

Harrington, Helen

From: T. J. Budge [tjb@racinelaw.net]
Sent: Monday, August 23, 2010 9:45 AM
To: Harrington, Helen
Cc: Randy Budge; Candice M. McHugh
Subject: RE: Comments on Draft State Water Plan
Attachments: 20100823 DRAFT SWP Milner to Murphy (TJB).docx; 20100823 DRAFT SWP-Policies-
Upstream of Milner (TJB).doc

Helen,

We made some additional comments to the Draft State Water Plan over the weekend, attached.

Thanks,

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From: T. J. Budge
Sent: Friday, August 20, 2010 5:49 PM
To: 'Helen.Harrington@idwr.idaho.gov'
Cc: Randy Budge; Candice M. McHugh
Subject: Comments on Draft State Water Plan

Helen,

The attached draft polices for the State Water Plan include our requested revisions in redline format. Thanks for providing us and opportunity to participate. We look forward to continuing to work with you and others throughout the process. Let me know if you have any questions or want to discuss our revisions.

Also, would you mind explaining the timeline for completion and stages of development of the updated Plan?

Thanks,

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STATE WATER PLAN – SNAKE RIVER POLICY

SNAKE RIVER ABOVE MILNER DAM OUTLINE

4 - SNAKE RIVER BASIN

4B- SNAKE RIVER ABOVE MILNER DAM

Water resource policy, planning and practice should continue to optimize water use and provide for full development of the Snake River above Milner Dam recognizing that the exercise of water rights above Milner Dam has and may reduce flow at the Dam to zero.

Discussion:

Milner Policy: The formulation and implementation of a plan for the optimum development and use of the water resources of the Snake River above Milner Dam must be consistent with the “Milner Policy” set forth in Idaho Code § 42-203B(2), which provides that no portion of the waters of the Snake River upstream from Milner Dam shall be considered for the purposes of the determination and administration of rights to the use of the waters downstream from Milner dam. The exercise of water rights above Milner Dam will reduce the flow of the Snake River at Milner Dam to zero. The Milner Policy simply states that no water rights located below Milner Dam can be used to affect the use and retention of water above Milner Dam.

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The Milner Policy dates back to the development of storage in Jackson Lake in 1906 and was articulated in a 1920 report prepared by a Board of Engineers convened by the Governor and the United States for the purpose of preparing a plan for the future development of irrigation and hydropower in the Upper Snake River Basin. As described by the Board of Engineers, the Milner Policy was founded upon the physical divide in the Snake River at Milner Dam. Above Milner Dam, the waters were easily diverted and used for irrigation and other consumptive uses. Below Milner Dam the river descended into a deep canyon and was unavailable for agricultural development with technology available at the time. The Board recommended, therefore, that in order to make optimum use of the water resources the entire flow of the Snake River above Milner should be dedicated to the extent economically feasible for upstream irrigation. Over the past century, the Milner Policy guided the economic growth and the development within the Snake River basin and is inextricably intertwined with the overall management of the water resources of the basin.

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The Milner Policy envisioned that while development of the flows above Milner Dam would have some impact on hydropower generation, the increased spring flows resulting from the upstream development would sustain hydropower production downstream from Milner Dam. In order to ensure that hydropower development didn't interfere with development above Milner, however, the Board advised that in “granting power rights in the future the Federal Government and the State should so far as possible provide restrictions requiring [their] eventual surrender ...” The State's policy of subordinating hydropower development to upstream uses was affirmed by the 1984 Swan Falls Settlement and 2009 Swan Falls Reaffirmation Agreement between the State and Idaho Power Company.

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monitoring and evaluation of the intended and unintended effects of the strategies. The monitoring and evaluation studies will be used to select and design Phase II strategies.

As part of the 2009 Swan Falls Reaffirmation Agreement, the State and the Board entered into a Memorandum of Agreement with Idaho Power Company that requires the Board to obtain legislative approval to increase the Phase 1 ESPA CAMP managed recharge goal of 100,000 af by more than 75,000 af prior to January 1, 2019. "The purpose of this memorandum of agreement is to recognize that implementation of managed recharge will have an effect on the flow characteristics of the Snake River above and below Milner Dam and to confirm that the relative merits of recharge proposals in addition to or different than that provided in Phase 1 of ESPA CAMP will be considered through the adaptive management process set forth in Section 4 of ESPA CAMP." The Memorandum of Agreement also requires that a change to the ESPA CAMP long-term hydrologic target for managed recharge target must be accomplished through an amendment of the State Water Plan. Finally, the Memorandum of Agreement recognizes that it is the mutual interest of the State and the Company to work cooperatively to explore and develop a managed recharge program for the Snake River Basin above the Swan Falls Dam that achieves to the extent possible benefits for all uses including hydropower.

