volumetric Limitation On Water Right License No. 01-7011* at 9 (arguing that adding a term condition to the license "affected a substantial property right of Idaho Power Company").[21] The argument alleging a

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[19] *Statement By John L. Runft: Attached to Minutes of H. Comm. On Res. & Conservation,* 1985 Leg., 48th Sess. 3 (Feb. 15, 1985).

[20] 1985 Idaho Sess. Laws 537 (1985 H.B. 186) (1985 Leg., 48th Sess. 1).

[21] This is the first time that the Canal Companies have asserted in this matter that Idaho Power Company has a property interest in water right no. 01-7011. While Idaho Power Company operates the Milner hydropower

vested or compensable property interest is incorrect for the same reasons these arguments are unpersuasive with respect to the subordination condition, as previously discussed: (a) the Idaho Constitution and Idaho Code § 42-203B specifically authorize the Director to regulate and limit hydropower water rights even if the Canal Companies (or Idaho Power Company) had a vested or compensable interest in the Milner Permit; and (b) the Canal Companies (and Idaho Power Company) did not have any vested or compensable interest in the Milner Permit.

65. The Director concludes that including a term condition in the license for water right no. 01-7011 is consistent with applicable provisions of state law and the State Water Plan. The Director therefore declines to accept the Hearing Officer's recommendation that the license for water right no. 01-7011 should not include a term condition.

66. The Director agrees, however, with the Hearing Officer's determination that the term condition of the *Final Order* is potentially inconsistent with Conclusion of Law No. 7 of the *Final Order*, because the term condition provides for review and potential cancellation or revision of the water right license upon expiration of the FERC license, while Conclusion of Law No. 7 states that the water right license will terminate upon expiration of the FERC license. *Second Recommendation* at 3 ¶ 6. The Director therefore rejects Conclusion of Law No. 7 of the *Final Order* to the extent it is inconsistent with term condition as approved herein.

The Volumetric Limitation.

67. The Director adopts and incorporates into this order the Hearing Officer's determinations and reasoning regarding the volumetric limitation ordered in the Final Order. The Director accepts the Hearing Officer's recommendation that the license for water right no. 01-7011 should include a volumetric limitation authorizing diversion of the diversion rate during the entire period of use set, if the water is available. *See* the *Final Order*. *Second Recommendation* at 10 ¶ 2.

ORDER

IT IS HEREBY ORDERED that water right no. 01-7011 authorizing the diversion of water from the Snake River for power purposes be licensed as follows:

Source:	Snake River
Beneficial Use:	Power
Period of Use:	01/01 to 12/31
Diversion Rate:	5,714.70 cfs
Diversion Volume:	4,140,000 acre-feet
Points of Diversion:	NW1/4SW1/4 Sec. 28, Twp. 10S, Rge. 21E, B.M.
	L8 (NE1/4SE1/4) Sec. 29, Twp. 10S, Rge. 21E, B.M.
Place of Use:	NE1/4SE1/4 Sec. 29, Twp. 10S, Rge. 21E, B.M.
	L8 (SW1/4NE1/4) Sec. 30, Twp. 10S, Rge. 21E, B.M.

facility pursuant to an agreement with the Canal Companies, and is a co-licensee on the facility's FERC license (with Milner Dam, Inc.), Idaho Power Company is not named on the Milner Permit, is not a party to this proceeding, and has not claimed any interest in water right no. 01-7011.

Conditions of Approval:

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 that 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 that the priority date of water right no. 01-7011.

2. A measuring device of a type approved by the Department shall be permanently installed and maintained as part of the diverting works.

3. Use of water under this right shall be non-consumptive.

4. This right does not constitute Idaho Public Utilities Commission or Federal Energy Regulatory Commission approval that may be required.

5. The diversion and use of water for hydropower purposes under this water right 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.

IT IS FURTHER ORDERED that this is a final order of the agency. The right holder may petition for reconsideration of this final order within fourteen (14) days of the service date of this order. The agency will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law pursuant to Idaho Code § 67-5246.

DATED this 18th day of October, 2010.

Gary Spackman

GARY SPACKMAN
Interim Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of October, 2010, the above and foregoing document was served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

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Victoria Wigle
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