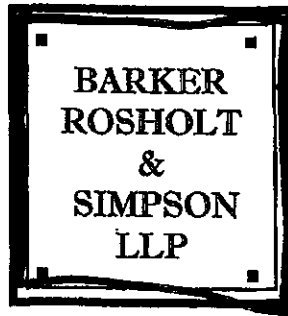


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**VIA US MAIL AND E-MAIL**

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Re: Initial Comments on Snake River Draft Policies-Above Milner and Milner to  
Murphy Gauge

Dear Ms. Harrington:

The following comments are submitted on behalf of the Twin Falls Canal Company, North Side Canal Company, and Clear Springs Foods, Inc. It is my understanding that these comments are solicited only as a preliminary matter to assist in the continued formulation of the Snake River Policies of the proposed Idaho State Water Plan currently undergoing re-drafting, and that additional opportunities for public comment will be offered as the proposed plan nears completion. As such, these comments are to be considered preliminary, and additional formal comments will be submitted when the Plan is officially considered open to public comments.

Idaho Code §§ 42-1734A and 42-1734B authorize the Idaho Water Resource Board to formulate a Comprehensive State Water Plan (the "Plan"). Part B of the Plan is intended to address policies for "component water plans for individual waterways, river basins, drainage areas, river reaches, ground water aquifers or other geographic designations." Combined, Part A of the plan addressing "statewide policies, goals and objectives" and Part B of the plan addressed to specific geographically designated portions of the state's water resources are considered the "Comprehensive State Water Plan." I.C. § 42-1734A(1). Idaho Code 42-1734B(2) identifies the material that must be included in the policies "prepared for particular water resources and waterways[.]" The development of Part B of the Plan for particular water ways must include:

(2) The board may develop a comprehensive state water plan in stages based upon waterways, river basins, drainage areas, river reaches, groundwater aquifers, or

other geographic considerations. The component of the comprehensive state water plan prepared for particular water resources and waterways shall contain, among other things, the following:

- (a) A description of the significant resources and waterway or waterways that are the subject of the plan, including pertinent maps detailing the geographic area of the plan;
- (b) A description of the significant resources of the water resources and waterway or waterways;
- (c) A description of the various existing and planned uses for these resources including currently undeveloped areas of the waterway and future plans for those areas, with a discussion of the advantages and disadvantages associated with each planned use;
- (d) A discussion of goals, objectives, and recommendations for improving, developing, or conserving the water resources, including an examination of how different uses will promote the overall public interest, a statement as to the goal the plan expects to achieve, and an analysis of how any specific recommendations further those goals. A description of the methodology used in developing the plan should be included.

(3) The description of the resources and uses in subsections (2)(b) and (2)(c) of this section shall contain, among other things:

- (a) navigation;
- (b) power development;
- (c) energy conservation;
- (d) fish and wildlife;
- (e) recreational opportunities;
- (f) irrigation;
- (g) flood control;
- (h) water supply;
- (i) timber;
- (j) mining;
- (k) livestock watering;
- (l) scenic values;
- (m) natural or cultural features;
- (n) domestic, municipal, commercial and industrial uses; and
- (o) other aspects of environmental quality and economic development.

All of these provisions are required to be incorporated into any Plan B State Water Plan for a specific waterway or river reach, and so must be incorporated into the provision for the four reach designations of the Snake River state water plan Part B policies.

The 1996 State Water Plan, under which the state is currently operating, did not specifically designate the river basin policies as Part B of the Plan. Those policies were represented by

sections 5 through 7 of the 1996 Plan. Sections 5A through 5J specifically of the 1996 Plan address the Snake River basin policies. A review of the policies set forth in the 1996 Plan for the Snake River demonstrates that the drafters were aware of the requirements of Idaho Code § 42-1734B(3), in that policy 5D titled "Snake River Basin DCMI," policy 5E titled "Snake River Basin Agriculture," policy 5F titled "Snake River Basin Hydropower," policy 5G titled "Snake River Navigation," policy 5H titled "Snake River Basin Springs," policy 5I titled "Snake River Basin New Storage" and policy 5J titled "Storage Acquisition" all reflect a specific resource description as contemplated by I.C. § 42-1734B(3). In addition, prior to the adoption of the 1996 State Water Plan, in response to a legislative directive, the Idaho Water Resource Board adopted the Comprehensive Basin Plan for the Snake River between Milner Dam and King Hill, assigning protected river status for recreation, wildlife, and aesthetic values in this reach of the Snake River. This Comprehensive Basin Plan is considered by Planning Staff for the Idaho Water Resource Board to be Part B to the Idaho State Water Plan. The Comprehensive Basin Plan, in addition to creating certain protected status designations, also addressed issues relating to general Snake River water quality considerations below Milner Dam.

