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BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO

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

**AFFIDAVIT OF LUKE H. MARCHANT  
IN SUPPORT OF UPPER SNAKE  
WATER USERS' AND GROUND  
WATER DISTRICTS' MOTION FOR  
SUMMARY JUDGMENT**

STATE OF IDAHO            )  
  )ss  
County of Bonneville        )

I, Luke H. Marchant, do solemnly swear or affirm that the testimony given in this sworn statement is the truth, the whole truth, and nothing but the truth, that is made upon my personal knowledge, and that I would so testify in open court if called upon to do so.

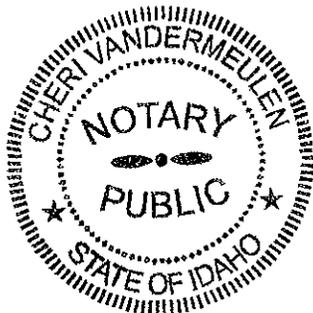
Being so sworn I depose and say:

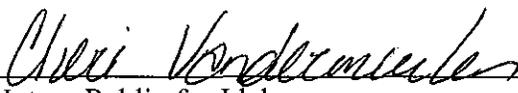
1. I am an attorney licensed to practice law in the State of Idaho and I am one of the attorneys representing the Plaintiffs in this action.
2. Attached hereto as Exhibit A is a true and correct copy of District Judge John M. Melanson's Order Granting Motion to Dismiss Petition for Writ of Mandate.
3. Attached hereto as Exhibit B is a true and correct copy of Chapter 38 of the 1997 Idaho Session Laws.
4. Attached hereto as Exhibit C is a true and correct copy of the State of Idaho's Memorandum in Support of the State of Idaho's Motion for Partial Summary Judgment RE: Milner Zero Minimum Flow.

DATED this 12 day of February, 2010.

  
\_\_\_\_\_  
Luke H. Marchant, Esq.  
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

SUBSCRIBED AND SWORN TO before me this 12<sup>th</sup> day of February, 2009.



  
\_\_\_\_\_  
Notary Public for Idaho  
Residing at Idaho Falls, Idaho  
My Commission Expires: July 7, 2015

## CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, a true and correct copy thereof on this 12<sup>th</sup> day of February, 2010.

**DOCUMENT SERVED:** AFFIDAVIT OF LUKE H. MARCHANT IN SUPPORT OF UPPER SNAKE WATER USERS' AND GROUND WATER DISTRICTS' MOTION FOR SUMMARY JUDGMENT

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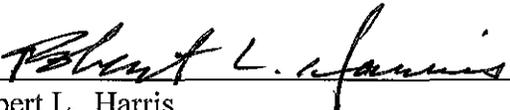
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\_\_\_\_\_  
Robert L. Harris  
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# **Exhibit A**

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JAN 29 2008

DEPARTMENT OF WATER RESOURCES

2008 JAN 29 10:11 AM

Michelle Emerson

*[Handwritten signature]*  
JEROME, IDAHO

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME

NORTH SIDE CANAL COMPANY and )  
TWIN FALLS CANAL COMPANY, )

Petitioners, )

vs. )

Case No.: CV 2007-1093

David R. Tuthill, Jr., in his official )  
Capacity as Director of the Idaho )  
Department of Water Resources, and )  
THE IDAHO DEPARTMENT OF )  
WATER RESOURCES, )

ORDER GRANTING MOTION TO  
DISMISS PETITION FOR WRIT OF  
MANDATE

Respondents. )

I. PROCEDURAL HISTORY

On September 26, 2007, the North Side Canal Company and Twin Falls Canal Company (collectively as "Petitioners"), through counsel of record Barker Rosholt & Simpson LLP, filed a *Petition for Peremptory Writ of Mandate* ("Petition") petitioning the Court to issue a writ of mandate compelling the Idaho Department of Water Resources ("IDWR" or "Department") and its Director David R. Tuthill Jr. (collectively as "Respondents") to void the Director's September 5, 2007, Order; to close any protest or comment period; and to issue a license to the Petitioners in accordance with Respondents' statutory duties as defined by Idaho Code § 42-219. Also on September 26, 2007, the Petitioners filed an *Application for Alternative Writ of Mandate*.

On the same date, the Honorable John K. Butler filed an *Order of Disqualification*. The case was assigned to the undersigned judge on October 1, 2007, in his capacity as District Judge for the Fifth Judicial District and not in his capacity as Presiding Judge of the Snake River Basin Adjudication.

On October 10, 2007, this Court issued an *Order Denying Petition for Alternative Writ of Mandate*.

On November 6, 2007, the Respondent's filed a *Motion to Dismiss* pursuant to I.R.C.P. 12(b)(1) and (6), together with a *Memorandum and Affidavit in Support*.

On December 14, 2007, the Petitioners filed a *Response to Respondents' Motion to Dismiss*.

A hearing was held on the *Motion to Dismiss* on December 21, 2007. At the conclusion of the hearing, the Court took the matter under advisement. Also on December 21, 2007, the Respondents filed an *Answer*. Following the hearing, the Court received an *Amicus Brief*, together with a supporting affidavit, filed on behalf of Mud Lake Water Users, Independent Water Users, Jefferson Canal Company, Montevue Canal Company, Producers Canal Company, Fremont-Madison Irrigation District and Eastern Idaho Water Rights Coalition (collectively as "Amici").

## II. MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument occurred in this matter on December 21, 2007. The parties did not request the opportunity to submit additional briefing, and the Court does not require any additional briefing on this matter. Therefore, this matter is deemed fully submitted for decision the next business day, or December 24, 2007.

## III. FACTS

On March 30, 1977, the Petitioners filed an *Application for Permit* with IDWR to appropriate water from the Snake River for year-round hydropower production at the Milner power plant at a rate of diversion up to 12,000 cfs. Notice was published in accordance with

Idaho Code § 42-201. As no protests were filed a permit was issued to the Petitioners on June 29, 1977 ("Milner Permit").

The deadline for filing proof of beneficial use under the permit was originally June 1, 1982. As a result of delays, the Petitioners sought and received deadline extensions in 1982, 1987, 1990, and 1992. Prior to seeking an extension of the 1987 deadline, the Swan Falls Agreement was executed and the Legislature passed Idaho Code § 42-203B, which among other things authorized IDWR to subordinate hydropower rights to future upstream consumptive uses. As a result, in 1987 when the Petitioners sought the second extension, the Chief of Operations Bureau for IDWR, L. Glen Saxton, notified the Petitioners that the granting of the extension would be conditioned on the Petitioners acceptance of the following subordination provision:

The rights for the use of water acquired under this permit shall be junior and subordinate to all other rights for the use of water, other than hydropower, within the state of Idaho that are initiated later in time than the priority of this permit and shall not give rise to any right or claim against any future rights for the use of water, other than hydropower, within the state of Idaho initiated later in time than the priority of this permit.

Attachment G to *Petition*.

In a letter dated May 8, 1987, counsel for Petitioners raised the following concern with the proposed condition:

At the time of the issuance of the Hells Canyon license, the subordination was to irrigation of lands and other beneficial consumptive uses in the Snake River Water Shed. In your proposed language, non-consumptive uses such as groundwater recharge could take the total flows of the upper Snake available to the Milner Power Plant and put them underground eliminating any generation at the project. The language would also facilitate a non-consumptive diversion of water above the project for fish propagation or some other non-consumptive purpose with the return of the water below the project. Finally, the language would facilitate a diversion of surplus flows of the Snake River to the Bear River Basin for any purpose.

Attachment H to *Petition*. Counsel for Petitioners then proposed the following amendments to the condition:

The rights for use of water acquired under this permit shall be junior and subordinate to all other rights for the consumptive beneficial use of water, other than hydropower and groundwater recharge within the Snake River Basin of the State of Idaho that are initiated later-in-time than the priority of this permit and shall not give rise to any right or claim against any future rights for the

consumptive beneficial use of water, other than hydropower and groundwater recharge within the Snake River Basin of the State of Idaho initiated late-in-time than the priority of this permit.

*Id.* (emphasis added).

In a letter dated November 18, 1987, the Respondents notified the Petitioners that they would use the amended language proposed by counsel for Petitioners as a condition of approval on the extension request. This is the condition that appears in the Milner Permit.

On October 29, 1993, the Petitioners submitted proof of beneficial use for 5,714.7 cfs, of the 12,000 cfs for which application was originally made. Since that time the Petitioners have relied on the Milner Permit and have been beneficially using water under the permit.

In 2006 and the spring of 2007, the Petitioners verbally requested that the Respondents issue a license for the Milner Permit. On September 5, 2007, in response to the Petitioners' request, the Respondents issued a *Notice of Intent to Issue License*. Attachment P to *Petition*. The *Notice of Intent* set forth the background and status of the Milner Permit and then provided, in relevant part:

Proof of beneficial use having been submitted under the permit, the Department is prepared to issue a license for the water right pursuant to Idaho Code § 42-219. Counsel for Permit Holders have orally requested that the Respondent issue a license for the water right.

The Department received written requests for notice of an opportunity to be heard on the form of the subordination condition to be included in the license for Water Right No. 01-7011 from the Bingham Ground Water District on January 11, 2007; from the Idaho Ground Water Appropriators, Inc. on February 7, 2007, for and on behalf of its ground water districts and other members, represented by the law firm of Racine Olson Nye Budge & Bailey, Chartered; and from the Mud Lake Water Users, Independent Water Users, Jefferson Canal Co., Montevue Canal Co., and Producer's Canal Co., on April 16, 2007, represented by the law firm of Holden Kidwell, Hahn & Crapo, P.L.L.C.

NOW THEREFORE NOTICE IS HEREBY GIVEN that the Department will accept and consider written Comments from the Permit Holders and other interested persons or entities addressing the form of the subordination condition that should be included on the license for Water Right No. 01-7011. Any Comments submitted should be addressed to Director, Idaho Department of Water Resources, P.O. Box 83720, Boise, Idaho 83720-0098 and received by the Department or post marked on or before October 10, 2007.

In response, the Petitioners initiated this action seeking a writ of mandate to compel the Respondents to issue a license for the Milner Permit in accordance with Idaho Code 42-219 and to prohibit the actions the Respondents were taking as provided by the September 5, 2007, *Notice of Intent to Issue License*. The Petitioners did not submit written comments to IDWR as provided by the *Notice* nor did they request a hearing before the Director.

## IV. DISCUSSION

### A. Arguments

The Respondents have now moved to dismiss the Petition alleging that the Petitioners have failed to exhaust available administrative remedies. The Respondents argue that Petitioners must wait until the license is issued and then pursue these remedies through the administrative process and the Idaho Administrative Procedures Act, Idaho Code § 67-5201 *et seq.*

The Petitioners argue that there are no more administrative remedies available because Idaho Code § 42-219 requires that the Petitioners perform the ministerial function of issuing the license after proof of beneficial use has been submitted. The Petitioners argue that Respondents are acting outside the scope of their authority by reopening the administrative record to comments after the protest period has closed, the permit issued, diversion works completed, and beneficial use proven. The Petitioners argue that the considerable investment in the diversion (hydropower) project was made in reliance on the issuance of the permit and the conditions ultimately negotiated and agreed upon. By permitting the record to be reopened to comments at this stage allows for protests to cloud an administrative record that was previously free of protests when the *Application for Permit* was approved and the diversion works completed in reliance on said approval.

### B. Standards of Review

#### 1. Motion to Dismiss, I.R.C.P 12(b)(1) and (6).

The Respondents' *Motion to Dismiss* is brought pursuant to I.R.C.P. 12(b)(1) "lack of jurisdiction over subject matter" and I.R.C.P. 12(b)(6) "failure to state a claim upon which relief can be granted." The failure to exhaust administrative remedies can implicate subject matter jurisdiction because a "district court does not acquire subject matter jurisdiction until all the administrative remedies have been exhausted." *Owsley v. Idaho Industrial Com'n*, 141 Idaho 129, 135, 106 P.3d 455, 461 (2005) (citing *Fairway Development v. Bannock County*, 119 Idaho 121, 125, 804 P.2d 294, 298 (1990)). The failure to exhaust administrative remedies can also be brought under I.R.C.P. 12(b)(1). *Id.* If a claimant fails to exhaust administrative remedies, then dismissal of the claim is warranted. *White v. Bannock County Comm'rs*, 139 Idaho 396, 401, 80 P.3d 332, 337 (2003) (string citations omitted). On a motion to dismiss, "the Court looks only at the pleadings and all inferences are viewed in favor of the non-moving party." *Id.* at 133, 106 P.2d at 459 (citing *Young v. City of Ketchum*, 137 Idaho 102, 1094, 44 P.3d 1157, 1159 (2002)).

The Idaho Administrative Procedures Act provides that "[a] person is not entitled to judicial review of an agency decision until that person has exhausted all administrative remedies required in this chapter." I.C. § 67-5271(1). However, "[a] preliminary, procedural or intermediate agency action or ruling is immediately reviewable if review of the final agency action would not permit an adequate remedy." I.C. § 67-5271(2). There are two recognized exceptions to the exhaustion requirement: (1) When the interests of justice so require and (2) when an agency has acted outside its authority. *American Falls Reservoir Dist #2 v. IDWR*, 143 Idaho 862, 154 P.3d 433 (March 15, 2007). In *American Falls Reservoir Dist #2*, the Idaho Supreme Court recently held:

Important policy considerations underlie the requirement for exhaustion of administrative procedures, such as providing the opportunity for mitigating or curing errors without judicial intervention, deferring to the administrative body, and the sense of comity for the quasi-judicial functions of the administrative body.

*Id.* at 872, 154 P.3d at 443 (citing *White v. Bannock County Comm'rs*, 139 Idaho 396, 401-02, 80 P.3d 332, 337-38 (2003)).

## 2. Writ of Mandate.

Idaho Code § 7-302 provides that a writ of mandate “may be issued . . . to compel the performance of an act which the law especially enjoins as a duty resulting from the office, trust or station . . . .” Idaho Code § 7-303 provides that the “writ must be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law.” In *Idaho Falls Redevelopment Agency v. Countryman*, 118 Idaho 43, 794 P.2d 632 (1990), the Idaho Supreme Court stated “[m]andamus will lie if the officer against whom the suit is brought has a ‘clear legal duty to perform the desired act and if the act sought to be compelled is ministerial or executive in nature.’” *Id.* at 44, 794 P.2d 633 (quoting *Utah Power & Light Co. v. Campbell*, 108 Idaho 950, 953, 703 P.2d 714, 717 (1985)). A ministerial act is:

That which is done under the authority of a superior; opposed to *judicial*. That which involves obedience to instructions, but demands no special discretion, judgment or skill. Official’s duty is ‘ministerial’ when it is absolute, certain and imperative, involving merely execution of a specific duty arising from fixed and designated facts.

*Ausman v. State*, 124 Idaho 839, 842, 864 P.2d 1126, 1129 (1993).

Further, the “[e]xistence of an adequate remedy in the ordinary course of law, whether legal or equitable in nature will prevent issuance of a writ . . . and the party seeking the writ must prove that such remedy exists. . . . [M]andamus is not a writ of right and the allowance or refusal to issue a writ of mandate is discretionary. *Id.* (citations omitted).

## 3. Discretion of Court.

A court acts within its discretion when it: 1) correctly perceives the issue as one of discretion; 2) acts within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) reaches its decision by exercise of reason. *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993 1000 (1991).

## C. Analysis

### 1. The Petitioners have failed to exhaust all available administrative remedies.

The Court holds that the Petitioners may not use a writ of mandate as a substitute for following the grievance process set forth in Idaho Code § 42-219(8) and Idaho Code § 42-1701A(3). Idaho Code §§ 42-219(8) and 42-1701A(3) set forth the administrative procedure for contesting IDWR's action with respect to issuing a license or failing to issue a license based on a permit. Idaho Code § 42-219(8) states:

In the event that the department shall find applicant has not fully complied with the law and the conditions of the permit, it may issue a license for a portion of the use which is in accordance with the permit, may refuse issuance of the license and void the permit. Notice of such action shall be forwarded to the permit holder by certified mail.

I.C. § 42-219(8). The statute then provides: "The applicant may contest such action by the department pursuant to section 42-1701A." *Id.*

Idaho Code § 42-1701A(3) provides:

Unless the right to a hearing before the director or the water resources board is otherwise provided by statute, any person aggrieved by any action of the director, including any decision, determination, order or other action, including action upon any application for a permit, license, certificate, approval, registration, or similar form of permission required by law to be issued by the director, who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action. The person shall file with the director within fifteen (15) days after receipt of written notice . . . a written petition stating the grounds for contesting the action by the director and requesting a hearing.

I.C. § 42-1701A(3). Idaho Code § 42-1701A(4) then provides:

Any person who is aggrieved by a final decision or order of the director is enabled to judicial review. The judicial review shall be had in accordance with the provisions and standards set forth in Chapter 52, title 67, Idaho Code.

The Petitioners filed proof of beneficial use on October 29, 1993. On July 27, 2006, Director Dreher indicated in a letter that "the issuance of a license for the water right is pending." Petitioners then verbally requested that Respondents issue a license in 2006 and again in 2007. In response Director Tuthill, who succeeded Director Dreher issued the *Notice of Intent to Issue*

*License.* The *Notice* referred to the communications received from other water users regarding the subordination provision and stated that the Department would receive comments on the issuance of the license on or before October 10, 2007. The *Notice* did not reopen a protest period nor did it give those submitting comments party status. The Petitioners did not respond to the *Notice*, nor otherwise object to the Director's reopening of the record to comments, nor did they ask for a hearing before the Director on the issue. The Petitioners also could have waited until the license was issued and then request a hearing. The Petitioners argue that continuing with the administrative process will result in the administrative record becoming improperly clouded with additional facts after the protest period has already closed resulting in prejudice and ultimately precluding any adequate remedy. The Petitioners also argue that after the beneficial use examination for the permit the issuance of the license is ministerial and because IDWR is acting outside the scope of its authority all administrative remedies have been exhausted. This Court disagrees.

The Petitioners had the opportunity to raise with the Director the issue of receiving comments by submitting their own comment or by specifically requesting a hearing on the alleged irregularities in the process in accordance with Idaho Code § 42-1701A(3). The Petitioners also still have the opportunity to raise and be heard on the issue once the license is issued. Ultimately, if the Director issues the license according to the subordination condition now included in the permit, the Petitioners have no grievance. If the Director modifies the condition the petitioners can raise the issue with Director and ultimately seek judicial review in accordance with Idaho Code § 42-1701A(4). Because the issue of whether the Director can appropriately consider additional comments after the beneficial use examination presents a threshold question of law a reviewing Court would be not be bound by the Director's determination on this issue as would be the case with the Director's factual determinations. Were it ultimately determined that the Director could not appropriately consider the comments there would be no prejudice to the Petitioners as the comments would be excluded from consideration. Accordingly, the Court finds no prejudice to the petitioners by continuing with the administrative process and exhausting their administrative remedies.