Upper Snake River Optimum Use Policy: Snake River flows at Milner Dam were reduced to zero early in the 20th century. Between the surface water reservoir system and storage in the ESPA, most of the water generated above Milner Dam can be captured, retained, and used above Milner Dam. When flows are reduced to zero at Milner Dam, the only water leaving the upper Snake River Basin emanates from groundwater discharges from spring outlets between Milner Dam and the Thousand Springs area near Hagerman. Thus, future development of the water resources in the Snake River Basin upstream of Milner Dam consistent with the Milner Policy, Ground Water Act, State Water Plan, and the ESPA CAMP require measures designed to increase water retention in the upper Snake River Basin above Milner Dam through efficient use of existing and new on-stream, off-stream, and aquifer storage, development of new storage management. Increased water retention and use in the upper Snake River Basin will optimize beneficial use in the upper Snake River Basin and will improve the ability to meet management objectives in the Milner to Murphy reach of the Snake River.

Coordinated management of the federal reservoir system above Milner Dam will provide an opportunity to optimize the use of the available water supply above Milner Dam. Therefore, the following Upper Snake River Optimum Use Policy is established:

1. It is in the public interest to manage the water resources above Milner Dam in a coordinated manner consistent with state law and the State Water Plan to provide a reliable supply of water for existing and future beneficial uses.
2. The Bureau of Reclamation must continue to operate the federal reservoir system in a manner that is consistent with State law. Reclamation is therefore encouraged to continue to manage the federal reservoir system in a manner that recognizes State sovereignty in implementing federal reclamation law and project purposes. To facilitate this effort, the Board will implement a process to openly address water management and reservoir operation needs through a standing advisory subcommittee. The subcommittee will be a collaborative forum where relevant information may be exchanged and reviewed on how the state and the Bureau of Reclamation, in the exercise of their respective authorities, can optimize the management of the water resources and the reservoir system above Milner Dam

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Implementation Strategies:

1. Identify where existing new surface water storage sites can be built that are safe, environmentally sound and economically feasible to secure new water supplies, provide flexibility in reservoir operations, and offset flow augmentation demands on supplies above Milner Dam.
2. Implement actions recommended in the ESPA CAMP Phase I to accomplish hydrologic targets including groundwater to surface water conversions, managed aquifer recharge, demand reduction, and weather modification.
3. Monitor and evaluate the results of each of the ESPA CAMP actions on water supply conditions above Milner Dam to assist with development and implementation of future actions, and determination of the efficacy of implementation of the ESPA CAMP Phase II.
4. Manage the water resources above Milner Dam in accordance with the Milner Policy, Ground Water Act, and Upper Snake River Optimum Use Policy.
5. Establish a standing subcommittee 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. The subcommittee shall have no power or authority to affect vested water rights or to prescribe the manner in which the reservoir system or the water resources above Milner Dam shall be managed, but shall develop, through a collaborative effort, recommendations and policies for the efficient and effective management of the water resources and the reservoir system above Milner Dam.
6. Opportunistically acquire Snake River water below Milner Dam, or from other tributary basins, to be exchanged for flow augmentation water with consideration of potential third party impacts including but not limited to impacts on water quality, aquatic resources, and hydropower. In addition, acquire storage water or surface water rights on flow-limited streams upstream of Milner Dam for transfer downstream to support conversions and stream flow restoration.
7. Measurement and Monitoring Implementation Strategy:
 - a. Continue to support and update the Eastern Snake River Plain Aquifer Model Version 1.1 (ESPAM1.1), the Snake River Planning Model (SRPM), and the Snake River Accounting system. Promote linkage of the models and their use in evaluation of impacts of various management decisions on Snake River flows, aquifer levels and reservoir operations.
 - b. Undertake measurement and monitoring of the combined river and aquifer system to facilitate water management and planning in the Snake River Basin above Milner Dam.
 - c. Evaluate the utility of System dynamic modeling techniques to facilitate decision making on optimizing the use of water resources above Milner Dam.
8. Work with the office of the Governor, state agencies, and the legislature to ensure that state management programs are consistent with the State Water Plan and the ESPA CAMP.
9. Implement and maintain cooperative water resource agreements and partnerships with neighboring states, the federal government, and Indian tribes in managing the water resources of the Snake River above Milner Dam.

