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MAR 05 2010
DEPARTMENT OF
WATER RESOURCES

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR PERMIT & LICENSE NO. 01-07011 APPLICANT: Twin Falls Canal Company & North Side Canal Company	)))))))))	**CANAL COMPANIES' MEMORANDUM IN OPPOSITION TO IDAHO WATER RESOURCE BOARD, UPPER SNAKE WATER USERS' AND GROUND WATER DISTRICTS' MOTIONS FOR SUMMARY JUDGMENT**

COME NOW, the North Side Canal Company and Twin Falls Canal Company, (hereinafter "Petitioners" or "Canal Companies"), by and through their undersigned attorneys, and hereby submit this Memorandum in Opposition to the Idaho Water Resource Board, Upper Snake Ground Water Users' and Ground Water Districts' (hereinafter "Intervenors") Motions for Summary Judgment. In an attempt to promote efficiency, the Canal Companies will address both Motions in this single Memorandum opposing both Motions.

I.
INTRODUCTION

The Intervenors' attempt to cast the Subordination Agreement entered into between the Canal Companies and the Idaho Department of Water Resources as an illegal backroom bargain, is belied by the facts surrounding the licensing of the Milner project, both by the State of Idaho and by the Federal Energy Regulatory Commission (hereinafter "FERC".) The Canal Companies initiated this protest action in order to attempt to enforce the agreement reached between the Canal Companies and the State of Idaho in 1987, some twenty-one years prior to the Idaho Department of Water Resources eventual licensing of the project, and some seven years before groundwater recharge was a recognized beneficial use in the State of Idaho. In 1987, the Director who issued the subordination provision exempting the Milner hydroelectric project from subordination to ground water recharge, relied on the same law and policy, and exercised the same discretion that in finding the subordination provision to be lawful, that the Department now relies upon to attempt to undermine that exercise of discretion. The Director's substantially belated attempt to include the new subordination condition cannot be sustained.

The Canal Companies ultimately developed the Milner hydroelectric project at the suggestion of the Idaho Department of Water Resources made in 1977. As development progressed, during the era of the first Swan Falls controversy, subordination to upstream uses was of substantial concern to the Canal Companies. The Milner hydroelectric project water is diverted upstream of the Milner dam in the same diversion point where the Twin Falls Canal Companies diverts water for irrigation purposes for its during the irrigation season. It was assumed from the genesis of the Milner hydroelectric planning process that the project would operate during the non-irrigation season, and when senior priority irrigation rights were already filled. Hence the interface with irrigation projects would be minimal, and the project was at that tail end of what is commonly known as 'above Milner diversions.' With that in mind the Canal

Companies, as early as 1982, recognized that the primary competing use during the non-irrigation season would be ground water recharge. In addition, counsel for the Canal Companies was aware that there were potentially competing applications being contemplated by other entities seeking to develop power at the Milner dam. In 1982, in the midst of the Swan Falls litigation concerning hydropower subordination, counsel for the canal companies approached the Idaho Water Resource Board, the Idaho Department of Water Resources, and the Idaho legislature to negotiate the necessary security for the project to insure that it would be able to be financed and profitable in the long term. This culminated in an agreement which abides both Idaho law and policy, negotiated in full view of the Idaho Department of Water Resources ("Department"), Idaho Water Resource Board ("Board"), and Idaho's legislature, that the Milner hydroelectric project would not be subordinated to ground water recharge.

Also, importantly, in 1985 the Department intervened in the Canal Companies Federal Energy Regulatory Commission ("FERC") licensing proceedings to request the inclusion in the FERC license of a subordination condition similar to the condition that now appears in the Milner license. FERC denied such an attempt. FERC reasoned that to adopt the "open-ended" subordination condition sought by the State would undermine the authority of FERC to make determination regarding the feasibility of the project. Neither the Department nor the Board appealed the decision. Now instead, twenty years later, through the reasoning of a new Director, the Department is attempting to do what it was expressly prevented from doing during the FERC licensing.

The Canal Companies are not attempting to degrade the concept of zero flow at Milner. In fact, the Milner hydroelectric project, in an identical fashion to the irrigation projects of the Twin Falls and North Side Canal Companies, diverts its water above the Milner dam for uses

with the boundaries of their projects, below Milner dam. The Canal Companies seek only to enforce the conditions of the permit and agreement that was reached between the State and the Canal Companies in 1987, to ensure that they continue to have a viable hydroelectric project, and that their substantial investment in the project is not stripped of them by the Department's change in its position concerning this project. The subordination condition included in the Milner permit was authorized by Director Higginson applying the same law and policy that Director Tuthill now declares requires a different result.