**2. The issuance of the license following the beneficial use examination is not a ministerial duty.**

The Petitioners raise the argument that following the proof of beneficial use examination the issuance of the license is simply a ministerial act. Idaho Code § 42-219(1) requires an intermediate step prior to the issuance of the license. After all evidence is filed in relation to proof of beneficial use, IDWR is then charged with “carefully examining the same, *and if the department is satisfied that the law has been fully complied with . . . the department shall issue . . . a license confirming such use.*” I.C. § 42-219(1)(emphasis added). The statute then provides that if IDWR finds that the applicant has not complied with the law or the conditions of the permit “it *may* issue a license for that portion of the use which is in accordance with the permit or *may* refuse issuance of the license and void the permit.” I.C. § 42-219(8) (emphasis added). 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. At this stage, IDWR has not made such a determination with respect to the form of the subordination language that should be included in the license despite the November 18, 1987, agreement between the Petitioner and IDWR. Simply because there is a prior agreement in place with respect to the form of the subordination remark does not make the duty to issue the license ministerial. If a determination is made contrary to the terms of the agreement then the issue of the effect and enforceability of the agreement can still be raised with the Director and through judicial review if necessary.

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

A similar issue also arose in the context of the SRBA. In *Memorandum Decision and Order on Challenge; Order on State of Idaho's Motion to Dismiss Claimant's Notice of Challenge (Subcase 36-08099, River Grove Farms) (Jan 11, 2000)(River Grove Farms)*, an applicant filed a permit application for a hydropower right in 1982. The permit application was approved in 1983. The permit did not include a subordination remark for hydropower.

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

The Hon. R. Barry Wood, then presiding judge of the SRBA, disagreed. Judge Wood held that the water right vested at the time the license was issued. The Court relied on the holding in *Cantlin v. Carter*, the statutory scheme itself and various other cases holding that a water right is inchoate until the license is issued.<sup>1</sup> Judge Wood ruled:

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

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<sup>1</sup> The following cases were cited for the proposition that a right to use the waters of this state remains inchoate until a license is actually issued by IDWR. *Hardy v. Higginson*, 123 Idaho 485 (1993)(Director can properly impose conditions on request to amend water permit, because permittee only has an inchoate right, not a vested right); *Hidden Springs Trout Ranch v. Allred*, 102 Idaho 623 (1981)(Director could consider the "local public interest," even though authority to do so was not granted by legislature until after applicant had applied for permit, because vesting of applicant's right was "contingent upon future statutory adherence and issuance of a license"); *Big Wood Canal Co. v. Chapman*, 45 Idaho 380 (1927)(statutory amendments, which increased the time allowable to submit proof of application to beneficial use, were not unconstitutionally retroactive, because permittee has an inchoate right, not a complete appropriation).

...

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

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

This Court holds that following the beneficial use examination the issuance of the license is not a ministerial act. The Department must first make a determination whether the use complies with the law and the terms of the permit. While the Court does have some concern with the length of time it takes for IDWR to complete its final determination and issue the license the statute does not provide for a time limit.

3. **Mandamus is not an appropriate remedy.**

Having determined that the act of issuing the license is not a ministerial act and having determined that the Petitioner's still have administrative remedies available in the ordinary course of law, this Court in the exercise of its discretion concludes that mandamus is not an appropriate remedy.

**D. Conclusion.**

The Court holds that Petitioners have failed to exhaust their available administrative remedies. For the reasons previously discussed the Petitioners are not giving up any rights by waiting until IDWR issues a license and then if necessary requesting a hearing before the Director and seeking judicial review. Aside from the issue of clouding the record with additional facts, which this Court addressed, the Petitioner's concern is further delay in the issuance of the license. Counsel for the Respondents stated that the license would have been issued by now but for this intervening action. Ultimately, depending on the form of the subordination remark included in the license further proceedings may not be necessary. Recent experience has shown that by issuing a writ at this stage significant delay would result while the parties litigated the propriety of the writ. For the above-stated reasons the Respondent's *Motion to Dismiss* is **granted**.

**V. ORDER ON AMICUS PARTICIPATION**

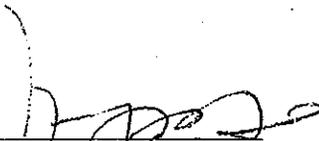
The decision on whether to limit participation to amicus curiae is discretionary with the trial court. *State v. United States (In Re SRBA Case No. 39576, Minidoka National Wildlife Refuge)*, 134 Idaho 106, 111, 996 P.2d 806 (2000); 4 Am. Jur. 2d *Amicus Curiae* § 8. The principle role of amicus curiae is to aid the court on questions of law. 4 Am. Jur. 2d at §.6. Among other things, a court may evaluate whether the proffered information is timely, useful, or otherwise necessary to the administration of justice. Additionally, a court should look to whether the parties to the lawsuit will adequately present all relevant legal arguments. *Id.* § 8.

In the instant case, the Court's decision turns on a question of law. The Amicus brief does not raise any new issues. The legal issue has broader reaching application than just the instant case. In cases such as this a certain degree of liberality in allowing a brief to be filed is

warranted. While the Court has some concerns regarding the timeliness of the brief, on balance the Court **grants** the amicus participation and has considered the brief.

IT IS SO ORDERED.

DATED: January 25, 2008

  
\_\_\_\_\_  
John M. Melanson  
District Judge

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that on the 28 day of January, 2008 a true and correct copy of the Order of Assignment was faxed and mailed, postage paid to the following persons.

Travis Lee Thompson  
Attorney at Law  
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By Judy Owens  
Judy Owens, Deputy Clerk

# **Exhibit B**

CHAPTER 38  
(S.B. No. 1137)

AN ACT

RELATING TO THE COMPREHENSIVE STATE WATER PLAN; RATIFYING AND APPROVING THE COMPREHENSIVE STATE WATER PLAN WITH AMENDMENTS TO POLICIES 3F AND 5B, RELATING TO TAILINGS POND REGULATION AND TO SNAKE RIVER MINIMUM FLOWS, AS THE PLAN WAS ADOPTED BY THE STATE WATER RESOURCE BOARD IN DECEMBER 1996; AND DECLARING AN EMERGENCY.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That pursuant to Section 42-1734B(6), Idaho Code, the Comprehensive State Water Plan adopted by resolution of the Idaho Water Resource Board in December 1996, is ratified and approved with the following amendment to Policy 5B relating to Snake River Minimum Flows. The Comprehensive State Water Plan and the amendment to Policy 5B shall read as follows:

1A-STATE SOVEREIGNTY

It is the policy of Idaho that the state has sovereignty over decisions affecting the development and use of its water resources, and that the state opposes any attempt by the federal government, its management agencies, any other state, or any other entity to usurp the state's role in these areas.

1B-PUBLIC INTEREST

It is the policy of Idaho that water be managed with due regard for the public interest as established by state law.

1C-BENEFICIAL USE OF WATER

It is the policy of Idaho that beneficial uses include certain nonconsumptive water uses.

1D-TRANSFERABILITY OF USE

It is the policy of Idaho that changes in the nature of use of a water right be allowed, including changes to nonconsumptive uses, provided other water rights are not injured.

1E-WATER MEASUREMENT

It is the policy of Idaho that the water resources of the state should be quantified and their uses should be measured.

1F-CONJUNCTIVE MANAGEMENT

It is the policy of Idaho that where evidence of hydrologic connection exists between ground and surface waters, they are managed conjunctively in recognition of the interconnection.

1G-REASONABLE USE

It is the policy of Idaho to promote the reasonable use of water in accordance with state law.

**1H-GROUND WATER WITHDRAWAL**

It is the policy of Idaho that average withdrawals from an aquifer should not exceed the reasonably anticipated rate of future recharge to that aquifer.

**1I-WATER SUPPLY BANK**

It is the policy of Idaho that the sale or lease of water is critical to the efficient management of the state's water resources. Use of the State's Water Supply Bank shall be encouraged.

**1J-RECHARGE**

It is the policy of Idaho that managed recharge be encouraged, pursuant to state law.

**1K-SPRING FLOWS**

It is the policy of Idaho that the hydrogeologic relationships between ground water supplies and spring flows continue to be quantified to allow for the determination of optimal development of the water resources.

**1L-WATER QUALITY**

It is the policy of Idaho that water be protected against unreasonable contamination or deterioration in quality, thereby maintaining designated beneficial uses.

**1M-POLLUTION CONTROL**

It is the policy of Idaho that the use of water to dilute pollution is not a substitute for adequate treatment.

**2A-SPECIES OF CONCERN**

It is the policy of Idaho that the public interests be considered when decisions are made to maintain sustainable populations of plant and animal species whose existence is threatened by mankind's actions.

**2B-FEDERALLY LISTED SPECIES**

It is the policy of Idaho to cooperate, insofar as allowed by state law, in efforts to conserve and restore plant and animal species listed by the federal government as Threatened or Endangered.

**2C-LAKE AND RESERVOIR MANAGEMENT**

It is the policy of Idaho that comprehensive management plans for surface use and water quality protection be developed for lakes and reservoirs in the state.

**2D-CLIMATE VARIABILITY**

It is the policy of Idaho that climate variability be considered in planning for and in the management of the state's water resources.

**3A-INSTREAM FLOW**

It is the policy of Idaho that when it is in the public interest the Idaho Water Resource Board should seek to appropriate waters in the state for instream flow purposes.

**3B-POTENTIAL**  
It is the policy of Idaho that average withdrawals from an aquifer should not exceed the reasonably anticipated rate of future recharge to that aquifer.

**3C-STATE WATER SUPPLY BANK**  
It is the policy of Idaho that the sale or lease of water is critical to the efficient management of the state's water resources. Use of the State's Water Supply Bank shall be encouraged.

**3D-RIPARIAN**  
It is the policy of Idaho that the hydrogeologic relationships between ground water supplies and spring flows continue to be quantified to allow for the determination of optimal development of the water resources.

**3E-STREAM QUALITY**  
It is the policy of Idaho that water be protected against unreasonable contamination or deterioration in quality, thereby maintaining designated beneficial uses.

**3F-TAILINGS**  
It is the policy of Idaho that the use of water to dilute pollution is not a substitute for adequate treatment.

**3G-RADIATION**  
It is the policy of Idaho that the use of water to dilute pollution is not a substitute for adequate treatment.

**3H-SAFETY**  
It is the policy of Idaho that the public interests be considered when decisions are made to maintain sustainable populations of plant and animal species whose existence is threatened by mankind's actions.

**3I-FLOOD CONTROL**  
It is the policy of Idaho to cooperate, insofar as allowed by state law, in efforts to conserve and restore plant and animal species listed by the federal government as Threatened or Endangered.

**3J-FLOOD CONTROL**  
It is the policy of Idaho that comprehensive management plans for surface use and water quality protection be developed for lakes and reservoirs in the state.

**4A-AGENCY COOPERATION**  
It is the policy of Idaho that climate variability be considered in planning for and in the management of the state's water resources.

**4B-REVIEW**  
It is the policy of Idaho that when it is in the public interest the Idaho Water Resource Board should seek to appropriate waters in the state for instream flow purposes.

**3B-POTENTIAL RESERVOIR SITES**

It is the policy of Idaho that potential reservoir sites be protected from significant land use change.

**3C-STATE PROTECTED RIVER SYSTEM**

It is the policy of Idaho that a state protected river system be maintained to meet the desires of the citizens of Idaho. The system should provide for the protection of the unique features that exist on various rivers within the state, and should provide the necessary authority and funding to protect such rivers and related lands for recreational, scenic, and natural values.

**3D-RIPARIAN HABITAT AND WETLANDS**

It is the policy of Idaho to protect the ecological viability of riparian habitat and wetlands within the state in the public interest.

**3E-STREAM CHANNEL REHABILITATION**

It is the policy of Idaho that the costs and benefits of stream channel rehabilitation be evaluated where past activities currently or potentially affect the yield or quality of the state's watersheds.

**3F-TAILINGS POND REGULATION**

It is the policy of Idaho that the construction, operation, and maintenance of mine tailings impoundment structures be regulated by the state.

**3G-RADIOACTIVE WASTE MONITORING**

It is the policy of Idaho to maintain a state program to monitor and regulate the use, handling, and storage of radioactive wastes.

**3H-SAFETY MEASURES PROGRAM**

It is the policy of Idaho that a program should be established to assist local units of government in repairing and installing safety structures on or near canals, rivers, lakes, and reservoirs. The program should be established as a cost-sharing cooperative program.

**3I-FLOOD PRONE AREAS**

It is the policy of Idaho to encourage the protection of flood plains and reliance on management rather than structural alternatives in reducing or preventing flood damages.

**3J-FLOOD CONTROL LEVEE REGULATION**

It is the policy of Idaho that the construction and maintenance of flood control levees be regulated by the State.

**4A-AGENCY CONSOLIDATION**

It is the policy of Idaho that the administration of state programs for water allocation, planning, and water quality regulation be consolidated in one agency.

**4B-REVIEW OF FEDERAL RESERVOIR WATER ALLOCATION**

It is the policy of Idaho that agreements be established with federal agencies to allow Idaho Water Resource Board review of any proposed

water allocation from federal reservoirs in excess of 500 acre-feet annually.

#### 4C-ENERGY PLAN

It is the policy of Idaho that the State Energy Plan set forth policies for energy use and development in the state and that the plan be updated at least every five years.

#### 4D-HYDROPOWER LICENSING

It is the policy of Idaho to insure that public interest, existing water rights, related settlement agreements, and the future water and energy needs of the State are considered in hydropower licensing.

#### 4E-HYDROPOWER SITING

It is the policy of Idaho that new hydropower developments be in conformance with the State Water Plan and the State Energy Plan.

#### 4F-CONSERVANCY DISTRICTS

It is the policy of Idaho that where practical, the total water needs of a geographic area be satisfied by a legal entity having the authority and responsibility to address all water needs in a comprehensive manner.

#### 4G-RESEARCH PROGRAM

It is the policy of Idaho to encourage and conduct research on important water resource topics.

#### 4H-FUNDING PROGRAM

It is the policy of Idaho that state funds be available to support the development, preservation, conservation, and restoration of the water and related resources of the state.

#### 4I-PLANNING PROGRAM

It is the policy of Idaho that water management plans be prepared for the individual river basins.

#### 4J-FEDERAL AND TRIBAL WATER RIGHTS

It is the policy of Idaho to quantify all federal and tribal water rights within the state.

#### 4K-WATER RESOURCE MANAGEMENT

It is the policy of Idaho that the diversion and use of water occur only in accordance with water rights issued by the state and federal reserved rights established by the courts. Adjudication of water rights through the state courts should be completed where necessary to fully define and quantify the rights.

#### 5A-SWAN FALLS AGREEMENT

It is the policy of Idaho that the Swan Falls agreement between the state and Idaho Power Company establishes the framework for water management in the Snake River basin.

**5B-SNAKE RIVER MINIMUM FLOWS**

It is the policy of Idaho that minimum average daily flows at the Murphy gaging station shall meet or exceed 3,900 cfs from April 1 to October 31 and 5,600 cfs from November 1 to March 31. The average daily flow measured at the Weiser gage shall not be less than 4,750 cfs. A minimum average daily flow of 5,000 cfs at Johnson's Bar shall be maintained and an average daily flow of 13,000 cfs shall be maintained at Lime Point (river mile 172) a minimum of 95 percent of the time. The exercise of water rights above Milner Dam has and may reduce the flow at the dam to zero.

**5C-SNAKE RIVER TRUST WATER**

It is the policy of Idaho that water held in trust by the state pursuant to Idaho Code 42-203B be reallocated to new uses in accordance with the criteria established by Idaho Code 42-203A and 42-203C.

**5D-SNAKE RIVER BASIN DCMI**

It is the policy of Idaho that 150 cfs of the water held in trust by the state above Swan Falls Dam pursuant to Policy 5C be reallocated to meet future domestic, commercial, municipal, and industrial consumptive uses in accordance with state law.

**5E-SNAKE RIVER BASIN AGRICULTURE**

It is the policy of Idaho that appropriated water held in trust by the state pursuant to Policy 5C, less the amount of water necessary to provide for present and future DCMI uses as set forth in Policy 5D, shall be available for reallocation to meet new and supplemental irrigation requirements which conform to Idaho Code 42-203A, 203B, 203C, and 203D.

**5F-SNAKE RIVER BASIN HYDROPOWER**

It is the policy of Idaho that hydropower use be recognized as a beneficial use of water, and that depletion of flows below the minimum average daily flows set forth in Policy 5B is not in the public interest.

**5G-SNAKE RIVER NAVIGATION**

It is the policy of Idaho that water sufficient for commercial and recreational navigation is provided by the minimum flows established for the Snake River.

**5H-SNAKE RIVER BASIN SPRINGS**

It is the policy of Idaho 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.

**5I-SNAKE RIVER BASIN NEW STORAGE**

It is the policy of Idaho that applications for large surface storage projects upstream from the Murphy gage be approved subject to the requirement that the use is in the public interest.

**5J-STORAGE ACQUISITION**

It is the policy of Idaho that reservoir storage be acquired in the name of the Idaho Water Resource Board to provide management flexibility in assuring the minimum flows designated for the Snake River.

**6A-BEAR RIVER COMPACT**

It is the policy of Idaho that water use and management in the Bear River Basin conform to the allocations set forth in the Bear River Compact [Idaho Code 42-3402].

**6B-INTERSTATE WATER DELIVERY**

It is the policy of Idaho that Idaho water users in the Lower Division of the Bear River Basin must be protected from inequitable water allocation in the event of a water emergency and the scheduling of interstate water deliveries.

**6C-BEAR LAKE**

It is the policy of Idaho to recognize and preserve the outstanding values of Bear Lake while continuing to meet existing allocations for irrigation and hydroelectric power generation.

**6D-BEAR RIVER BASIN WATER PROJECTS**

It is the policy of Idaho to encourage additional projects for the development of the water resources of the basin without regard to state boundaries.

**7A-PANHANDLE BASINS**

It is the policy of Idaho that the ground and surface waters of the Idaho Panhandle be managed to protect the environmental quality of the region.

**7B-PANHANDLE MINIMUM FLOWS**

It is the policy of Idaho to provide sufficient water to meet the minimum requirements for aquatic life, fish and wildlife, and to provide for recreation in the Panhandle Basins.

**7C-PANHANDLE DCMI**

It is the policy of Idaho to provide water for new domestic, commercial, municipal and industrial uses. A depletion of 14 cfs is allocated for these purposes.