The newly proposed plan abandons the structure contemplated by Idaho Code §§ 42-1734A and 42-1734B. Twin Falls Canal Company, North Side Canal Company, and Clear Springs Foods, Inc., object to the new proposed structure of Snake River policies. Not only does the newly proposed structure abandoned the statutorily codified requirements for policies addressed to specific waterways or reaches of those waterways, the new format reaches beyond the purposes of Plan B of a State Water Plan and invades the purview of administration, committed to the Idaho Department of Water Resources, and the purview of the legislature to codify laws.

Section 4B addressing the Snake River above Milner Dam is divided into six subsections. The first sub-section, titled "Milner Policy," states the Idaho Attorney General offices' interpretation of some of the historical materials that explain how the adage "zero flow at Milner," entered the Idaho lexicon. The policy as written gives the mistaken impression that the "Milner Policy" as set forth in this subsection represents a commonly held historical view of the Snake River above Milner Dam. Certain fact based statements within the proposed policy are not disputed, but to include certain of those facts to the exclusion of others is inappropriate. A thorough historical overview of how the adage "zero flow at Milner" came about would likely fill volumes. Relying on this limited historical overview to reach the conclusion "[c]onsistent with the Milner Policy and the Swan Falls Settlement, the primary long term water planning objective for the Snake River above Milner Dam is to ensure that unappropriated flows tributary to the Snake River above Milner Dam area available to supply existing and future beneficial uses in this reach of the Snake River," is inappropriate. The Canal Companies and Clear Springs are concerned that such a statement fails to accurately represent the commonly known fact that at certain times during the irrigation season, the flow of the Snake River at Milner Dam has been reduced to zero to fulfill irrigation needs during the irrigation season. The newly proposed policy seems to indicate that such historical flows during the irrigation season may be mistakenly understood to be the policy or history of flows at Milner Dam during the non-irrigation season, which is inaccurate. Additionally, the policy as proposed fails to take into account the existing water rights and the manner in which those rights have been continually exercised.

The second sub-section titled "Conjunctive Administration of Spring Flows and GW Rights" causes some concern to the Canal Companies and Clear Springs. The "resolution of the surface/groundwater conflict" that the Board implies is essential to the implementation of the Board's long term planning goals for the River is governed by the Conjunctive Management Rules, and to suggest in this policy that those rules are ineffective to address the appropriate resolution of conflicts between groundwater and surface water users invades the Idaho Department of Water Resources administrative duties. Administration of groundwater and surface water rights will continue regardless of the long-term objectives adopted in the State Water Plan.

The subsection titled "ESPA CAMP" is in some respects redundant with the policy already set forth in the in Section 1 of Part A of the Plan. While the Canal Companies and Clear Springs laud the long term goals of the ESPA CAMP program, there is nothing in the proposed Part A policy, or the proposed Part B policy for the Snake River Above Milner that addresses measurement of the efficiency of the aquifer recharge program to determine whether the long term goals of the program are actually being met. The Board should incorporate in both the Part A and Part B policies addressed to ESPA CAMP directives requiring measurement and policing of the effectiveness of the CAMP program to meet the goals intended to be met. Also, the continued reiteration of slightly different policies addressed to the ESPA CAMP creates the potential to create unnecessary ambiguity.

The next subsection titled "Upper Snake Optimum Use Policy" is especially problematic in that it initially relies upon the so-called "Milner Policy" which would be adopted for the first time in this State Water Plan and is limited in the respects set forth above, but it also appears to propose an entirely new regime for the Snake River directed at reallocation of privately held water rights "to optimize the use of the available water supply above Milner Dam." It is unclear what is intended by the use of the word "available" but since the same policy recognizes that "the reliable water supply of the Snake River Basin above Milner Dam is nearly developed," it would appear that measures proposed are directed at reallocation. Additionally, in the implementation strategies associated with these policies there is a recommendation that a standing committee be formed "for the purpose of supporting the Upper Snake River Optimum use Policy and collaborating on the management of the water resources and the reservoir system above Milner Dam with representatives from the U.S. Bureau of Reclamation and other stakeholders. While the recommendation goes on the state that the committee would have no power to affect vested rights or to direct the management of the reservoir systems, it is still alarming that the Board would recommend some committee to develop "policies for the efficient and effective management of the water resources and reservoir system." This policy is proposed because the drafters of the policy anticipate there will be additional "impacts that development above Milner will have on the water supply available to meet management objectives in the Milner to Murphy reach of the Snake River." Given the already substantial impacts that users below Milner Dam have experienced in the last fifty years, adoption of an "Optimum Use Policy" for the reach of the Snake River above Milner Dam that already anticipates additional impacts to those water users from reallocation of the resource causes the Canal Companies and Clear Springs substantial concern.