STATE WATER PLAN - SNAKE RIVER POLICY

SNAKE RIVER FROM MILNER DAM TO MURPHY GAGE

4 - SNAKE RIVER BASIN

SNAKE RIVER FROM MILNER DAM TO MURPHY GAGE

Water resources tributary to the Snake River in the Milner to Murphy reach will be managed to meet or exceed the minimum stream flow of 3,900 cfs from April 1 to October 31 and 5,600 cfs from November 1 to March 31 at Murphy gage/Swan Falls.

Discussion:

Swan Falls Minimum Flow Policy: The Swan Falls Settlement between Idaho Power Company and the State established a minimum average daily flow of 3,900 cfs from April 1 to October 31 and 5,600 cfs from November 1 to March 31 at the Murphy gage to assure an adequate hydropower resource base and to protect other instream values such as fish propagation, recreation, aesthetics and water quality. These minimum flows are management and permitting constraints.

As a consequence of the "Milner Policy" set forth in Idaho Code § 42-203B(2) water rights located below Milner Dam cannot be used to affect the use and retention of water above Milner Dam. The Policy provides that Snake River flows at Milner Gauge may be reduced to zero. Consequently, Snake River flows from the Milner Dam to Murphy gage will consist, at times, entirely of ground water discharges from the aquifer into springs. Therefore, the Eastern Snake Plain Aquifer must be managed as an integral part of this reach of the Snake River in accordance with the minimum flows established at the Murphy Gauge.

The State of Idaho, by and through the Governor, holds legal title to the hydropower water rights for the Idaho Power Company hydroelectric plants in this reach of the Snake River in excess of the Swan Falls minimum flows in trust for the benefit of Idaho Power Company and the people of the State of Idaho. Pursuant to Idaho Code § 42-203B, the hydropower water rights held in trust by the State are subordinate to new water rights that are acquired pursuant to state law

As contemplated by the parties to the Swan Falls Settlement, the State of Idaho approved applications for the appropriation of water from sources tributary to the Snake River below Milner Dam. These new depletions in combination with changes in irrigation practices and climate variability have led to declines in spring flows in this reach of the Snake River to the point that in dry years the flows are beginning to approach the 3,900 cfs minimum flow.

Conjunctive Administration of Spring Flow and Ground Water Rights: The Ground Water Act (Idaho Code 42-226 et seq.) authorizes the conjunctive administration of hydraulically connected surface and ground water rights. The Act also provides that "while the doctrine of 'first in time is first in right' is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources." On , the IDWR promulgated Rules for Conjunctive Management of

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Swan Falls Minimum Flow Adaptive Management Policy: The impact from the use of ground water within the basin on the timing of aquifer discharge to the Snake River is such that curtailment of water rights when the flow of the Snake River approaches the Swan Falls minimum flows is not an effective remedy. Therefore, a long-term monitoring and adaptive management plan to proactively administer water sources tributary to the Snake River below Milner Dam is essential to prevent depletion of the flow of the Snake River at Murphy gage below the Swan Falls minimums. The plan should establish an agreed upon measurement and monitoring protocol for determining the average daily flow at the Murphy gaging station consistent with terms of the Swan Falls Agreement. In addition, the plan should identify adaptive management strategies for managing the water sources tributary to the Snake River below Milner Dam to satisfy the Swan Falls minimum flows.

Implementation Strategies:

- 1) Initiate a review of water right permits and licenses containing a term limitation.
- 2) Support the development of an enhanced spring water measurement program as a mechanism for facilitating ESPA CAMP and maintaining the Swan Falls minimum flow objectives.
- 3) Implementation of a Swan Falls monitoring and adaptive management program to provide for the administration of water sources tributary to the Snake River below Milner Dam to maintain the minimum average daily flows at the Murphy Gauge.
- 4) Develop streamlined policy for processing transfers to meet future water supply needs.
- 5) Implement ESPA CAMP to maximize beneficial use of the Eastern Snake Plain Aquifer while improving the reliability of water supply for hydropower generation and other instream uses above the Murphy gage.

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Milestones:

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