**7D-PANHANDLE AGRICULTURAL WATER**

It is the policy of Idaho that additional water be made available for irrigated agriculture in the Panhandle. A combined net depletion of 200 cfs is allocated for this purpose.

**7E-PANHANDLE NAVIGATION**

It is the policy of Idaho that water sufficient for commercial and recreational navigation be maintained in the streams and lakes of the Idaho Panhandle.

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SECTION 2. An emergency existing therefor, which emergency is hereby declared to exist, this act shall be in full force and effect on and after its passage and approval.

Approved March 12, 1997.

CHAPTER 39  
(S.B. No. 1146)

AN ACT

RELATING TO THE IDAHO HORSE BOARD; AMENDING SECTION 25-2510, IDAHO CODE, TO GOVERN THOSE WHO ARE ELIGIBLE TO PARTICIPATE IN A REFERENDUM ON THE MANDATORY FEE IMPOSED ON EACH HORSE; AND DECLARING AN EMERGENCY.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 25-2510, Idaho Code, be, and the same is hereby amended to read as follows:

25-2510. REFERENDUM FOR HORSE OWNERS. (1) After five (5) years from the effective date of this section, a referendum shall be held to determine if horse owners favor the continuation of the mandatory provisions prescribed in section 25-2505, Idaho Code. The question shall be submitted to all horse owners who had a brand inspection the year prior to the referendum. The brand board shall provide a ballot at the time of the brand inspection. Horse owners who have been issued a lifetime brand inspection subsequent to the effective date of this amendment are also eligible to participate in the referendum and may do so by requesting a ballot from the Idaho horse board. Voting shall be by secret ballots upon which the words "Do you favor the continuation of a mandatory assessment to fund the Idaho Horse Board?" are printed with a square before each of the printed words "YES" and "NO" with directions to insert an "X" mark in the square before the proposition which the voter favors. If a majority of the referendum vote is in favor of continuing the mandatory program, the provisions of section 25-2505, Idaho Code, shall be extended indefinitely or until such time that the horse board deems it necessary to hold another referendum on the issue.

(2) After five (5) years from the effective date of the referendum required in the provisions of subsection (1) of this section, and every five (5) years thereafter, a referendum on the continuation of the mandatory assessment to fund the Idaho horse board may be held at the petition of horse owners, or at the request of the Idaho horse board. The question shall be submitted by secret ballots upon which the words, "Do you favor the continuation of a mandatory assessment to fund the Idaho Horse Board?" are printed with a square before each of the printed words "YES" and "NO" with directions to insert an "X" mark in the square before the question which the voter favors. If a majority of the referendum vote is in favor of continuing the mandatory assessment, all of the provisions of chapter 25, title 25, Idaho Code,

# **Exhibit C**

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*Attorneys for the State of Idaho*

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re SRBA

Case No. 39576

) Subcase nos. 00-92002GP, 02-00200,  
) 02-00201, 02-00223 and 02-00224  
)

) **MEMORANDUM IN SUPPORT OF**  
) **STATE OF IDAHO'S MOTION FOR**  
) **PARTIAL SUMMARY JUDGMENT**  
) **RE: MILNER ZERO MINIMUM**  
) **FLOW**  
)

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## INTRODUCTION

The Director's recommendations, objections and responses for water right 02-0200 and General Provision No. 4 for Basin 02 demonstrate that the principal substantive issue in subcases 02-0200 and 00-92002GP is the question of the meaning and effect of the "zero minimum flow" at Milner Dam. This question is controlled by the Idaho State Water Plan and Idaho statutes.

The Idaho State Water Plan and the 1997 Idaho Session Laws provide that "[t]he exercise of water rights above Milner Dam has and may reduce flow at the dam to zero." Idaho State Water Plan at 17 (Idaho Water Res. Bd., Dec. 1996) ("1996 State Water Plan");<sup>1</sup> 1997 Idaho Sess. Laws 71. The purpose of this provision, as Fifth District Judge John M. Melanson recently stated, is to allow for full utilization of the Snake River above Milner Dam: "In brief terms, the State Water Plan sets a 'zero flow' at Milner Dam to allow for full development of the River above Milner." Order On Petition For Judicial Review at 40 n.12, Clear Springs Foods, Inc. v. Idaho Ground Water Appropriators, Inc. (Fifth Jud. Dist., Gooding County) (Case. No. 2008-444) (Jun. 19, 2009). Further, the Idaho Code provides:

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). This provision ensures that, as a matter of Idaho law, uses of water below Milner shall not interfere with the use and storage of flows upstream from Milner Dam, even to the point of reducing the flow at Milner Dam to zero c.f.s.

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<sup>1</sup> See Affidavit of Michael C. Orr ("Orr Aff."), Exhibit 1 at 11 (1996 State Water Plan at 17).

These principles are firmly embedded in the long history of water resource development and settled property rights expectations in the Snake River Basin. Because the Snake River enters a canyon at Milner and becomes inaccessible for gravity irrigation, early agricultural development had appropriated the reliable summer flow of the river above Milner shortly after the end of the nineteenth century. Thereafter, water supplies for further development and for protection against devastating droughts that periodically occur could be secured only by conserving and storing winter flows, spring runoff and flood waters above Milner. This objective has been the principal basis of water resource policy, planning and development in the Snake River Basin for the last century, and is commonly referred to as the Milner "zero minimum flow" principle or the "Two Rivers" doctrine. Under either name, the Snake River is physically, developmentally and legally divided at Milner into two different systems: all flows of the river may be fully developed above Milner Dam, and uses downstream from Milner Dam may not interfere with or prevent such upstream development.<sup>2</sup>

The State's Motion for Partial Summary Judgment seeks a determination that as a matter of law under the State Water Plan and controlling Idaho statutes, the zero minimum flow established at Milner Dam means that the flow of the Snake River above Milner Dam may be reduced to zero, and that water rights using water downstream from Milner Dam have no right to call for the delivery, or seek the administration, of the flow of the Snake River or surface and ground water tributary to the Snake River upstream from Milner Dam. Granting the State's Motion is necessary for purposes of the

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<sup>2</sup> Even when the entire flow of the river above Milner is diverted for agricultural and storage purposes, significant river flows remain available for use and development in the canyon below Milner as a result of inflows, especially from the numerous springs discharging from the canyon walls.

definition and administration of water rights in Basin 02, and will simplify the remaining issues and expedite the resolution of this subcase.

### STATEMENT OF FACTS

#### **I. The Milner "Zero Minimum Flow" Provisions Of The State Water Plan And Statutes.**

In 1964, the voters of the state of Idaho approved a constitutional amendment providing for a state water resource agency authorized to develop a plan for "optimum development" of the State's water resources: "There shall be constituted a Water Resource Agency . . . [that] shall have power to formulate and implement a state water plan for optimum development of water resources in the public interest." Idaho Const. art. XV § 7. The amendment was adopted "in response to a publicly recognized need for the state to maintain greater control over its water resources." Idaho Power Co. v. State, 104 Idaho 570, 571, 661 P.2d 736, 737 (1983). The following year, the Idaho Legislature implemented the amendment by establishing the Idaho Water Resource Board ("Board") and directing it to "progressively formulate an integrated, coordinated program for conservation, development and use of all unappropriated water resources of this state." 1965 Idaho Sess. Laws 905; see also Idaho Code § 42-1734A(1). This "comprehensive state water plan" was to be based on studies and formulated after public hearings in affected areas at which all interested parties had an opportunity to appear. Id.

After nearly a decade of study and public participation, the Board adopted the initial State Water Plan in two parts. The purpose of part one was "to identify and define the policies and objectives which the Idaho Water Resource Board has adopted to govern the planning, development, and conservation of the state's water and related lands." The Objectives - State Water Plan - Part One at v (Idaho Water Res. Bd., June 1974) ("1974

State Water Plan”).<sup>3</sup> Part two was intended to identify and evaluate the projects and programs necessary to implement the objectives in part one. State Water Plan – Part Two at 4 (Idaho Water Res. Bd., Dec. 1976) (“1976 State Water Plan”).<sup>4</sup>

The 1976 State Water Plan established “protected flows” at various points on the Snake River to be “protected against further appropriations.” Id. at 116. The “protected flow” for Milner was defined to be “0 cfs.” Id. The 1976 State Water Plan further stated: “Studies indicate that sufficient water exists in excess of these flows to provide for additional uses if water conserving and storage facilities are constructed.” Id.

In 1978, the Idaho Legislature twice affirmed the “protected flow” of “0 cfs” at Milner. House Concurrent Resolution No. 48 declared the 1976 State Water Plan’s “protected flows” to be an expression of “legislative intent.” 1978 Idaho Sess. Laws 1011. The same resolution also provided: “it is the policy of the State of Idaho to augment, maintain, enhance and increase available, usable water by additional upstream, off stream and aquifer storage.” Id. The Idaho Legislature again affirmed the “protected flow” of “0 cfs” at Milner in a statute recognizing House Concurrent Resolution No. 48 “as the guide for the state water plan,” id. at 885, and providing that the “protected flows” of the 1976 State Water Plan were “minimum daily flows.” Id. at 886.<sup>5</sup>

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<sup>3</sup> Orr Aff., Exhibit 2 at 5. The Board had also issued an “Interim State Water Plan – Preliminary Report,” in July 1972. This report and all of the State Water Plans referenced herein are viewable at: [http://www.idwr.idaho.gov/waterboard/WaterPlanning/StateWaterPlanning/State\\_Planning.htm](http://www.idwr.idaho.gov/waterboard/WaterPlanning/StateWaterPlanning/State_Planning.htm).

<sup>4</sup> Orr Aff., Exhibit 3 at 14.

<sup>5</sup> Prior to 1983, it was believed that the Legislature had authority to amend the State Water Plan under article XV § 7 of the Idaho Constitution, but the Idaho Supreme Court held otherwise in 1983. See Idaho Power Co., 104 Idaho at 573-74, 661 P.2d at 739-40. The Legislature obtained such authority under a 1984 amendment to article XV § 7: “The Legislature of the State of Idaho shall have the authority to amend or reject the state water plan in a manner provided by law.” Idaho Const. art. XV § 7. In any event, the Idaho Legislature’s 1978 and 1982 resolutions and enactments regarding the State Water Plan did not purport to change the zero minimum flow at Milner, but rather strongly endorsed it.

The next revision of the State Water Plan, in 1982, retained the "protected flow" provisions, including the "0 cfs" flow at Milner. Idaho State Water Plan at 42 (Idaho Water Res. Bd., Jan. 19, 1982).<sup>6</sup> The 1982 State Water Plan also provided: "Applications for future water permits shall not be approved if they are in conflict with the State Water Plan adopted by the Idaho Water Resource Board in the public interest." Id. at 21. The Legislature again endorsed the plan. 1982 Idaho Sess. Laws 944-46.

In 1985 the State Water Plan was amended in connection with the Swan Falls settlement. While the Swan Falls settlement called for increasing the minimum flows at Murphy, the settlement reaffirmed that "[t]he minimum daily flow at the Milner gauging station shall remain at zero c.f.s."<sup>7</sup> The 1985 amendments provided, in relevant part:

It is the policy of Idaho that the ground water and surface water of the basin be managed to meet or exceed a minimum average daily flow of zero measured at the Milner gauging station . . . . The establishment of a zero minimum flow at the Milner gauging station allows for existing uses to be continued and for some new uses above Milner. The zero flow established at Milner means that river flows downstream from that point to Swan Falls Dam may consist almost entirely of ground-water discharge during portions of low-water years. The Snake River Plain aquifer which provides this water must therefore be managed as an integral part of the river system.<sup>8</sup>

The Legislature approved these amendments. 1985 Idaho Sess. Laws 514.

Although the 1986 revision of the State Water Plan renumbered its "policies," the Milner language of the 1985 amendments was retained, Idaho State Water Plan at 35 (Idaho Water Res. Bd., Dec. 12, 1986) ("1986 State Water Plan") (Policy 5A),<sup>9</sup> and reaffirmed by the Legislature. 1987 Idaho Sess. Laws 818. Moreover, the 1986

<sup>6</sup> Orr Aff., Exhibit 4 at 14.

<sup>7</sup> Orr Aff., Exhibit 5 at 27 (Swan Falls Agreement, Exhibit 6).

<sup>8</sup> Orr Aff., Exhibit 6 at 4-5 (minutes of Senate Resources and Environment Committee, Mar. 4, 1985, attachment 1 at 1-2) ("A Resolution, In The Matter Of Policy 32 Of The State Water Plan) (Idaho Water Res. Bd.) (Mar. 1, 1985).

<sup>9</sup> Orr Aff., Exhibit 7 at 12.

Legislature amended Idaho Code § 42-203B, one of the statutes enacted the year before in connection with the Swan Falls settlement, to expressly provide:

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.

1986 Idaho Sess. Laws 309; (codified as amended at Idaho Code § 42-203B(2)).

The 1992 revision of the State Water Plan also recognized “that the exercise of water rights above Milner Dam has and may reduce flow at the dam to zero.” Idaho State Water Plan at 28 (Idaho Water Res. Bd., Jan. 1992) (“1992 State Water Plan”) (Policy 5A).<sup>10</sup> The 1992 State Water Plan further stated: “The zero flow at Milner Dam is not a target or goal to be achieved, and may not necessarily be desirable. It is rather, a recognition of the current condition in which zero flow passes Milner Dam during certain periods of time.” Id.<sup>11</sup>

When the original version of the 1996 State Water Plan was presented to the Legislature for approval without the Milner zero minimum flow provision, the Legislature added it back in by direct amendment. 1997 Idaho Sess. Laws 71. Thus, the current State Water Plan (1996) expressly provides: “The exercise of water rights above Milner Dam has and may reduce flow at the dam to zero.” Idaho State Water Plan at 17 (Idaho Water Res. Bd., Dec. 1996) (“1996 State Water Plan”).<sup>12</sup>

## II. The Proceedings.

The Director recommended a quantity of zero c.f.s. for water right No. 02-0200:

<sup>10</sup> Orr Aff., Exhibit 8 at 7 (1992 State Water Plan at 28).

<sup>11</sup> The 1992 State Water Plan was submitted to the Legislature for review, but the Legislature took no action on it. Therefore, the plan became effective sixty days following its submission to the Legislature. Idaho Const. art. XV § 7.

<sup>12</sup> Orr Aff., Exhibit 1 at 11 (1996 State Water Plan at 17).

“The quantity of this right is the average daily flow of zero (0) cfs measured by the Milner Dam gaging station at river mile 638.7 downstream.”<sup>13</sup> The Director also recommended a zero c.f.s. minimum flow in General Provision No. 4 for Basin 02: “The minimum daily flows at the Milner gauging station shall remain as zero cubic feet per second.”<sup>14</sup>

Eight ground water districts jointly filed objections to the Director’s recommendations for water right No. 02-0200 and General Provision No. 4 (subcase 00-92002GP), asserting that: (1) zero c.f.s. should be a “maximum” rather than a minimum;<sup>15</sup> (2) water right 02-0200 should be decreed and administered as part of Basin 01 “to ensure maintenance of a flow of zero (0) cfs at Milner Dam”;<sup>16</sup> and (3) a general provision is necessary to implement the comprehensive management plan established by the Swan Falls settlement as reflected in the 1986 State Water Plan adopted by the Board and approved by the Legislature.<sup>17</sup> Idaho Power Company also objected to the Director’s recommendations, asserting that water right 02-0200 should not exist<sup>18</sup> because the Board did not follow statutory requirements for establishing a minimum instream flow water right,<sup>19</sup> and that General Provision No. 4 should not be included in the Director’s Report or in any decree.<sup>20</sup>

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<sup>13</sup> Part 1 – Director’s Report – Irrigation & Other Uses – Reporting Area Basin 02 at Director’s Report for water right 02-00200 (Vol. One) (Dec. 29, 2006).

<sup>14</sup> Id. at Basin 02 General Provisions.

<sup>15</sup> Standard Form 1 Objection, Subcase 02-200 and General Provisions at 2 (Aberdeen American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Madison Ground Water District, Magic Valley Ground Water District, North Snake Ground Water District, Fremont Madison Ground Water District, Clark Jefferson Ground Water District) (Jan. 30, 2008).

<sup>16</sup> Id.

<sup>17</sup> Id. at 5.

<sup>18</sup> Standard Form 1 Objection, Subcase No. 02-200 at 2 (Idaho Power Co.) (Jan. 30, 2008).

<sup>19</sup> Motion to File Late Objections and Request for Expedited Hearing at 2 (Idaho Power Co.) (Jan. 30, 2008).

<sup>20</sup> Standard Form 1 Objection, General Provision #4 at 2 (Idaho Power Co.) (Dec. 5, 2007).

The City of Pocatello responded to and supported the ground water districts' objection to the Director's Report in subcase 02-0200.<sup>21</sup> The City of Pocatello also responded to the ground water districts' objection to General Provision No. 4, stating that the ground water districts' proposed general provision should apply to all water rights in the Snake River drainage above Murphy.<sup>22</sup> Pocatello also responded to Idaho Power's objection to General Provision No. 4, stating that it provides for administration of water right 02-0200 and that the City understood General Provision No. 4 as applying both above and below Milner Dam.<sup>23</sup> The State of Idaho, the United States Bureau of Reclamation, Idaho Power, and the Twin Falls and North Side Canal Companies also responded to the ground water districts' objections.<sup>24</sup> The State, the Bureau of Reclamation, the ground water districts, the Twin Falls and North Side Canal Companies, Jeff C. and Jackie Harper, Basin and Range Resource Co., LLC, and "Interested Water Users" also responded to Idaho Power's objections.<sup>25</sup>

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<sup>21</sup> Standard Form 2 Response To Objection, Subcase No. 02-200 at 2 (City of Pocatello) (Feb. 5, 2008).

<sup>22</sup> Standard Form 2 Response To Objection, Subcase No. 00-92002GP at 2 (City of Pocatello) (Feb. 5, 2008).

<sup>23</sup> Standard Form 2 Response To Objection, Subcase No. 00-92002GP at 2 (City of Pocatello) (Feb. 5, 2008).

<sup>24</sup> Standard Form 2 Response To Objection, Subcase No. 02-0200 and General Provisions (State of Idaho) (Feb. 4, 2008); Standard Form 2 Response To Objection, Subcase No. 02-00200 & 00-92002GP#4 (U.S. Bureau of Reclamation) (Feb. 5, 2008); Standard Form 2 Response To Objection, Subcase No. 02-200 (Idaho Power Co.) (Feb. 4, 2008); Standard Form 2 Response To Objection, Subcase No. 00-92002GP (Idaho Power Co.) (Feb. 4, 2008); Standard Form 2 Response To Objection, Subcase No. 02-200 and Basin 02-General Provision #4 (Twin Falls Canal Co., North Side Canal Co.) (Mar. 12, 2008).