The last two subsections of the Snake River Above Milner Dam policy are redundant with policies already proposed in Part A of the Plan. Redundant policies within the same document may provide unnecessary ambiguity in the Plan.

The next set of policies are addressed to the Snake River from Milner Dam to Murphy Gage. The first subsection titled Swan Falls Minimum Flow Policy accurately depicts the agreement reached between Idaho Power Company and the State of Idaho, however, in order to meet the water rights of other water users in the river between Milner Dam and the Murphy Gage, the State must recognize that while those minimum flows may have been statutorily codified for purposes of providing hydropower flows, it does not allow the state to allow development that deprives other water users in this reach of their full beneficial use of their water rights. The next section titled "Conjunctive Administration of Spring Flow and Ground Water Rights" is nearly identical to the subsection in the policies addressed to the first reach relating to the conjunctive administration of ground and surface water. The Canal Companies and Clear Springs reiterate their objection to these policy statements to the extent that they suggest that some overarching goal of conflict resolution supplants the Idaho Department of Water Resources' administrative responsibility to conjunctively manage the aquifer, surface water, and spring water rights in conformance with the priority doctrine and the conjunctive administration rules.

The ESPA CAMP policy included in the Milner to Murphy reach Snake River policies raises the same concerns addressed earlier in these comments. Additionally, the statement in this CAMP policy that "the ESPA CAMP measures are expected to lead to stabilization of spring flows," but not to enhance or increase those flows, is problematic. The State continues to have a responsibility to ensure that the spring water users are delivered the full demonstrated beneficial use of their water rights.

The Milner to Murphy Optimum Use Policy raises substantial concerns. The first paragraph of this proposed policy that states the primary tool that the State intends to rely upon to achieve the Swan Falls minimum flows at Murphy gage is the ESPA CAMP, should be stricken. Given that there is presently no monitoring plan in place to determine whether the CAMP program is providing the intended results, it would be irresponsible to rely entirely upon the CAMP measures to meet the state's obligation of minimum flows at Murphy gage. The second paragraph must be stricken because the subordination scheme proposed therein is unconstitutional and insupportable. The third paragraph is unnecessary in this policy document. The Idaho Department of Water Resources already has an obligation to undertake the term review set forth in this policy statement. It is not a suggested policy position, but rather a duty of the Department to undertake that review. Similarly, the last paragraph merely states a legal obligation that the State undertook when it entered into the Swan Falls Agreement, and therefore, is likewise not a policy position but a duty of the state.

The Water Transfer Policy is vague, and should be clarified to reflect that the Board position will not and is not intended to affect Idaho Code § 42-222 in any way, or the rights and processes embodied in that statute.

The final policy included in this section titled "Swan Falls Minimum Flow Adaptive Management Policy" invades the Idaho Department of Water Resources responsibilities to

administer water rights in conformance with the laws and rules of the state. The overall tone of this proposed policy sounds like a proposal to avoid administration of water rights and it should be stricken.

Importantly, and as a matter that has been entirely overlooked in the development of these Snake River policies to date, the Idaho Water Resource Board adopted a Comprehensive Basin Plan for the Milner to King Hill reach of the Snake River in 1992. That document states that the goal for the basin is to protect water quality in this reach of the river by increasing flows past Milner dam. Specifically it states:

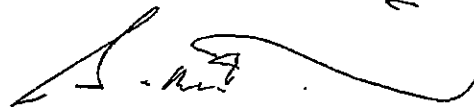
As a long term goal, the Water Board will work toward higher river flows during the summer months. The Idaho Water Resource Board would like to see more than a zero flow at Milner and will continue to examine options to secure flow throughout the year at the dam or main powerhouse. Increased flows would improve some aspects of water quality and fish habitat, and restore some of the scenic beauty to Twin Falls, Shoshone Falls, and many of the smaller, less famous waterfalls within the reach. At this time, there is no ready mechanism to provide this water. Increased irrigation efficiency could lead to increased operational flexibility in the Snake River, and perhaps more water through the Middle Snake reach during low-flow periods as a by-product of rental pool use by Idaho Power.

Comprehensive Basin Plan – Milner to King Hill, p. 74. Many of the proposed policies in both Part A of the new State Water Plan, and these first two Part B sets of policies on the Snake appear to be in direct conflict with the stated goal of the Board as to the Milner to King Hill reach of the river.

The Twin Falls and North Side Canal Companies, and Clear Springs Foods, Inc., appreciate this early opportunity to provide their initial thoughts concerning these proposed new Snake River policies. Additional comments, including comments addressed to the implementation strategies and milestones will be provided at a later date.

Very truly yours,

**BARKER ROSHOLT & SIMPSON LLP**



Shelley M. Davis

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