<sup>25</sup> Standard Form 2 Response To Objection, Subcase No. General Provision no. 4 (State of Idaho) (Feb. 1, 2008); Standard Form 2 Response To Objection, Subcase No. 00-92002GP#4 (U.S. Bureau of Reclamation) (Feb. 5, 2008); Standard Form 2 Response To Objection, Subcase No. General Provision #4 Basin 02 Director's Report (Aberdeen American Falls Ground Water District, Bingham Ground Water District, Bornevillle-Jefferson Ground Water District, Madison Ground Water District, Magic Valley Ground Water District, North Snake Ground Water District, Fremont Madison Ground Water District, Clark Jefferson Ground Water District) (Feb. 4, 2008); Standard Form 2 Response To Objection, Subcase No. 02-200 and Basin 02-General Provision #4 (Twin Falls Canal Co., North Side Canal Co.) (Mar. 12, 2008); Standard Form 2 Response To Objection, Subcase No. General Provision # 4 (Jeff C. & Jackie Harper, Basin and Range Resource Co., LLC, Interested Water Users) (Feb. 5, 2008).

## ARGUMENT

### I. **Legal Standards.**

Under the Idaho Rules of Civil Procedure, a party may move for summary judgment upon “any part” of a claim or defense. I.R.C.P. 56(a), (b). “The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” I.R.C.P. 56(c).

The purpose of summary judgment “is to avoid useless trials,” Bandelin v. Pietsch, 98 Idaho 337, 340, 563 P.2d 395, 398 (1977), and “to eliminate groundless claims and paper issues in cases which would end in directed verdict or other rulings of law.” Lipe v. Javelin Tire Co., Inc., 97 Idaho 805, 806, 554 P.2d 1302, 1303 (1976). Summary judgment “helps to separate the real issues and facts from the spurious ones; to eliminate the chaff from the wheat.” Stewart v. Arrington Const. Co., 92 Idaho 526, 531, 446 P.2d 895, 900 (1968).

The interpretation of a statute is a question of law over which a court exercises free review. Cowan v. Bd. of Comm'rs of Fremont County, 143 Idaho 501, 511, 148 P.3d 1247, 1257 (2006). The objective of statutory interpretation is to give effect to legislative intent. State v. Yzaguirre, 144 Idaho 471, 475, 163 P.3d 1183, 1187 (2007). The best guide to legislative intent is the statutory language itself, therefore the interpretation of a statute must begin with the literal words of the statute. Id. Where the statutory language is unambiguous, the Court does not construe it but simply follows the law as written. Id. The statutory words must be given their plain, usual, and ordinary meaning, and the

statute must be construed as a whole. Idaho Cardiology Assocs., P.A. v. Idaho Physicians Network, Inc., 141 Idaho 223, 225, 108 P.3d 370, 372 (2005).

When a statute is ambiguous, “it must be construed to mean what the legislature intended it to mean. To determine that intent, we examine not only the literal words of the statute, but also the reasonableness of proposed constructions, the public policy behind the statute, and its legislative history.” Hayden Lake Fire Prot. Dist. v. Alcorn, 141 Idaho 388, 398-99, 111 P.3d 73, 83-84 (2005) (citation omitted). In such cases, a court should consider the “context in which language is used, the evils to be remedied and the objects in view.” Hayden Lake Fire Prot. Dist. v. Alcorn, 141 Idaho 307, 312, 109 P.3d 161, 166 (2005).

**II. The State Is Entitled To Summary Judgment As A Matter Of Law Under The Plain Language Of Chapter 38 Of The 1997 Idaho Session Laws, The State Water Plan, And Idaho Code § 42-203B(2).**

The Idaho Legislature has explained the meaning of the Milner zero minimum flow in unambiguous terms. The Legislature directly amended the current version of the State Water Plan through chapter 38 of the 1997 Idaho Session Laws, to expressly provide: “The exercise of water rights above Milner Dam has and may reduce the flow at the dam to zero.” 1997 Idaho Sess. Laws 71 (underlining in original); *see also* 1996 State Water Plan at 17. The purpose of this policy is to allow the Snake River to be completely developed for uses above Milner Dam, as District Judge John M. Melanson recently explained: “In brief terms, the State Water Plan sets a ‘zero flow’ at Milner Dam to allow for full development of the River above Milner.” Order On Petition For Judicial Review at 40 n.12, Clear Springs Foods, Inc. v. Idaho Ground Water Appropriators, Inc. (Fifth

Jud. Dist., Gooding County) (Case. No. 2008-444) (Jun. 19, 2009).<sup>26</sup> Thus, as a matter of law under the Idaho State Water Plan and Idaho statute, the exercise of water rights upstream from Milner Dam may reduce the flow of the Snake River at Milner Dam to zero c.f.s.

The Legislature has been equally clear that water rights using water downstream from Milner Dam may not impair or interfere with the full development of the river for uses above Milner Dam:

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) (emphasis added). Through this language, the Legislature has unambiguously provided that uses downstream from Milner Dam have no legal entitlement to call for any of the water upstream from Milner Dam, and may not interfere with any water rights using water above Milner Dam.

Taken together, section 42-203B(2), chapter 38 of the 1997 Idaho Session Laws, and the State Water Plan leave no doubt that the entire flow of the Snake River may be diverted for uses above Milner Dam, and that water rights using water downstream from

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<sup>26</sup> Judge Melanson made this statement after having been fully briefed on the question of the effect of the Swan Falls Agreement's requirement that the "zero minimum flow" provision be retained in the State Water Plan, which the State of Idaho and Idaho Power Company addressed in summary judgment briefing in Consolidated Subcase 00-92023. Judge Melanson is withholding his decision on this issue pending the resolution of the State's and Idaho Power's joint motions for entry of partial decrees that contain remarks reciting the relevant language of Idaho Code § 42-203B(2), and providing that the hydropower water rights in question may not be enforced or administered against any diversions or uses of water above Milner Dam. See Orr Aff., Exhibit 9 at 3, 5 (Milner remarks in examples of the partial decrees proposed under *State Of Idaho's And Idaho Power Company's Joint Motion For Entry Of Partial Decrees Re: Water Rights In Basin 02 And Basin 37*) (SRBA Consolidated Subcase 00-92023) (June 25, 2009).

Milner Dam have no legal standing to prevent or interfere with such diversions. The plain statutory language forecloses any other conclusion.

Further, nothing in the statutes or the State Water Plan requires the flow at Milner to be maintained at "zero." This is why the Milner zero flow is a minimum and not a maximum; the underlying policy is simply to allow for full utilization of flows above Milner. In other words, the zero minimum flow principle does not require full utilization above Milner and does not bar spills over Milner Dam: it only provides that it is permissible for the flows at Milner to be reduced to zero c.f.s., and that water rights using water downstream from Milner Dam may not call for water to be spilled over the dam.<sup>27</sup>

The importance of the incorporation of the Milner zero minimum flow principle in the general provisions and the 02-0200 partial decree for purposes of defining and administering Basin 02 water rights is self-evident. The modification to General Provision No. 4 proposed by the State's Motion for Partial Summary Judgment is necessary for the definition and efficient administration of Basin 02 water rights. Idaho Code § 42-1412(6). For the same reasons, a corresponding remark is necessary for the definition and administration of water right 02-0200. Idaho Code § 42-1411(2)(j).

This Court need go no further to determine the question of the meaning and effect of the Milner zero minimum flow in subcases 02-0200 and 00-92002GP. Thus, the State is entitled to summary judgment as a matter of law under chapter 38 of the 1997 Idaho Sessions Laws, the State Water Plan, and Idaho Code § 42-203B(2).

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<sup>27</sup> The State's Motion for Partial Summary Judgment does not address the issue of whether storage water may be released for use below Milner Dam. The use of storage water below Milner is governed by federal spaceholder contracts and other provisions of state law.

**III. The Legislative History Confirms That The State Is Entitled To Summary Judgment.**

If this Court determines, however, that the State Water Plan and Idaho Code § 42-203B(2) are ambiguous, it may consider “not only the literal words of the statute, but also the reasonableness of proposed constructions, the public policy behind the statute, and its legislative history.” Hayden Lake Fire Prot. Dist., 141 Idaho at 398-99, 111 P.3d at 83-84 (citation omitted). The legislative history of the State Water Plan and Idaho Code § 42-203B(2) confirm their plain meaning.

A. The State Water Plan As Formulated By The Board And Approved By The Idaho Legislature Has Consistently Provided For A Zero Minimum Flow At Milner Dam.

The Board is charged with formulating and implementing the comprehensive State Water Plan, which provides “for optimum development of water resources in the public interest.” Idaho Const. art. XV § 7; Idaho Code §§ 42-1734A(1); 42-1734B(1). The State Water Plan is based upon studies and public hearings in affected areas at which all interested parties have the opportunity to appear or present written testimony. Idaho Code § 42-1734A(1). The Board has discretion to balance all factors relevant to the formulation, adoption and implementation of the State Water Plan, Idaho Code § 42-1734B(2), and the Legislature may approve, amend or reject it. Idaho Const. art. XV § 7; Idaho Code §§ 42-1734B(6), (7); 42-1736. State agencies “shall exercise their duties in a manner consistent with the comprehensive state water plan,” Idaho Code § 42-1734B(4), and “[a]ll future filings, permits and decrees on the unappropriated waters of this state shall be determined with respect to the effect such filings, permits and decrees will have on the minimum daily flow of the affected stream or river. . . .” Idaho Code § 42-1736B(1).

The State Water Plan has included a Milner zero minimum flow provision since it was first issued in 1976. The 1976 and 1982 State Water Plans designated the flow at Milner to be “protected against further appropriations” as “0 c.f.s.” and stated that there was sufficient excess water “to provide for additional uses if water conserving and storage facilities are constructed.” 1982 State Water Plan at 42; 1976 State Water Plan at 116. The 1985 amendments and the 1986 State Water Plan provided that the Snake River Basin should “be managed to meet or exceed a minimum average daily flow of zero measured at the Milner gauging station.” 1986 State Water Plan at 35. The 1992 State Water Plan provided that “the exercise of water rights above Milner Dam has and may reduce flow at the dam to zero.” 1992 State Water Plan at 28. The 1992 State Water Plan also explained that “[t]he zero flow at Milner Dam is not a target or goal to be achieved . . . .” *Id.* The current State Water Plan also provides that “[t]he exercise of water rights above Milner Dam has and may reduce flow at the dam to zero.” 1996 State Water Plan at 17.

The Legislature approved the current State Water Plan and its predecessors, particularly with regard to the Milner “zero minimum flow.” *See* 1978 Idaho Sess. Laws 885-86, 1011;<sup>28</sup> 1982 Idaho Sess. Laws 944-46; 1985 Idaho Sess. Laws 514; 1987 Idaho Sess. Laws 818-19.<sup>29</sup> Notably, when the Milner “zero minimum flow” provision was omitted from the 1996 State Water Plan as originally forwarded to the Legislature for

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<sup>28</sup> *See supra* note 5.

<sup>29</sup> The Legislature did not pass a statute or resolution formally approving the 1992 State Water Plan, but also did not reject or amend it, and therefore the 1992 State Water Plan became effective as written sixty days after its submission to the Legislature. Idaho Const. art. XV § 7. Further, the Legislature directly amended the 1996 State Water Plan to incorporate the Milner “zero minimum flow” provision of the 1992 State Water Plan. *Compare* 1992 State Water Plan at 28 with 1997 Idaho Sess. Laws 71. This fact suggests that the Legislature viewed the 1992 State Water Plan’s “zero minimum flow” provision favorably, even if it was not specifically endorsed through formal legislative action in 1992.

review, the Legislature directly amended it to include the zero minimum flow provision of the previous revision of the State Water Plan. 1997 Idaho Sess. Laws 71. Thus, the principle that the flows of the Snake River may be completely developed above Milner Dam, even to the point of reducing the flow at Milner to zero c.f.s., has been an element of the State's comprehensive water resource planning in the Snake River Basin since the Idaho Constitution originally called for such planning.

B. The Legislature Specifically Affirmed The Meaning And Effect Of The Milner Zero Minimum Flow Through The 1986 Amendment To Idaho Code § 42-203B(2).

In 1986 the Legislature specifically affirmed that the "zero minimum flow" principle of the State Water Plan means that water rights using water downstream from Milner may not interfere with or impair the full use and development of flows above Milner. The Legislature did so through the 1986 amendment to Idaho Code § 42-203B(2).

The 1986 amendment was a response to the need for clarification regarding the meaning and effect of the Milner zero minimum flow for purposes of implementing the 1984 Swan Falls Agreement. The Swan Falls Agreement was contingent upon, among other things, retention of the Milner zero minimum flow in the State Water Plan: the Agreement required that "[t]he minimum daily flow at the Milner gauging station shall remain at zero c.f.s."<sup>30</sup>

It was widely understood that retention of the zero minimum flow at Milner Dam meant that surplus flows upstream from Milner such as winter flows and flood waters

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<sup>30</sup> Orr Aff., Exhibit 5 at 27 (Swan Falls Agreement, Exhibit 6). The Board amended the State Water Plan accordingly in 1985. See Orr Aff., Exhibit 6 at 4-5 (attachment 1 to minutes of Senate Resources and Environment Committee) (Mar. 4, 1985). The Legislature approved the amendments. 1985 Idaho Sess. Laws 514.

would remain available for storage and use above Milner. In a press release on the settlement, Attorney General Jim Jones (who signed the Agreement) stated, among other things, that "[t]he parties have agreed to a zero flow at Milner, which would allow for the filling of present upstream storage facilities, as well as additional new water storage projects."<sup>31</sup> Idaho Power's attorney Tom Nelson (who negotiated the Agreement on behalf of Idaho Power) explained in the Board's public information meeting on the day the Agreement was signed:

The water plan target minimum flow at Milner Dam is zero, which is a condition realized in the summer all the time, and this agreement does not contemplate any change in that minimum flow. So short of a statement that before new storage is built we should fully utilize existing storage, what goes on above Milner is not affected by this agreement.<sup>32</sup>

The Governor's negotiator, attorney Pat Costello, also pointed out in one of the Board's public information meetings that the zero minimum flow provision allowed for future storage projects upstream of Milner Dam: "And on the up-stream storage, I guess it's in here by omission, because by maintaining the zero flow at Milner, it still provides for any future up-stream storage projects that become feasible above Milner."<sup>33</sup>

The Committee of Nine of Water District No. 1 passed a resolution supporting the Swan Falls Agreement only if it was clearly understood that there would continue to be no obligation to spill water over Milner Dam:

BE IT FURTHER RESOLVED that in implementation it be clear that the following conditions prevail:

<sup>31</sup> Orr Aff., Exhibit 10 at 3 ("News Release" at 2) (Office of the Attorney General) (Oct. 1, 1984).

<sup>32</sup> Orr Aff., Exhibit 11 at 9 (transcript of Idaho Water Resource Board public information meeting on Swan Falls settlement at 27) (Twin Falls) (Oct. 25, 1984).

<sup>33</sup> Orr Aff., Exhibit 12 at 20 (transcript of Idaho Water Resource Board public information meeting on Swan Falls settlement at 66) (Boise) (Nov. 1, 1984).

1. That there is, and will continue to be, no obligation to provide surface flows for water rights established below Milner Dam and that the “zero” flow at Milner Dam be reaffirmed.<sup>34</sup>

In the Board’s 1985 hearings on the State Water Plan amendments proposed by the Swan Falls Agreement, the Secretary of the Great Feeder Canal Company stated his understanding “that this entire policy is based on a minimum flow at Milner that anything that can develop or anything that’s affected above Milner should not be affected by this agreement.”<sup>35</sup> Board representative Frank Sherman clarified this point during the Board’s 1985 hearings: “The negotiators agreed that above Milner there is a requirement for zero flow back to the dam.”<sup>36</sup> “They’re going to continue the zero flow at Milner Dam. . . . there is no requirement for the water to be dumped past Milner Dam.”<sup>37</sup>

The understanding that winter and flood flows would remain available for storage and development above Milner was thrown into doubt when the Idaho Department of Water Resources (“IDWR”) proposed administrative rules to implement the Swan Falls settlement’s “trust” provisions.<sup>38</sup> The proposed rules defined all surface and ground

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<sup>34</sup> Orr Aff., Exhibit 13 at 3 (“Resolution” of Committee of Nine of Water District 1) (Jan. 17, 1985).

<sup>35</sup> Orr Aff., Exhibit 14 at 29 (transcript of Idaho Water Resource Board hearing on proposed State Water Plan amendments at 28) (Idaho Falls) (Jan. 28, 1985, 2:00 p.m.).

<sup>36</sup> Orr Aff., Exhibit 15 at 20 (transcript of Idaho Water Resource Board hearing on proposed State Water Plan amendments at 15) (Pocatello) (Jan. 29, 1985, 7:00 p.m.).

<sup>37</sup> Orr Aff., Exhibit 16 at 20 (transcript of Idaho Water Resource Board hearing on proposed State Water Plan amendments at 65) (Lewiston) (Feb. 6, 1985, 7:00pm).

<sup>38</sup> Pursuant to the Swan Falls Agreement and its implementing legislation—specifically Idaho Code § 42-203B—the State holds in trust certain hydropower water rights located below Milner Dam that formerly were claimed by Idaho Power. *See Memorandum Decision And Order On Cross Motions For Summary Judgment at 31* (SRBA Consolidated Subcase 00-92023) (Apr. 18, 2008) (“This Court holds that Exhibit 7B [of the Swan Falls Agreement] clearly and unambiguously provides that any portion of Idaho Power’s water rights in excess of the minimum flows are held in trust by the State . . .”); *see also Idaho Code § 42-203B(2)* (similar). The flows encumbered by the hydropower water rights held in trust by the State are often termed “trust water.” *See Memorandum Decision And Order On Cross Motions For Summary Judgment at 41* (stating that new appropriators received “a portion of the water freed up and encumbered as a result of the trust arrangement. This is where the reference to ‘trust water’ comes from . . .”). The administrative rules proposed to implement Idaho Code § 42-203B would have defined, among other things, the geographic area in which “trust water” is found. *See Orr Aff., Exhibit 17 at 3* (IDWR publication setting forth proposed rules) (Rule 1.5 and Figure 1).

water flows above Milner as subject to the hydropower water rights held in trust by the State below Milner, despite the retention of the zero minimum flow. While IDWR acknowledged that retaining the zero minimum flow at Milner had been interpreted “by some” to mean the hydropower water rights held in trust by the State did not have any effect on flows above Milner Dam, it nonetheless rejected this view because Idaho Code § 42-203B(2) as originally enacted contained no such limitation:

The adopted minimum flow of zero cfs at Milner has been construed by some as exempting any water passing Milner from the trust water provisions. . . . A simple reading of S1008 (Section 42-203b(2)) indicates that all waters in excess of an established minimum flow up to the amount of the established hydropower right are to be considered trust waters. . . . I propose to draft the rules recognizing all flows tributary to Snake River above Swan Falls including water passing Milner as trust waters . . . .<sup>39</sup>

Thus, the proposed “rules for water allocation” provided that the entire Snake River drainage above Swan Falls, including the area upstream from Milner Dam, contained “flows subject to the trust water provisions as a result of the agreement and the legislation which implemented it.”<sup>40</sup>

IDWR’s administrative interpretation was universally rejected. In his written comments on the proposed rules, attorney John Rosholt<sup>41</sup> wrote “its been my understanding all along that trust water flows can only exist between the Swan Falls Dam and the Milner Dam . . . . for the reason that the minimum stream flow at Milner is

<sup>39</sup> Orr Aff., Exhibit 18 at 3 (internal IDWR memorandum from Norm Young to Director Ken Dunn, “Legal Issues Associated With Senate Bill 1008”) (June 14, 1985) (parentheses in original).

<sup>40</sup> Orr Aff., Exhibit 17 at 3 (IDWR publication setting forth proposed rules) (Rule 1.5 and Figure 1).

<sup>41</sup> John Rosholt represented Idaho Power, Twin Falls Canal Company, North Side Canal Company and American Falls Reservoir District in proceedings related to the Swan Falls settlement. See Orr Aff., Exhibit 19 at 1, 4 (letter from John A. Rosholt, as attorney for Twin Falls Canal Company, North Side Canal Company and American Falls Reservoir District, to Norman C. Young of IDWR at 1, 4) (Oct. 12, 1988); id. at 10 (Idaho Power’s memorandum in support of motion to reconsider and amend summary judgment at 5) (*Idaho Power Co. v. State*, Case No. 62237) (Fourth Jud. Dist., Ada County) (Feb. 19, 1980) (signed by John A. Rosholt).

zero.”<sup>42</sup> Attorney General Jim Jones stated: “the parties did not intend ground waters or surface waters tributary to the Snake River above Milner Dam to be included within the definition of trust water flows . . . . The reason for this conclusion is that the parties retained the minimum streamflow at Milner Dam at zero.”<sup>43</sup> The United States Bureau of Reclamation also commented: “[S]ince it is further stated that the minimum flow at Milner is zero, meaning no surface flow is required past Milner for any downstream uses, it would appear to be a misinterpretation to include surface water above Milner.”<sup>44</sup>

A water manager for several upper Snake River valley canal companies pointed out in a hearing on the proposed rules that they threatened to interfere with the established practice of reserving flood waters for uses upstream from Milner:

I’m wishing for more of a clarification of whether flood waters is what — or relationship flood waters has with trust waters. Now, in the past, when we have been having flood waters, we use those flood waters, we could use all we could take care of in the canal system. . . . And so I’d like to make my formal protest or clarification of what flood waters is in relation to the trust waters. And if it was going to change anything that we have been doing in the past 30 or 40 years, it would be detrimental to our canal systems.<sup>45</sup>

The Secretary of the Great Feeder Canal Company emphasized that the settlement had been presented as reserving flows above Milner Dam for existing water rights and new development:

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<sup>42</sup> Orr Aff., Exhibit 20 at 2 (letter from John A. Rosholt to Kenneth Dunn, Director of Idaho Department of Water Resources, at 1) (Oct. 30, 1985). Mr. Rosholt also commented that re-evaluation of permit applications for storage projects upstream of Milner Dam “becomes totally unnecessary . . . since there can be no surface trust water above Milner Dam.” *Id.* at 4-5.

<sup>43</sup> Orr Aff., Exhibit 21 at 3 (“News Release” at 2) (Office of the Attorney General) (Jan. 29, 1986).

<sup>44</sup> Orr Aff., Exhibit 22 at 2 (letter from John W. Keyes III, Assistant Regional Director, U.S. Bureau of Reclamation, to A. Kenneth Dunn, Director, Idaho Department of Water Resources, at 1) (Jan. 27, 1986).

<sup>45</sup> Orr Aff., Exhibit 23 at 6 (transcript of IDWR public hearing on proposed rules and regulations for water appropriation at 10-12) (Idaho Falls) (Jan. 14, 1986).

I've been at two meetings in which I specifically asked the question of whether the Swan Falls agreement would affect the flow above Milner. And I was assured that under no circumstances would the Swan Falls agreement affect any of the diversion of water under any circumstances above Milner. . . . The water users that I have talked to feel as if they have been deceived . . . . you know, after being promised one thing and here we come and we find that all of our water rights may be in jeopardy – or some of them, at least – or that new development may be minimized because of the rules and regulations and the laws that are now made, it appears to us that it's pure deception. . . . I don't think you realize how the farmers feel, how the people feel, about that very principle.<sup>46</sup>

Mike Crapo, then a state senator, had played a key role in the passage of the 1985 Swan Falls legislation, including Idaho Code § 42-203B. He also emphasized the importance of the Milner minimum streamflow in a hearing on the proposed rules: “zero flow at Milner was very heavily discussed and was the basis upon which the [Swan Falls settlement] legislation was passed. And certainly with regard to surface flow, there are no trust waters above Milner, as my understanding of it goes.”<sup>47</sup> “[I]t was the understanding of everyone last year that the flow at Milner was zero, and there was no trust water in the flow above Milner.”<sup>48</sup>

The parties therefore proposed a clarifying amendment to Idaho Code § 42-203B(2) to confirm that flows arising above Milner Dam would not be subject to water rights using water below Milner Dam. The amendment proposed to add two sentences to the statute. The first sentence addressed the hydropower water rights held in trust by State pursuant to the Swan Falls settlement. The second sentence of the proposed amendment to Idaho Code § 42-203B(2)—the passage quoted and discussed earlier in this memorandum—clarified that for all water rights downstream from Milner dam, “no

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<sup>46</sup> *Id.* at 7-8 (transcript at 16-18).

<sup>47</sup> *Orr Aff., Exhibit 24 at 5* (transcript of IDWR public hearing on proposed rules and regulations for water appropriation at 8) (Boise) (Jan. 16, 1986).

<sup>48</sup> *Id.* at 6 (transcript at 11).

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” for purposes of “determination and administration.” S.B. 1358, 48<sup>th</sup> Idaho Leg., 2d Reg. Sess. (1986);<sup>49</sup> Idaho Code § 42-203B(2).

The parties supported the amendment as a confirmation of the original intent of the Agreement.<sup>50</sup> The Committee of Nine of Water District No. 1 also passed a resolution endorsing the proposed amendment. The resolution recited the committee’s understanding that the parties to the Swan Falls Agreement had agreed “that it was never their intent to force water arising above Milner Dam to be released to fill downstream water rights” and that “the upper Snake has always been managed separately from the lower Snake.”<sup>51</sup> The Legislature enacted the proposed amendment to Idaho Code § 42-203B(2). 1986 Idaho Sess. Laws 309 (codified as amended at Idaho Code § 42-203B(2)).

Thus, the legislative history of the 1986 amendment to Idaho Code § 42-203B(2) demonstrates the Legislature specifically affirmed that the zero minimum flow at Milner means not only that the river may be fully developed for storage and use above Milner, but also that water rights using water downstream from Milner Dam have no legal standing to impair or interfere with such development.

#### **IV. The Origin And Implementation Of The Milner Zero Minimum Flow.**

While the State’s Motion for Partial Summary Judgment can be resolved solely on the basis of the plain language of Idaho Code § 42-203B(2), the 1997 Idaho Session Laws and the State Water Plan, the State submits that the Court may consider the following

<sup>49</sup> Orr Aff., Exhibit 25 at 3.

<sup>50</sup> See Orr Aff., Exhibit 26 at 2 (minutes of Senate Resources and Environment Committee, Feb. 19, 1986, at 1) (describing the 1986 amendment as “merely clarification”).

<sup>51</sup> Orr Aff., Exhibit 27 at 6 (“Resolution 19”) (Committee of Nine and the Water Users of Water District I) (Mar. 4, 1986).

undisputed historical facts to resolve any alleged ambiguity. These undisputed facts reveal “the public policy behind the statute.” Hayden Lake Fire Prot. Dist., 141 Idaho at 398-99, 111 P.3d at 83-84 (citation omitted)

The zero minimum flow provisions of the State Water Plan and the 1986 amendment to Idaho Code § 42-203B(2) were not created out of whole cloth. Rather, they reflected the long-established practice of conserving and storing non-irrigation season (“winter”) flows and flood waters above Milner Dam for agricultural purposes. The origins of this policy and practice are inextricably intertwined with the development of the water resources of the Snake River Basin during the last century.

As discussed below, the unique geography of the Snake River Basin fostered irrigation development that resulted in the full appropriation of the summer flow of the river at Milner by the early years of the twentieth century. Thereafter, further development was possible only by conserving and storing above Milner the winter flows and flood waters that would otherwise be lost or “wasted” for irrigation purposes. This fact, plus a series of low water years and devastating droughts that resulted in shortages even for existing irrigation projects, made the conservation and storage of winter and flood flows above Milner Dam an imperative that became the primary consideration in water resources planning and development in southern Idaho. State and federal policies aimed at conserving and storing winter and flood flows above Milner Dam to the greatest extent possible were part of the bedrock of Snake River Basin water development and property rights expectations long before the first State Water Plan formally incorporated a “zero minimum flow” at Milner Dam.

A. The Physical Division Of The Snake River Basin At Milner Dam.

"From Heise to Milner, a distance of 219 river miles, the [Snake] river is not deeply entrenched. . . . At Milner, the river enters a deep canyon cut through lava and sedimentary beds and continues for 216 miles in a west and northwesterly direction."<sup>52</sup> Thus, geography physically divides the Snake River into two sections as it arcs across southern Idaho, and this natural bifurcation dictated the progression of early irrigation development. The section downstream from Milner offered essentially no opportunities for significant agricultural development because the river was largely inaccessible in the deep canyon.<sup>53</sup> Prior to the advent of high-lift pumping, the principal use contemplated below Milner was hydropower development.<sup>54</sup>

The river above Milner was readily accessible to irrigate the broad, fertile plains and was quickly developed for this purpose. The area above American Falls was especially well-suited to gravity irrigation diversions and by 1900 private interests had developed many irrigation systems in this area.<sup>55</sup> After 1900, large-scale irrigation projects were developed with government assistance in the area from American Falls to

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<sup>52</sup> Orr Aff., Exhibit 4 at 13 (1982 Idaho State Water Plan at 5).

<sup>53</sup> See Orr Aff., Exhibit 28 at 6 ("Report and Recommendations to the Federal Power Commission by W.G. Swendsen, Commissioner of Reclamation, representing the State of Idaho" at 3) (Oct. 28, 1922) ("Almost immediately below Milner Dam, Snake River enters what ultimately becomes a rather deep rock gorge, from which water can not be diverted by gravity for irrigation uses.").

<sup>54</sup> See Orr Aff., Exhibit 29 at 14 ("Report of Board of Engineers to Consider Projects in Snake River Valley Which May Affect the Proposed American Falls Reservoir" at 5) (April 10, 1920) ("Board of Engineers Report") ("The waters flowing in the stream below Milner Dam are not susceptible of diversion to any considerable amount, and therefore become of primary use in connection with the production of power."); see also Orr Aff., Exhibit 30 at 4 (W.G. Hoyt, Hydraulic Engineer, U.S. Geological Survey, "Report Relative To Application of Idaho Power Company for Preliminary Permit to Develop Upper Salmon Falls Site on Snake River, Idaho - Permit No. 19, Federal Power Commission" at 3) (July 1921) ("in the section downstream [from Milner] the use of water for power purposes will undoubtedly predominate, since the larger portion of the land adjacent to the river is at such an elevation that it cannot feasibly be irrigated by water pumped or diverted below the Milner dam.").

<sup>55</sup> See generally Orr Aff., Exhibit 31 at 3 (Leonard J. Arrington, *Irrigation In The Snake River Valley: An Historical Overview*, IDAHO YESTERDAYS, Spring/Summer Issue, 1986, Vol. 30, Numbers 1-2, at 4.)

Milner. The Twin Falls south and north side projects were constructed by the Twin Falls and North Side Canal Companies under the 1894 Carey Act, and the federal Minidoka Project was developed by the U.S. Reclamation Service (later the Bureau of Reclamation) under the 1902 Reclamation Act.<sup>56</sup> The Minidoka Project built dams and large reservoirs at Lake Walcott (Minidoka Dam) and Jackson Lake in Wyoming.<sup>57</sup> The Twin Falls companies constructed a large dam and diversion works at Milner,<sup>58</sup> the lowest point on the river at which large irrigation diversions were practicable.<sup>59</sup> As a result of this development, the reliable summer flow of the river at Milner was fully appropriated soon after the end of the nineteenth century.<sup>60</sup>

B. Early Recognition Of The Need To Conserve And Store Winter Flows Above Milner.

The full appropriation of irrigation season flows at Milner was a turning point in the development of the Snake River Basin. From that point on, storage reservoirs and the waters to fill them were necessary for further irrigation development. As the Director of the U.S. Reclamation Service emphasized in a 1920 letter to Idaho Power Company regarding the proposal to build a reservoir at American Falls:

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<sup>56</sup> See *id.*; Orr Aff., Exhibit 32 at 6 (W.G. Hoyt, "Report Relative to Water Power Resources of Snake River and Status of Public Lands Between Milner and Weiser, Idaho" at 42) (U. S. Geological Survey) (Aug. 1922).

<sup>57</sup> See Erik A. Stene, "Minidoka Project History" at 2, 5-10 (U.S. Bureau of Reclamation) (1997), [http://www.usbr.gov/projects/ImageServer?imgName=Doc\\_1245093434100.pdf](http://www.usbr.gov/projects/ImageServer?imgName=Doc_1245093434100.pdf); (link located on webpage: [http://www.usbr.gov/projects/Project.jsp?proj\\_Name=Minidoka%20Project&pageType=ProjectHistoryPage](http://www.usbr.gov/projects/Project.jsp?proj_Name=Minidoka%20Project&pageType=ProjectHistoryPage)).

<sup>58</sup> Orr Aff., Exhibit 33 at 5 (C.E. Tappan, "Report Covering Water Measurements and Studies of Stream Flow of Snake River Between Milner and Shoshone Falls" at 8) (Idaho Power Company 1923).

<sup>59</sup> Orr Aff., Exhibit 29 at 6 (transmittal letter from I.W. McConnell, Chairman of the Board of Engineers, to Chief of Construction, U.S. Reclamation Service, at 2) (Apr. 10, 1920) (transmitting Board of Engineers Report).

<sup>60</sup> See Orr Aff., Exhibit 34 at 5 ("State of Idaho Response to Federal Energy Regulatory Commission Request for Additional Information" at 2) (*In the Matter of Petition for Declaratory Order by Idaho Power Company*) (FERC Docket no. EL85-38-000) (Jan. 30, 1987) ("The reliable natural flow during the summer month period was fully developed by the end of the 19<sup>th</sup> century.")

The time has already passed when the natural flow of the river was sufficient to irrigate the lands under cultivation along its shores and storage reservoirs have been recognized as a necessity for many years past. . . . without additional storage no new areas at all can be made productive and habitable and even the present projects will suffer occasional serious losses.<sup>61</sup>

The great drought of 1919, the driest year on record in the Snake River Valley to that point, provided the catalyst for the development of the storage facilities needed to support continued agriculture development within the basin. In a report to the Governor in June of that year, the State Commissioner of Reclamation stated that there had been an "extreme shortage of water, occasioned by a very light precipitation and snow-fall."<sup>62</sup>

The Commissioner further reported:

During seasons of normal flow, the Snake River is at this time at flood stage and a considerable quantity of water has heretofore, at this time of

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<sup>61</sup> Orr Aff., Exhibit 35 at 1 (Letter from A.P. Davis, Director of U.S. Reclamation Service, to Idaho Power Company at 1) (Nov. 2 1920). The inadequacy of natural flow for further irrigation development, and the need for additional storage, was recognized repeatedly in subsequent years. In 1934 the State Commissioner of Reclamation reported:

The limit of the development of the irrigation resources of the State from the natural flow of streams has long since been reached, and resort has been had to storage, pumping from lakes and streams, and the development of subterranean water to supplement and augment the supply necessary to irrigate the lands under cultivation.

Orr Aff., Exhibit 36 at 2 (R.W. Paris, State Commissioner of Reclamation, "Supplementary Water For Irrigation In Idaho, With Particular Reference To Boise And Snake River Valleys" at 1) (Oct. 15, 1934) (revised). A 1935 U.S. Geological Survey water utilization report stated: "Irrigation development has reached a point in the Snake River Basin beyond which there can be no large increase in acreage without the construction and utilization of additional storage reservoirs or through the development of additional water supply by pumping." Orr Aff., Exhibit 37 at 7 (W.G. Hoyt, "Water Utilization In The Snake River Basin" at 65) (U.S. Department of the Interior, Water Supply Paper 657) (1935). The Idaho Supreme Court also took notice of the fact that natural flow had been fully appropriated: "The normal flow of our streams has been appropriated, and therefore the limit of development by irrigation from that source has been reached." State Water Conservation Board v. Enking, 56 Idaho 722, 738, 58 P.2d 779, 785-86 (Holden, J., concurring) (1936); see also Orr Aff., Exhibit 38 at 7 ("Special Report - Upper Snake River Basin (Above Powder River) - Irrigation And Associated Developments" at 63) (U.S. Dept. of the Interior, Bur. of Reclamation, Regional Office, Boise, Idaho) (February 1955) ("Large scale irrigation of new lands or providing supplemental supplies in the upper portion of Snake Basin would depend upon development of a water supply in the river above Milner Dam.").

<sup>62</sup> Orr Aff., Exhibit 39 at 1 (W.G. Swendsen, Idaho State Commissioner of Reclamation, "Departmental Report No. 2 from May 1 To June 1, 1919 - To His Excellency C.C. Moore, Acting Governor Of The State Of Idaho" at 1).

the year, been wasting over the Milner Dam, whereas during this season the stream has been entirely used for irrigation purposes at this point for some weeks past.<sup>63</sup>

The Commissioner also issued a notice in June to the water users on the Snake River, notifying them of the run-off shortage and the unusually low storage in Jackson Lake Reservoir, and stating that it was "highly important that the greatest economy be exercised in the use of water during this season."<sup>64</sup> The District Counsel for the U.S. Reclamation Service, B.E. Stoutemyer, reported to the Chief Counsel of the U. S. Reclamation Service: "The water situation on Snake River is extremely critical this year . . ."<sup>65</sup> "There is a great shortage of water in Snake River this year, this being the lowest year in thirty years, the Snake River at this time being about 3,000 second-feet lower than ever known before at this time of the year."<sup>66</sup>

After the 1919 drought, "[i]t became obvious to all that additional storage facilities had to be built to provide water when short supplies occurred in the future."<sup>67</sup> As the State Commissioner of Reclamation reported to the Governor in 1923: "The shortage of water experienced in the Snake River valley in 1919 and the subsequent crop loss from drouth during that year acted to stimulate interest in and created a demand for additional storage on the Snake River."<sup>68</sup> Because the river was fully appropriated above Milner during the irrigation season, the only waters available for storage in new

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*Id.*

<sup>64</sup> Orr Aff., Exhibit 40 at 2 (W.G. Swendsen, Commissioner of Reclamation, Department of Reclamation, "Re: Water District No. 36, To the Water Users on the Snake River") (June 2, 1919).

<sup>65</sup> Orr Aff., Exhibit 41 at 2 (Letter from B.E. Stoutemyer, U.S. Reclamation Service District Counsel, to the Chief Counsel, U.S. Reclamation Service at 2) (June 26, 1919).

<sup>66</sup> Orr Aff., Exhibit 42 at 1 (Letter from District Counsel B.E. Stoutemyer, U.S. Reclamation Service, to Chief Counsel, U.S. Reclamation Service, Washington D.C. at 1) (June 30, 1919).

<sup>67</sup> Orr Aff., Exhibit 31 at 6 (Arrington article at 7).

<sup>68</sup> Orr Aff., Exhibit 43 at 1 (Letter from W.G. Swendsen, State Reclamation Commissioner, to Governor C.C. Moore at 1) (July 9, 1923).

reservoirs were non-irrigation season flows and flood waters. The location most often proposed for a new reservoir to store such flows was American Falls.

In 1920, the United States Director of Reclamation A.P. Davis and Idaho Governor D.W. Davis designated a joint federal-state Board of Engineers to consider water projects in the Snake River Valley, particularly those affecting the proposed American Falls Reservoir.<sup>69</sup> The engineers selected to serve on the board represented governmental and private interests: the U.S. Reclamation Service, the Idaho Department of Reclamation, the Twin Falls Canal Company, and the Twin Falls North Side Land & Water Company (the predecessor to North Side Canal Company).<sup>70</sup>

The Board of Engineers quickly recognized that the water supply situation called for comprehensive planning and coordinated development. During the Board's first meeting, Idaho State Commissioner of Reclamation W.G. Swendsen said that State officials believed "the time had come for the formation of a definite plan for the development of the remaining resources of the Snake River water supply on a broad and comprehensive basis which would insure to the state the maximum utility of the possibilities of the stream."<sup>71</sup> Further, as the Board of Engineers reported: "It became apparent from preliminary consideration of the subject that no one of the principal problems involved could be properly considered without taking into account its effect upon the general problem of the conservation of the waters of Snake River."<sup>72</sup> Thus, the Board of Engineers considered "[t]he total water supply available in the Snake River basin for irrigation," the "quantity of storage required for the utilization of the water

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<sup>69</sup> Orr Aff., Exhibit 29 at 10 (Board of Engineers Report at 1).

<sup>70</sup> Id. at 11 (Board of Engineers Report at 2).

<sup>71</sup> Id. at 11-12 (Board of Engineers Report at 2-3).

<sup>72</sup> Id. at 12 (Board of Engineers Report at 3).

supply and the relation of that supply to the size of the American Falls Reservoir and other reservoirs which may be necessary,” and the loss of hydropower rights at American Falls through “the appropriation of all waters available for irrigation.”<sup>73</sup> The Board of Engineers issued a much-anticipated report in April 1920 (“Board of Engineers Report”).<sup>74</sup>

The Board of Engineers Report concluded that “the greatest use of the water of Snake River will be found in the dedication of the entire flow of the stream to irrigation in so far as the water can be economically appropriated,” and that it was possible “with the requisite storage to utilize a very large percentage of all the waters originating in the watershed above Milner dam.”<sup>75</sup> The Report also stated that because there was an excess of irrigable land and “the amount of water available in the river is the limiting factor,”<sup>76</sup> that “[t]he net effect of this condition will be to dry up the river below Milner Dam during the irrigation season, also to as great an extent as possible below American Falls Reservoir, during the non-irrigation season.”<sup>77</sup>

While high-lift pumping would eventually make large-scale irrigation possible in the section downstream from Milner Dam,<sup>78</sup> at the time of the Board of Engineers Report

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<sup>73</sup>

*Id.*

<sup>74</sup> See Orr Aff., Exhibit 44 (letter from Barry Dibble, Minidoka Project Manager, to the Chief Engineer of the U.S. Reclamation Service) (Apr. 16, 1920) (“There is considerable demand for this report, and I believe some of the papers will be interested in printing parts of it.”).

<sup>75</sup> Orr Aff., Exhibit 29 at 14 (Board of Engineers Report at 5); see also *id.* at 6 (transmittal letter at 2) (“The board is of the opinion that all of the water of Snake River susceptible of economical diversion should be dedicated to irrigation. . . . The unappropriated water of Snake River can be made available by the development of approximately 3,900,00 acre-feet of storage capacity.”).

<sup>76</sup> *Id.* at 14 (Board of Engineers Report at 5); see also *id.* at 7 (letter of transmittal of report at 2) (“The available water supply is not sufficient for the irrigation of all the land which can be reached from the river.”).

<sup>77</sup> *Id.* at 14 (Board of Engineers Report at 5).

<sup>78</sup> See Orr Aff., Exhibit 45 at 9-11 (Susan M. Stacy, Legacy of Light: A History of Idaho Power Company at 135-37) (Idaho Power Co. 1991) (discussing high-lift pumping developments in the 1960s).

hydropower was the only feasible use of any significance below Milner.<sup>79</sup> Thus, for purposes of considering the downstream effects of maximizing winter flow storage above Milner, the Report focused on hydropower impacts:

The principle involved therefore is to secure as nearly as possible a total use of the waters for irrigation above Milner Dam, and to secure the greatest possible use for power below Milner Dam. To a moderate extent these interests conflict with each other but fortunately on account of the large accretions to the stream below Milner Dam the power resource is restored at Upper Salmon Falls and the injury to that resource which would be susceptible of future development is relatively not very great.<sup>80</sup>

Similarly, the Board of Engineers Report emphasized that the storage of winter flows that would otherwise be used for power purposes was key to sustaining irrigation development:

It is recognized generally that the establishment of the American Falls Reservoir is essential to the further development of dependable irrigation possibilities on the Snake River, also that the development of that reservoir will shut off the winter flow at that point which will thereby to a very large extent deprive the remaining power sites of the winter water which now passes American Falls.<sup>81</sup>

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<sup>79</sup> See Orr Aff., Exhibit 29 at 14 (Board of Engineers Report at 5) ("The waters flowing in the stream below Milner Dam are not susceptible of diversion to any considerable amount, and therefore become of primary use in connection with the production of power.")

<sup>80</sup> Id. at 14-15 (Board of Engineers Report at 5-6). Hydraulic Engineer W.G. Hoyt, of the U.S. Geological Survey, came to the same conclusions in a report issued the following year:

In general the river may be divided into two main sections. First, that portion upstream from Milner, and second, the portion downstream from Milner. In the portion of the river upstream from Milner the use of water for irrigation will predominate over power use, while in the section downstream the use of water for power purposes will undoubtedly predominate, since the larger portion of the land adjacent to the river is at such an elevation that it cannot feasibly be irrigated by water pumped or diverted below the Milner dam.

Orr Aff., Exhibit 30 at 4 (Hoyt report on preliminary permit application for Upper Salmon Falls at 3).

<sup>81</sup> Orr Aff., Exhibit 29 at 17 (Board of Engineers Report at 23); see also id. at 16 (Board of Engineers Report at Table 5, "Power Possibilities on the Snake River from American Falls to Swan Falls, inclusive") ("Proposed Conditions: All flow stopped at American Falls in non-irrigation season. All flow except waste waters to be diverted at Milner Dam or above in all seasons") (underlining in original).

The Board of Engineers Report also recognized that hydropower water rights for the use of winter flows might attach or perfect before irrigation development had been completed because "the complete utilization of the Snake River water supply above Milner Dam for irrigation purposes will, under normal conditions require a considerable length of time."<sup>82</sup> The Board of Engineers therefore advised: "In granting power rights in the future the Federal Government and the State should so far as possible provide restrictions requiring its eventual surrender when and as the waters are required for application to the land."<sup>83</sup> Similarly, when large reclamation projects were eventually proposed downstream from Milner, State and Federal authorities made it clear that such projects would not be permitted to interfere with the conservation and storage of winter flows above Milner Dam.<sup>84</sup>

C. The American Falls Reservoir And The Twin Falls Power Site.

The principles proposed in the Board of Engineers Report were soon put into effect in the negotiations and agreements for construction of the American Falls Dam and the Twin Falls power project. Idaho Power Company owned land, hydropower facilities

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<sup>82</sup> Id. at 18 (Board of Engineers Report at 30).

<sup>83</sup> Id. at 19 (Board of Engineers Report at 31). The Idaho State Commissioner of Reclamation made this same point in a report to the Federal Power Commission:

it is extremely important that any power permits granted in connection with these applications shall be conditioned upon the State's present and future right to divert, use and impound as much water as may be necessary for a complete development of its agricultural resource, both for irrigation, domestic and other consuming uses.

Orr Aff., Exhibit 28 at 5 (Swendsen "Report and Recommendations" at 2).

<sup>84</sup> See Orr Aff., Exhibit 46 at 2-3 (letter from Idaho Governor Robert Smylie to U.S. Secretary of Interior Stewart L. Udall at 1-2) (Dec. 7, 1966) (stating that further irrigation development above Milner was possible provided that the proposed Southwest Idaho Water Development Project did not require water to be spilled over Milner Dam); Orr Aff., Exhibit 47 at 5 ("Statement" of Evan Kackley, Idaho Water Resource Board Member from District 4, to the Idaho Water Resource Board at 5) (June 1967) (Idaho Falls) (stating that the Southwest Idaho Water Development Project would not require spills over Milner Dam).

and water rights at American Falls and also below Milner Dam,<sup>85</sup> and had applied for a preliminary permit to develop the Twin Falls power site just downstream from Milner.<sup>86</sup>

Thus, the proposed American Falls Reservoir could not be built until a resolution was reached with Idaho Power Company regarding its property interests at the American Falls site. Equally important, the American Falls and Twin Falls projects bracketed Milner and squarely presented the question of whether downstream uses would be allowed to require the spilling over Milner Dam of winter and flood flows that otherwise could be stored upstream for irrigation.

Federal and state authorities entered into negotiations with Idaho Power on these subjects and eventually an agreement was reached.<sup>87</sup> The resulting contract, dated June 15, 1923 (the "American Falls Contract"), recognized that "the United States contemplates the construction of a large reservoir at American Falls, Idaho, to store the flood water and winter flow of Snake River and make the same available for the reclamation of large areas" in public and private irrigation projects in the Snake River

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<sup>85</sup> Orr Aff., Exhibit 43 at 2-3 (Swendsen letter to Governor C.C. Moore at 2-3) ("The construction of the [American Falls] reservoir will ultimately interfere with the power rights and property of the Idaho Power Company at American Falls and at other down river points on the Snake River. For example, Shoshone Falls, Lower Salmon Falls and Swan Falls.").

<sup>86</sup> See Orr Aff., Exhibit 48 (letter from U.S. Reclamation Service Director A.P. Davis to the Executive Secretary of Federal Power Commission forwarding a copy of a report by George L. Hoffman, U.S. Reclamation Service Engineer, on Idaho Power Company's application to the Federal Power Commission regarding the Twin Falls power site) (Apr. 5, 1921); see also Orr Aff., Exhibit 49 at 1 (George L. Hoffman, U.S. Reclamation Service Engineer, "Report on Application Before Federal Power Commission by Idaho Power Company, Serial No. 18, For Preliminary Permit covering Twin Falls site, on Snake River") (Mar. 15, 1921); see also Orr Aff., Exhibit 50 at 2 (Idaho Power Company, "Project No. 18 - Application For License - Twin Falls Project - Snake River, Idaho") (Feb. 1, 1922).

<sup>87</sup> Orr Aff., Exhibit 43 at 3 (Swendsen letter to Governor C.C. Moore at 3) ("Negotiations were opened with the Power Company some two or three years ago, with the result that after considerable study and deliberation, involving many conferences in which the writer participated, as the representative of the State of Idaho, an agreement was finally reached . . .").

valley.<sup>88</sup> The American Falls Contract also recognized that “the storing by the United States of winter flow at American Falls will interfere with certain power and other rights of company at American Falls and points below.”<sup>89</sup>

The contract limited Idaho Power Company’s right “to demand the turning out of water from the reservoir for release by and use below Milner,”<sup>90</sup> and granted the United States “[t]he right to limit all other rights of the company on Snake River . . . insofar as and no farther than the rights allowed and granted to the United States to store and use water as herein provided may interfere with any rights of the company at any lower points on Snake River.”<sup>91</sup> The State Commissioner of Reclamation informed the Governor that “the contract between the power company and the government provides for the regulation of Snake River in the interest of irrigation, adequate to the needs of a million and a half acre feet, reservoir capacity.”<sup>92</sup> The contract cleared the way for the construction of the American Falls Dam, which was completed in 1927.<sup>93</sup>

Negotiations regarding Idaho Power Company’s proposal to develop the Twin Falls power site proceeded in tandem with the American Falls negotiations because both projects raised the question of the extent to which storable winter flows would be spilled over Milner Dam. A 1921 Reclamation Service report to the Federal Power Commission (“FPC”) on Idaho Power’s application for a preliminary permit for the Twin Falls site stated that “from a power standpoint, the Snake River is divided into two sections, that

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<sup>88</sup> Orr Aff., Exhibit 51 at 3 (“Contract Between the United States and the Idaho Power Company Relative to Power Rights at American Falls Reservoir, Idaho – Dated June 15, 1923”) (Symbol Ilr-733) (“American Falls Contract” at 1).

<sup>89</sup> Id. at 4 (American Falls Contract at 2).

<sup>90</sup> Id. at 7 (American Falls Contract at 21) (“Company’s Rights below Milner Dam”).

<sup>91</sup> Id. at 6 (American Falls Contract at 11).

<sup>92</sup> Orr Aff., Exhibit 43 at 4 (Swendsen letter to Governor C.C. Moore at 4) (July 9, 1923).

<sup>93</sup> Orr Aff., Exhibit 31 at 2 (Arrington article at 1).

above and that below Milner Dam. . . . During the irrigation season . . . the Snake River is turned dry at the Milner dam, all of the water being diverted into the irrigation canals . . . .”<sup>94</sup> The report also stated: “The further development of this site—in fact even the present development would interfere seriously with the storage of water in the American Falls reservoir, which reservoir is the key to the full development of the Snake river for irrigation purposes.”<sup>95</sup> The report explained:

Plans for storage reservoirs are now being made by the U.S. Reclamation Service, working in conjunction with the State of Idaho and the different water users associations along the Snake River, that will ultimately conserve all the water of Snake river susceptible of economical diversion for irrigation purposes. The lowest point on the river at which diversion is practicable in large amounts is at Milner dam.<sup>96</sup>

Idaho Power’s license application for the Twin Falls project recognized these plans: “The effect of the Milner diversion is to completely stop the natural flow of water at Milner during a part of the irrigation season . . . . In the near future the flow will be further affected by the construction of a storage reservoir at American Falls by the U.S. Reclamation Service . . . .”<sup>97</sup> The application stated that upon completion of the reservoir, “the only natural flow available at the site” from the beginning of the irrigation

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<sup>94</sup> Orr Aff., Exhibit 49 at 1 (Hoffman report at 1) (March 21, 1921). Similar comments were made in a U.S. Geological Survey report on Idaho Power’s application for a preliminary permit at the Upper Salmon power site. See Orr Aff., Exhibit 30 at 4 (Hoyt report on preliminary permit application for Upper Salmon Falls at 3).

<sup>95</sup> Orr Aff., Exhibit 49 at 2 (Hoffman report at 2).

<sup>96</sup> Id. at 3 (Hoffman report at 3). The Director of the U.S. Reclamation Service made the same points in a letter to the Federal Power Commission regarding the Upper Salmon power project:

[The American Falls] reservoir will completely control and utilize Snake River above Milner dam and it would manifestly be opposed to the public interest to grant to a private company rights which might enable them to handicap seriously, if not prohibit, the otherwise feasible complete development of the power and irrigation resources of the Snake River Basin.

Orr Aff., Exhibit 52 at 1 (letter from A.P. Davis, Director, U.S. Reclamation Service, to Mr. Merrill, Executive Secretary, Federal Power Commission at 1) (Mar. 26, 1921).

<sup>97</sup> Orr Aff., Exhibit 50 at 8 (Idaho Power application for Twin Falls license at Exhibit H).

season until the reservoir began to spill, "which in an average year will be about December 1st, and in a minimum year not until March or April, will be make-up from Milner to Twin Falls."<sup>98</sup>

Nonetheless, in the Twin Falls negotiations (which extended several years after the signing of the American Falls Contract) Idaho Power continued to seek rights to winter flows above Milner Dam. The Reclamation Service steadfastly opposed these efforts, as Idaho Power's corporate secretary made clear in a 1931 status report to the company's vice president and general manager: "we may expect little concession from the Department of Reclamation in the way of further prior rights to the use of the waters of Snake River so far as the same may be available for irrigation use at, or at points above, Milner Dam."<sup>99</sup> "It was very clear to me that it is not [District Counsel Stoutemyer's] nor the Reclamation Department's intention that we shall gain, without his or their serious protest, any further prior rights to water of Snake River which may be used for irrigation purposes at or above Milner Dam."<sup>100</sup>

Ultimately, a stipulation confirmed that power use at the Twin Falls site was subordinate to existing and future irrigation uses and strictly limited the water supply to flows below Milner Dam, with the exception of 45,000 acre-feet of "primary storage" Idaho Power held under the American Fall Contract. The stipulation was incorporated into the FPC license for the Twin Falls site as Article 14:

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*Id.*

<sup>99</sup> Orr Aff., Exhibit 53 at 1 (letter from James L. Boone to Mr. Hibbard at 1) (May 29, 1931). Mr. Hibbard and Mr. Boone were, respectively, the vice president and the corporate secretary of Idaho Power Company. See Orr Aff., Exhibit 54 (letter from M.L. Hibbard, Vice President and General Manager of Idaho Power Company, to E.B. Darlington, Superintendent, U.S. Reclamation Service) (Apr. 7, 1931); Orr Aff., Exhibit 55 at 3 ("Idaho Power Company Minutes of Special Meeting of Board of Directors" at 2) (May 11, 1934) (certification of corporate secretary James L. Boone).

<sup>100</sup>

Orr Aff., Exhibit 53 at 1 (Boone letter to Hibbard at 1).

Article 14. As a condition of this license, the Licensee, for itself, its successors and assigns, hereby stipulates and agrees that all rights to the use of water for power purposes heretofore or hereafter acquired for the development of power at the site of this project shall be held and considered at all times to be subject, inferior and subordinate to all rights heretofore or hereafter acquired by the United States or other parties for irrigation purposes, except (a) the right to use for power development at this project the water from the 45,000 acre-feet of primary storage capacity which the Licensee holds in American Falls Reservoir under paragraph 16 of that certain contract between the United States of America and Idaho Power Company, dated June 15, 1923, and the discharge of which it may control under the terms of said contract; (b) the right to use for power development at this project the seepage, percolation, drainage, spring or springs, waste, and/or other influent waters which do not flow or spill over Milner Dam but which enter in, arise in, and flow in and along the channel of Snake River between the down-stream toe of Milner Dam in Snake River, Idaho, and the site of the project covered by this license.<sup>101</sup>

The Article 14 stipulation also provided that it was “a covenant running with the title to the said power plant at Twin Falls, and all rights in connection therewith” and “effective to bind the Licensee and its successors and assigns.”<sup>102</sup> Idaho Power agreed to “to execute and acknowledge under authority of a suitable resolution of its board of directors” a recordable contract or deed embodying the stipulation,<sup>103</sup> and the company’s Board of Directors unanimously approved a corresponding resolution on the same date the license was approved.<sup>104</sup> In the meantime, the Snake River Basin was experiencing another devastating drought.

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<sup>101</sup> Orr Aff., Exhibit 56 at 13 (“Federal Power Commission, License on Government Lands, Project No. 18, Idaho, Idaho Power Company” at 11) (“Article 14”) (May 11, 1934).

<sup>102</sup> Id.

<sup>103</sup> Id.

<sup>104</sup> See Orr Aff., Exhibit 55 at 2-3 (“Idaho Power Company, Minutes of Special Meeting of Board of Directors”) (May 11, 1934). Two years later, in a technical journal article describing the Twin Falls project, an Idaho Power engineer confirmed that the project “may be said to be dependent for its water supply upon that water returning to, or arising within, the 22 miles of river bed between Milner Dam and that plant, with the addition of such limited amounts of water permitted under contract to flow by Milner Dam.” Orr Aff., Exhibit 57 at 3; (H.L. Senger, Idaho Power Company, *Twin Falls Hydroelectric Development*, ELECTRICAL WEST – Vol. 76, No. 4 at 19) (April 1936).

D. The 1930s Drought And Renewed Efforts To Conserve Winter Flows.

The drought of the early 1930s was worse than the 1919 drought. Lynn Crandall, watermaster for Water District No. 36 (the area upstream from Milner Dam - later renumbered Water District No. 1), wrote in 1953:<sup>105</sup> "The drought during the early 1930's was the most severe and prolonged of any that have occurred during the 62 past years of stream-flow records on Snake River."<sup>106</sup> The State Commissioner of Reclamation reported in late 1934: "We have just passed through the most serious and disastrous drouth in the history of the State. . . . The situation is acute and disaster confronts many heretofore prosperous and self-sustaining communities unless supplementary and additional water can be provided to afford relief."<sup>107</sup>

As in 1919, the drought resulted in a clamor for new storage projects to protect against short water years. "Shortly after American Falls was built we had an unprecedented drought in the Snake River Valley which lasted over 5 years, 1931, 1932, 1933, 1934, and 1935. In two or three of those years the reservoir did not fill. . . . The settlers immediately started a request for investigations for further storage."<sup>108</sup> The State responded by enacting legislation providing for "the construction of a system of works, in

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<sup>105</sup> Mr. Crandall was watermaster during the 1930s drought, and was still watermaster in 1953 when he wrote of the drought. See Orr Aff., Exhibit 58 at 7 (transcript of examination of Lynn Crandall in Federal Power Commission proceedings on Idaho Power Company's proposed Hells Canyon project at 10136) (Jan. 12-13, 14-15, 1954) ("Crandall Examination").

<sup>106</sup> Orr Aff., Exhibit 59 at 8 (Lynn Crandall, "Future Upstream Depletion Above Hells Canyon" at 6) (Apr. 6, 1953) ("Crandall Report").

<sup>107</sup> Orr Aff., Exhibit 36 at 2-3 (Faris report at 1-2).

<sup>108</sup> Orr Aff., Exhibit 60 at 14 ("The Palisades Dam And Reservoir Project - Hearings before a Subcommittee On Irrigation And Reclamation Of The Committee On Public Lands, House of Representatives and a Special Subcommittee Of The Committee On Interior And Insular Affairs, United States Senate - Eighty-First Congress - First Session on H.R. 5506" at 23) (United States Government Printing Office, Washington) (1949) (statements of Robert J. Newall, former regional director of the Bureau of Reclamation in Boise, Idaho).

the manner hereinafter provided, for the conservation, development, storage, distribution and utilization of water for irrigation purposes.”<sup>109</sup>

Federal authorities redoubled their efforts to develop storage sites and water supplies above Milner Dam, as the State Reclamation Commissioner reported in 1934: “The United States Bureau of Reclamation, during the past two years, has made surveys and investigations in an effort to discover ways and means of relieving this situation by providing storage on the upper reaches of both the North Fork and South Fork of Snake River.”<sup>110</sup> In 1935, the Bureau of Reclamation published a report on its upper Snake River basin storage investigations, the purpose of which was “to determine the surplus water for contemplated future storage developments.”<sup>111</sup>

A 1935 Department of Interior water supply paper reported that there could be no significant increase in irrigation in the Snake River Basin without additional storage or pumping,<sup>112</sup> and that “the recurrence of years of abnormal low run-off has demonstrated

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<sup>109</sup> 1935 Idaho Session Laws 162. Although the Idaho Supreme Court subsequently declared this legislation unconstitutional because of the powers it purported to confer on the State Water Conservation Board, see generally State Water Conservation Board v. Enking, 56 Idaho 722, 58 P.2d 779 (1936), the Court recognized the legitimacy of the underlying legislative purpose:

More than half the people of the state depend, either directly or indirectly, upon irrigation. The normal flow of our streams has been appropriated, and therefore the limit of development by irrigation from that source has been reached. Hence the need of providing additional water by storage or otherwise is great, and the purpose of the statute under consideration most commendable.

Id. at 738, 58 P.2d at 785-86 (Holden, J., concurring). The Idaho Supreme Court later overruled Enking to the extent it was inconsistent with the holdings in two subsequent decisions. Dept. of Parks v. Dept. of Water Admin., 96 Idaho 440, 443, 530 P.2d 924, 927 (1974); Idaho Water Res. Bd. v. Kramer, 97 Idaho 535, 555, 648 P.2d 35, 55 (1976).

<sup>110</sup> Orr Aff., Exhibit 36 at 4 (Faris report at 3).

<sup>111</sup> Orr Aff., Exhibit 61 at 7 (E.B. Debler, Hydraulic Engineer & J.R. Riter, Associate Engineer, “Report on Upper Snake River Storage Investigations – Volume I – Snake River Above Idaho Falls” at 158) (U.S. Department of the Interior, Bureau of Reclamation) (June 1935).

<sup>112</sup> Orr Aff., Exhibit 37 at 7 (Hoyt report on “Water Utilization In The Snake River Basin” at 65). The State Commissioner of Reclamation also recognized that “[t]he limit of the development of the irrigation resources of the State from the natural flow of streams has long since been reached.” Orr Aff., Exhibit 36 at 2 (Faris report at 1).

the desirability of holdover storage for irrigated areas which under normal climatic and run-off conditions have a reasonably adequate water supply.”<sup>113</sup> In 1936 the Secretary of the Interior found that “the very serious water shortages which have occurred in large sections of the Snake River Valley during the last five years” demonstrated “the urgent importance of having every acre foot of the winter flow of Snake River which it is possible to save, and storing the water for use during the next irrigation season.”<sup>114</sup>

The measure of potential winter water conservation and storage efforts, and their success, was the amount of water that spilled over Milner Dam. As the 1935 Department of the Interior water supply paper stated: “Present or future power rights not being taken into account, the amount of water that passes the Milner diversion dam is an index of the present utilization of the Snake River for irrigation above Milner and a measure of future possibilities.”<sup>115</sup> Watermaster Lynn Crandall made similar points in a 1934 letter to the United States Commissioner of Reclamation:

Inasmuch as all water passing Milner is waste as far as irrigation is concerned . . . . Only by decreasing present discharge past Milner dam can the supply for American Falls reservoir be increased . . . . Sooner or later the need for irrigation water on Snake River will require the elimination of any discharge past Milner in years of deficient runoff . . . .<sup>116</sup>

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<sup>113</sup> Orr Aff., Exhibit 37 at 7-8 (Hoyt report “Water Utilization In The Snake River Basin” at 65-66).

<sup>114</sup> Orr Aff., Exhibit 62 at 1-2 (T.A. Walters, Acting Secretary of the Interior, “Findings of the Secretary of the Interior as to net profits from the Black Canyon and the Minidoka Power Plants, through sales of power on the Minidoka project and towns adjacent thereto, during the year 1935” at 1-2) (United States Department of the Interior, Bureau of Reclamation) (Mar. 12, 1936).

<sup>115</sup> Orr Aff., Exhibit 37 at 9 (Hoyt report on “Water Utilization In The Snake River Basin” at 167); see also Orr Aff., Exhibit 63 at 10 (Thomas R. Newall, U.S. Geological Survey engineer, *Newall On Administrative Water Problems*, 94 TRANSACTIONS OF THE AMERICAN SOCIETY OF CIVIL ENGINEERS 321 (1930) (Newall’s comments on Baldwin, *Transmission and Delivery of Reservoir Water in Administrative Water Problems: A Symposium*) (“The small percentage of ultimate wastage (flow past Milner during regulation period) is a real index of the excellence and efficiency of the control system of river operation as a whole.”); see also Orr Aff., Exhibit 61 at 8 (Debler & Riter report at 204) (“any winter use below the [American Falls] Reservoir is a total loss as far as irrigation is concerned”) (quoting Lynn Crandall report).

<sup>116</sup> Orr Aff., Exhibit 64 at 2, 3 (Letter from Lynn Crandall to Elwood Mead, Commissioner, U.S. Bureau of Reclamation at 2-3) (Feb. 21, 1934).

In his report on water distribution and hydrometric work for Water District No. 36 during the first good water year after the drought, Lynn Crandall wrote “[i]t is a matter of regret that lack of storage facilities resulted in the waste of 620,000 acre-feet of surplus flood waters past Milner during 1936.”<sup>117</sup> He explained that surplus water “wasted” past Milner Dam was a lost opportunity to store supplies against future shortages: “Dry years to be expected in the future will require all the water that can be made available from any source at reasonable cost if the established irrigated agriculture is to be adequately maintained in the Snake River Valley.”<sup>118</sup>

In addition to demonstrating the need for new storage above Milner to hold the surplus flows of high water years, the 1930s drought also focused attention on the need to conserve winter flows of normal and below-average years. Winter flows routinely had been diverted for power generation at Minidoka Dam<sup>119</sup> and for domestic and stockwater purposes above Milner Dam. Curtailing these winter uses to allow further conservation of winter flows above Milner was seen as a means of ensuring the filling of American Falls Reservoir on a regular basis. The State Commissioner of Reclamation reported that the reservoir repeatedly failed to fill during the drought and that winter water uses, including winter power generation at the Bureau of Reclamation’s Minidoka Dam and winter diversions for domestic and stockwater uses, “might be looked to to supply this

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<sup>117</sup> Orr Aff., Exhibit 65 at 5 (Lynn Crandall, Watermaster for Water District No. 36, “Water Distribution And Hydrometric Work – Water District No. 36 – 1936” at 9).

<sup>118</sup> Id.; see also Orr Aff., Exhibit 66 at 2 (Letter from District Engineer Lynn Crandall to District Counsel B.E. Stoutemyer at 2) (Sept. 8, 1939) (“there have been over 3,000,000 acre-ft. of surplus water spill to waste over Milner Dam during the past 4 years and that if the So. Fork Reservoir was in existence over a million acre-ft. of this wasted water would today be in the reservoir waiting to be used in future dry years”).

<sup>119</sup> See Orr Aff., Exhibit 67 at 1 (letter from B.E. Stoutemyer to U.S. Commissioner of Reclamation at 1) (Mar. 12, 1940) (stating that the Minidoka power plant was constructed “for reclamation purposes” and “irrigation pumping requirements”).

deficiency.”<sup>120</sup> In a 1934 letter to the president of the Aberdeen-Springfield Canal Company, District Counsel Stoutemyer discussed closing down the Minidoka power plant in the non-irrigation season and reducing water users’ winter diversions for domestic and stockwater purposes: “Such a saving of winter flow would assure the filling of American Falls Reservoir practically every year.”<sup>121</sup>

A 1934 contract between the United States and Idaho Power Company paved the way for conserving the winter flows that had long been used for power generation at Minidoka Dam. Among other things, the contract provided for Idaho Power to furnish winter power to the Minidoka Project, which allowed the United States to shut down the Minidoka power plant in the non-irrigation season and thereby retain at American Falls Reservoir the winter flows that otherwise would have been sent downstream to generate power at Minidoka.<sup>122</sup>

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<sup>120</sup> Orr Aff., Exhibit 36 at 4-5 (Paris report at 3-4) (“the American Falls Reservoir has filled but twice since it was placed in operation, in 1926 . . . . The rights that might be looked to to supply this deficiency are . . . the right of the Minidoka project to divert something like 2,000 second feet, continuously, for the operation of its power plant at Minidoka dam, and that of the canals diverting water at the Milner Dam for domestic purposes during the non-irrigation season”).

<sup>121</sup> Orr Aff., Exhibit 68 at 1 (letter from B.E. Stoutemyer, District Counsel, U.S. Bureau of Reclamation, to W.H. Philbrick, President of Aberdeen-Springfield Canal Company at 1) (June 6, 1934). District Counsel Stoutemyer had also pointed out in previous years that winter flow should be used to fill the American Falls Reservoir before giving any consideration to potential power uses:

In years like 1924 and 1926 there is little or no flood water available for storage in the spring. Whatever storage is secured must be secured out of the winter flow. . . . In the event that we have another low water year, the winter flow which can be stored in American Falls reservoir is far more valuable for irrigation than for power and we should store all the water we can and rent the Government’s share to the projects which will need it. When we have stored enough water in the American Falls reservoir to take care of all the irrigation needs of Snake River valley, we can then consider dickering with the Power Company to release some water for power development, but not before that time.

Orr Aff., Exhibit 69 at 1, 2 (letter from B.E. Stoutemyer, District Counsel, U.S. Reclamation Service to the Chief Engineer at 1-2) (“Subject: Use of American Falls Storage – Minidoka Project”) (Aug. 16, 1926).

<sup>122</sup> See Orr Aff., Exhibit 70 at 12 (“Contract between United States and Idaho Power Company for conservation of Snake River Water and furnishing transmission service” at 11) (Symbol Ilr-801) (Oct. 1, 1934) (“ . . . the water conserved and made available by the terms of this agreement is for storage in the American Falls Reservoir . . .”).

The Secretary of the Interior found that "the public interest requires that the water supply needed for irrigation purposes should not be sacrificed for the purpose of providing increased power profits . . . It has therefore been found necessary (in order to avoid the waste of water for irrigation purposes) to limit the operation of the Minidoka Power Plant during the non-irrigation season . . ." <sup>123</sup> District Counsel Stoutemyer raised the same public interest concerns in a letter to the State Commissioner of Reclamation in 1937, when Idaho Power sought to perfect additional hydropower water rights at Twin Falls and Lower Salmon Falls. Mr. Stoutemyer's letter recited the Article 14 stipulation and explained "[w]hen the license in question was under consideration, we insisted on the above quoted stipulation for the protection of the present and future irrigators of the Snake River Valley." <sup>124</sup> It further explained:

It seems to us that it would be contrary to sound public policy to allow any additional power rights to attach for use in the Snake River Canyon to such an extent as would require the waste of water over Milner Dam, since all the water available in Snake River above the Milner Dam is needed for irrigation purposes even at the present time (especially so in low water years when there have been serious water shortages even for the lands now under irrigation) and with increasing irrigation requirements, and construction of additional reservoirs to store flood water and to carry over excess water of high water years for use in low water years, the need to conserve all the available water above Milner Dam for irrigation purposes will become more and more evident as the years go on . . . . Any additional power rights which would require the waste of water over Milner Dam would conflict with both of these propositions . . . . <sup>125</sup>

<sup>123</sup> Orr Aff., Exhibit 62 at 2 (findings of the Secretary of the Interior at 2) (parentheses in original).

<sup>124</sup> Orr Aff., Exhibit 71 at 3 (Letter from B.E. Stoutemyer, District Counsel, U.S. Bureau of Reclamation, to R.W. Faris, Idaho State Commissioner of Reclamation at 2-3) (June 21, 1937).

<sup>125</sup> Id. at 3, 4 (parentheses in original). Mr. Stoutemyer's letter also forwarded a copy of a letter he had received from Watermaster Lynn Crandall, which notified Mr. Stoutemyer of Idaho Power's new water right filings and stated Mr. Crandall's view that under the Article 14 stipulation,

any water rights acquired would not be adverse to future storage rights above Milner. . . . I suppose the [Federal license] would control anyhow but it seems to me that it would be desirable to have it reaffirmed in the State water right license so that it will be clearly evident that the date of priority applies only to rights below Milner and is not adverse to subsequent developments above Milner.

The United States Court of Appeals for the District of Columbia Circuit also endorsed the United States' decision to store winter flows above Milner. In rejecting Burley Irrigation District's challenge to the Secretary of the Interior's accounting methodology for the Minidoka power plant under the winter water conservation program, the court stated: "Water passing [Minidoka Dam] in winter serves only to generate power at the plant for commercial sale, is useless for irrigation and pumping, and is lost therefore to the project, including Burley District, for its primary purposes. Winter flow is therefore highly wasteful."<sup>126</sup>

E. The Palisades Project And Winter Water Savings Contracts.

Further winter water conservation measures were necessary to ensure a reliable water supply for additional storage projects that were contemplated even further upstream. This need led to proposals to link new storage projects to commitments by water users to reduce or eliminate winter diversions for domestic and stockwater uses. District Counsel Stoutemyer stated in a 1939 letter to the United States Commissioner of Reclamation: "[A]s the Chief Engineer reports that such saving of winter water is essential to the feasibility of the Grand Valley project I think that we have no alternative but to insist that such contracts must be executed before the new reservoir is constructed."<sup>127</sup> Thus, the reduction or elimination of winter domestic and stockwater diversions became a pre-condition for acquiring storage space in the next large reservoir the Bureau proposed above Milner, the Palisades Project: "the Bureau has adopted the

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Orr Aff., Exhibit 72 (Letter from Lynn Crandall, U.S. Geological Survey District Engineer, to B.E. Stoutemyer, District Counsel, U.S. Bureau of Reclamation) (June 18, 1937).

<sup>126</sup> Burley Irr. Dist. v. Ickes, 116 F.2d 529, 535 (D.C. Cir. 1940).

<sup>127</sup> Orr Aff., Exhibit 73 (letter from B.E. Stoutemyer, District Counsel, U.S. Bureau of Reclamation, to Commissioner, U.S. Bureau of Reclamation) (Sept. 5, 1939).

requirement that all companies purchasing space in the Palisade Reservoir will have to agree to cease winter water diversions within 5 years from the date that construction starts on the dam."<sup>128</sup>

The Palisades Project was originally authorized in 1941, placed on hold during World War II, and reauthorized in 1949. In his statement in support of the 1949 Palisades legislation, Idaho Congressman John Sanborn stated that it dealt with "the control and use of water in the entire watershed of the Snake River above Milner Dam. . . The proposed legislation will authorize the construction of units for the storage and use of nearly all of the water not now utilized in the upper Snake River Valley."<sup>129</sup> He also stated that the Bureau of Reclamation had been conducting studies for more than 20 years "for the purpose of developing a plan to place under beneficial use all available water in the Snake River Valley above Milner, Idaho."<sup>130</sup> The 1949 Palisades legislation retained the winter water savings requirement,<sup>131</sup> as the Assistant Reclamation Commissioner explained:

Commissioner Page of the Bureau of Reclamation, whom many of you remember, presented the original plan for Palisades Dam in 1941, but its construction was regarded then, as now, as being dependent on the working out of assurances of a minimum water supply through the curtailment of certain wasteful winter diversions in the upper Snake River Valley. The Palisades Dam project was authorized in December 1941 upon the basis that these negotiations be worked out prior to construction. The negotiations and plan of operation, together with the plans for

<sup>128</sup> Orr Aff., Exhibit 74 at 1 (letter from Watermaster Lynn Crandall to E.V. Berg, Idaho State Commissioner of Reclamation at 1) (Sept. 25, 1941).

<sup>129</sup> Orr Aff., Exhibit 60 at 5 (Palisades hearings at 4) ("Statement of Honorable John Sanborn, a Representative in Congress from the State of Idaho").

<sup>130</sup> Id. at 5 (Palisades hearings at 5) ("Statement of Honorable John Sanborn, a Representative in Congress from the State of Idaho").

<sup>131</sup> Pub. L. No. 81-864 § 4(a), 64 Stat. 1083-84 (1950) ("The continuation of construction of Palisades Dam beyond December 31, 1951 . . . is hereby made contingent on there being a finding by the Secretary by the controlling date that contracts have been entered with various water users' organizations of the Upper Snake River Valley in Idaho that, in his opinion, will provide for an average annual savings of one hundred and thirty-five thousand acre-feet of winter water.").

facilities to accomplish the desired operation, have now been completed.<sup>132</sup>

Because the practice of diverting winter flows for stockwater and domestic uses was “deep rooted and difficult to alter,” the Palisades winter water savings agreements embodied a compromise.<sup>133</sup> The compromise included a number of important elements, including, among others: conservation of water for storage above Milner through elimination of winter diversions for stockwater and domestic uses and curtailment of winter power generation; coordination of reservoir operations for maximum storage; exchanges of storage rights between certain reservoirs; and clarification of diversion and storage rights and holdover storage privileges.<sup>134</sup> The Bureau of Reclamation concluded that the Palisades contracts “resulted in better distribution and utilization of the waters of the Snake River”:

The elimination of winter water runs for stock and domestic use, the establishing of uniform storage water holdover privileges, the coordinated system-wide operation of reservoirs, the subordination of winter power production to conserve storage, and the exchange of storage space to effectuate its use closer to points of diversion, all have resulted in better distribution and utilization of the waters of the Snake River.<sup>135</sup>

#### F. The Hells Canyon Project.

The need to conserve winter and flood flows above Milner for irrigation purposes was also recognized in the FPC proceedings on Idaho Power’s Hells Canyon project in the 1950s. In his report analyzing future depletions above Hells Canyon, which Idaho

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<sup>132</sup> Orr Aff., Exhibit 60 at 8 (Palisades hearings at 11) (“Statement of Wesley R. Nelson, Assistant Commissioner, Bureau of Reclamation”).

<sup>133</sup> Orr Aff., Exhibit 75 at 3 (“Status Report – Workings of Palisades Water Savings Agreement” at 2) (U.S. Bureau of Reclamation) (Boise, Idaho) (Aug. 5, 1968).

<sup>134</sup> *See generally id. at 3-6* (status report at 2-5).

<sup>135</sup> *Id. at 9* (status report at 8).

Power offered in support of its FPC application,<sup>136</sup> watermaster Lynn Crandall stated that “flood waters in years of ample runoff will be stored in new reservoirs such as Palisades and will be fed out onto the lands in dry years.”<sup>137</sup> His report stated that future development would probably eliminate spills past Milner: “Except in years of well above normal runoff it is quite likely that future years will see the flow of upper Snake River controlled so as to practically eliminate spills past Milner except for storage rights owned by the Idaho Power Company . . . .”<sup>138</sup>

Mr. Crandall’s report also pointed out the possibility of diverting “surplus flows that would otherwise spill past Milner” for purposes of recharging “the ground-water reservoir.”<sup>139</sup> When examined on this point during the FPC proceedings, Mr. Crandall testified that it would be possible “to provide greater storage and offset to some extent depletions arising out of ground water pumping”<sup>140</sup> by recharging the ground water using “waters that would otherwise spill down past Milner into the Columbia.”<sup>141</sup>

Subsequent analyses also recognized ground water recharge as a means of conserving winter and flood flows above Milner Dam. A 1955 report by the Bureau of Reclamation referred to “the possibility of using the lavas under this plain as a ground-water storage reservoir which would outlet into the Snake River.”<sup>142</sup> In discussing opportunities for obtaining new irrigation water supplies above Milner Dam, a joint report in 1960 by the Bureau of Reclamation and the Army Corps of Engineers pointed

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<sup>136</sup> See Orr Aff., Exhibit 58 at 17 (Crandall Examination at 10146) (“This report, which is his direct testimony, was offered by the applicant . . .”).

<sup>137</sup> Orr Aff., Exhibit 59 at 7 (Crandall Report at 5).

<sup>138</sup> Id. at 8 (Crandall Report at 6).

<sup>139</sup> Id.

<sup>140</sup> Orr Aff., Exhibit 58 at 34 (Crandall Examination at 10317).

<sup>141</sup> Id. at 35 (Crandall Examination at 10318).

<sup>142</sup> Orr Aff., Exhibit 38 at 6 (special report on upper Snake River basin at 16).

out: "In a sense, the ground water is storage. In considering future development it could be used much as a conventional storage reservoir."<sup>143</sup> The joint report pointed out "the possibility of artificially recharging [the underground reservoir] by diverting surplus flows, beyond requirements of existing and future developments, from the Snake River during the flood season into highly permeable areas of raw volcanics."<sup>144</sup> Governor Smylie also pointed out in a 1966 letter to the Secretary of the Interior the potential to use flows above Milner Dam for "ground water recharge."<sup>145</sup> In a 1967 letter to the Board, the Assistant Regional Director of the Bureau of Reclamation stated: "Artificial recharge would consist of diverting surplus surface flows of wet years from Snake River or Henrys Fork to infiltration areas where this water would enter the porous materials of the Snake Plain aquifer," and thereby "[p]ut underground in an evaporation-free reservoir, surplus flows of Henrys Fork and Snake River that would otherwise spill past Milner unused."<sup>146</sup> In a 1972 Board meeting, Board Director Dr. Robert Lee stated that recharge "really represents an alternative to capture waste water that is now spilling down the Snake . . . . It is an alternative to future dams in the area."<sup>147</sup>

G. The 1960s.

The need to conserve surplus water above Milner was reaffirmed a number of times in the years following the approval of the Palisades and Hells Canyon projects. In

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<sup>143</sup> Orr Aff., Exhibit 76 at 7 ("Information Bulletin On A Study Of Water Resource Development Possibilities -- Upper Snake River Basin" at 5) (U.S. Army Corps of Engineers & U.S. Department of the Interior, Bureau of Reclamation) (Sept. 29, 1960).

<sup>144</sup> Id. at 11 (information bulletin at 9).

<sup>145</sup> Orr Aff., Exhibit 46 at 2 (Governor Smylie letter to U.S. Secretary of Interior at 1).

<sup>146</sup> Orr Aff., Exhibit 77 at 3 (letter from Norman H. Moore, Assistant Regional Director, U.S. Department of the Interior, Bureau of Reclamation, to Dr. Robert E. Lee, Director, Idaho Water Resource Board at 2) (Oct. 27, 1967).

<sup>147</sup> Orr Aff., Exhibit 78 at 3 ("Minutes of Meeting No. 4-72" at 7) (Idaho Water Res. Bd., Jun. 13, 1972).

a December 1960 meeting between the Committee of Nine of Water District No. 1 and representatives of the Bureau of Reclamation, R.P. "Pat" Parry, counsel for Idaho Power as well as several irrigation entities such as the Twin Falls and North Side Canal Companies,<sup>148</sup> presented two criteria for river operations: "1. Have water at the beginning of the irrigation season in those reservoirs where the best use can be made of it. 2. Spill no water to waste past Milner."<sup>149</sup>

In a 1962 letter to the FPC commenting on Idaho Power's application for a single FPC license to cover its previously constructed facilities at American Falls, Upper Salmon Falls and Shoshone Falls, the Assistant Secretary of the Interior pointed out that the Department "has constructed upstream from Milner a reservoir system in excess of 4,500,000 acre-feet, all of which is operated with the objective of conserving the water to minimize spills past Milner Dam," and emphasized the "long history of the obvious need for the conservation of water above Milner Dam."<sup>150</sup> In a 1968 letter to Idaho Senator Len Jordan regarding the proposed enlargement of American Falls Reservoir, Bureau of Reclamation Commissioner Floyd Dominy discussed the need "[t]o utilize fully the water resource in the upper Snake River above Milner Dam."<sup>151</sup> He stated that if it was

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<sup>148</sup> See, e.g. Orr Aff., Exhibit 58 at 12 (Crandall Examination at 10141) (Mr. Parry speaking on behalf of Idaho Power); see also 1955 WL 60750 at \*2 (syllabus page of Federal Power Commission order issuing Hells Canyon license) (listing R.P. Parry as counsel for Idaho Power Company); Orr Aff., Exhibit 79 at 2 (Minutes of the Meeting on Snake River Flood Control Problems at 8) (Dec. 16, 1957) ("Mr. R.P. Parry then spoke as representative of the water users in the lower Snake River Valley below American Falls Reservoir.").

<sup>149</sup> Orr Aff., Exhibit 80 at 2 ("Minutes of Meeting, Bureau of Reclamation and Advisory Committee" at 1) (Dec. 29, 1960).

<sup>150</sup> Orr Aff., Exhibit 81 at 5 (letter from Assistant Secretary of the Interior Kenneth Holum to Joseph C. Swidler, Chairman, Federal Power Commission at 4) (Aug. 30, 1962).

<sup>151</sup> Orr Aff., Exhibit 82 at 2 (letter from U.S. Bureau of Reclamation Commissioner Floyd Dominy to Senator Len Jordan at 2) (January 5, 1968).

determined that American Falls Dam should not be enlarged, then “alternatives should be investigated to control and utilize uncommitted flows passing Milner Dam.”<sup>152</sup>

The policy of conserving winter flows and flood waters for irrigation use above Milner applied even when irrigation developments were proposed downstream from Milner. In his 1966 comments to the Secretary of the Interior regarding the proposed Southwest Idaho Water Development Project, which would have relied on diversions below Milner Dam, Governor Robert Smylie discussed a number of proposed projects that were intended to realize the “tremendous potential for irrigation development” in the Snake River Basin above Milner Dam.<sup>153</sup> The Governor pointed out that these projects were feasible only if the water supply for Southwest Idaho Water Development Project “is not dependent upon spills past Milner Dam,” and stated: “We are assured by Region 1, Bureau of Reclamation that inflows below Milner are sufficient to meet Southwest Idaho Project requirements.”<sup>154</sup> Idaho Water Resource Board member Evan Kackley reported to the Board the next year that he was “glad to note” that according to the Department of the Interior’s report to the Governor, “the Southwest Idaho Water Development would not require the spills of Milner.”<sup>155</sup>

#### H. The Rebuilding Of American Falls Dam.

The primary objective of reserving flows above Milner for irrigation use was again reaffirmed in the 1970s with the replacement of American Falls Dam. By 1972 an alkali-aggregate reaction and deteriorating concrete had compromised it to the point that the Bureau of Reclamation restricted the reservoir to no more than two-thirds of its 1.7

<sup>152</sup>

Id.

<sup>153</sup>

Ort. Aff., Exhibit 46 at 2 (Governor Smylie letter to U.S. Secretary of Interior at 1). The Governor’s list of irrigation development projects included “ground water recharge.”

<sup>154</sup>

Id. at 2-3 (Governor Smylie letter to U.S. Secretary of Interior at 1-2).

<sup>155</sup>

Ort. Aff., Exhibit 47 at 4-5 (“Statement” of Evan Kackley at 4-5).

million acre-foot storage capacity.<sup>156</sup> Legislation authorized the American Falls Reservoir District ("Reservoir District") to reconstruct the dam in lieu of waiting for a federal appropriation that would have enabled the Bureau of Reclamation to do so.<sup>157</sup> The Reservoir District was authorized to contract with an electrical utility for hydroelectric use of the falling water at the new dam, which would help defray the cost of reconstruction, and Idaho Power Company expressed interest in such a falling water contract.<sup>158</sup>

Under the Internal Revenue Service's interpretation of then-existing law, Idaho Power's use of falling water from the new dam for commercial power generation meant that any bonds the Reservoir District issued would not be tax-exempt,<sup>159</sup> which presented a significant financing obstacle. Thus, federal legislation was proposed to provide tax-exempt status for bonds issued to support the construction of "a dam which furnishes waters for irrigation purposes which has a subordinate use in connection with the generation of electrical energy," where the "subordinate use of water for generating electric energy means that less than 10 percent of the normal supply of stored water may contractually be scheduled for release by the power company and used for generating electric energy."<sup>160</sup>

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<sup>156</sup> Orr Aff. Exhibit 83 at 2-3 (H.R. Rep. No. 94-531, at 2-3) (1975) (House Ways And Means Committee) ("Tax Exempt Status Of Obligations Used To Provide Certain Irrigation Facilities").

<sup>157</sup> Id. at 3 (H.R. Rep. No. 94-531 at 3).

<sup>158</sup> Id.

<sup>159</sup> See id. ("If it were not for the use of the water by the Idaho Power Company for hydroelectric power generation, any bonds issued by the Reservoir District would presently qualify for tax-exempt status").

<sup>160</sup> Id. at 4 (H.R. Rep. No. 94-531 at 4); see also Orr Aff. Exhibit 84 at 3-4 (Sen. Rep. No. 94-570, at 3-4) (1975) (Senate Finance Committee) ("Tax Exempt Status Of Obligations Used To Provide Certain Irrigation Facilities") (same).

With the new federal legislation making tax-exempt bonds available, the United States, the Reservoir District and Idaho Power executed the contracts necessary for reconstruction of the American Falls Dam: the "Government Contract" between the Reservoir District and the United States, the "Falling Water Contract" between the Reservoir District and Idaho Power, and the "Spaceholder Contract" among all three parties. All three contracts were dated March 31, 1976.

The "Government Contract" and the "Falling Water Contract" established that power generation was to be subordinate to irrigation purposes. The Government Contract provided that the United States would operate and maintain the new dam "as a part of the Minidoka Project for the beneficial use of the water on the land within the service areas of the Spaceholders pursuant to Section 8 of the Reclamation Act of June 17, 1902."<sup>161</sup> Article 16 of the Government Contract further provided that "the primary irrigation purpose and the incidental purposes of the Minidoka Project shall not be impaired by the subordinate utilization for power generation,"<sup>162</sup> and that the United States "is not obligated to operate the Replacement Dam in a manner to have water in the Replacement Dam at elevations for power generation or to operate to increase the head in the Replacement Dam for power generation."<sup>163</sup> Article 18 of the Government Contract provided that "less than 10 percent of the water accruing to the active storage capacity in the Replacement Dam may be contractually scheduled for release by the Idaho Power

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<sup>161</sup> Ort Aff., Exhibit 85 at 6 ("Contract between The United States Of America and The American Falls Reservoir District for Construction And Operation And Maintenance Of The American Falls Replacement Dam Program Dated as of March 31, 1976" at 10) ("Government Contract").

<sup>162</sup> Id.

<sup>163</sup> Id.

Company.”<sup>164</sup> Idaho Power acknowledged and agreed to these provisions in the Falling Water Contract.<sup>165</sup>

Thus, the Milner “zero minimum flow” principle reflects the long-established objective of maximizing the conservation and storage of non-irrigation season flows and flood waters above Milner Dam for use above Milner. This objective has been an integral part of water resources development policy, planning and practice in the Snake River Basin since long before the first Idaho State Water Plan. Then, as now, the underlying policy and principle is to allow for complete storage and utilization of winter flows and flood waters for irrigation purposes above Milner Dam.

### CONCLUSION

The Idaho Legislature codified the Milner zero flow principle in chapter 38 of the 1997 Idaho Session Laws and in Idaho Code § 42-203B(2). The Board and the Legislature memorialized the zero minimum flow at Milner in every revision of the Idaho State Water Plan. Thus, as a matter of law, the State is entitled to summary judgment that General Provision No. 4 should provide that the flow of the Snake River above Milner Dam may be reduced to zero, and that water rights using water downstream from Milner Dam have no right to call for the delivery, or seek the administration, of the flow of the Snake River or surface and groundwater tributary to the Snake River upstream from Milner Dam. A corresponding remark should be inserted in water right 02-0200 for the same reasons.

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<sup>164</sup> *Id.* at 7 (Government Contract at 14).

<sup>165</sup> See Orr Aff., Exhibit 86 at 10 (“Falling Water Contract Dated as of March 31, 1976 by and between American Falls Reservoir District and Idaho Power Company” at 19) (“Falling Water Contract”) (“The Idaho Power Company agrees to the provisions of the Government Contract governing operation and maintenance of the Replacement Dam.”).

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Respectfully submitted this 16<sup>TH</sup> day of OCTOBER 2009.

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