Importantly, the concepts of zero flow at Milner, and the hydropower subordination management tool that has been tested throughout the years, were intended to protect surface water irrigation interests above the Milner divide. The subordination agreement reached between the Idaho Department of Water Resources and the Canal Companies in 1987 realized this important aspect of hydropower subordination, and as the Milner hydroelectric project was intended to produce the bulk of its power outside of the irrigation season, the subordination agreement recognized that ground water recharge projects would be a potentially substantial competing interest during the non-irrigation season. The Canal Companies expended substantial resources to develop the project based on the express agreement between the Idaho Department of Water Resources and the Canal Companies that the state would protect the Canal Companies investment, and not subordinate the project to groundwater recharge.

The Department adopted an unlawful procedure in 2007 when it issued its Notice of Intent to Issue License, at which time it invited new comment and objection to the Milner permit and particularly, the subordination provision agreed to among the State, Board and Canal Companies some twenty years earlier. This amounted to an unprecedented departure from the law governing the issuance of water right licenses, as well as the Departments own rules

governing the procedure for review of a permit and issuance of license. By this time the Milner hydroelectric project had been completed, submitted proof of beneficial, and producing power for over fourteen years. The Canal Companies had acquired more than a mere hope of a water right at the time they submitted proof of beneficial use, that should have been confirmed in compliance with Idaho Code § 42-219 when license issued. They had acquired a water right that should have secured to them the conditions of the permit that had been issued in 1987, twenty years before the Department unlawfully re-opened the permit and issued the non-conforming subordination in the condition.

II.
PERTINENT FACTUAL AND PROCEDURAL HISTORY

A. THE GENESIS OF THE MILNER HYDROELECTRIC PROJECT.

On January 7, 1977, Stephen Allred, who was then employed by the Idaho Department of Water Resources as the Administrator of the Investigations Division, sent a letter to John Rosholt counsel for the Canal Companies, to inform him that the Milner Dam site had been identified as a site for a potential power project, which included certain profitability calculations prepared by Department staff.[1] After receiving notification that the Milner dam, which was built, owned and operated by the Canal Companies was considered by the State to be an appropriate, and profitable opportunity for the shareholders of the canal companies, they began to make investigations concerning the feasibility and siting of such a power project.[2] On March 30, 1977, the Canal Companies filed their application for a water right permit to develop a hydropower

[1] Affidavit of Shelley M. Davis in Support of Canal Companies' Memorandum in Opposition to Motions for Summary Judgment, ("Davis Aff."), Ex. 1, Jan. 7, 1977 letter from Allred to Rosholt.
[2] Davis Aff., Ex. 2, Joint Statement of Twin Falls and North Side Canal Companies on House Bill 459, Feb. 4, 1984.

project at Milner Dam.[3] The application was granted on June 29, 1977 and a permit was issued containing no conditions.[4]

The Canal Companies were acutely aware at this time of the subordination issues relating to hydropower licenses being issued in the State of Idaho. Idaho Power Company had filed an action seeking a declaratory judgment concerning, among other issues, the impact of the Hells Canyon projects subordination condition on the Company's Swan Falls License.[5] The Company's action was prompted in response to a complaint filed against the company with the Idaho Public Utilities Commission by a group of rate payers who sought damages due to the Company's alleged failure to protect the Company's earlier priority water rights and consequently, river flows.[6] On December 10, 1979, the Ada County District Court entered its Memorandum Decision and Order finding that "[i]t must be concluded therefore that the Company's right (sic) under the Swan Falls license are clearly subordinated by the Hells Canyon licenses," for the reason that any water that passed through the Swan Falls project would pass downstream to the Hells Canyon project, and therefore, the subordination at Hells Canyon was effectively a subordination of all Idaho Power Company's upstream projects.[7] The opinion was appealed and the Idaho Supreme Court reversed the District Court in an Opinion dated November 19, 1982.[8] The Supreme Court held "that the language of the subordination clause affects the operation of the three dams in the Hells Canyon project only and does not extend to the other dams of the river, and specifically does not subordinate the water rights of Idaho Power at Swan Falls."[9] The Supreme Court's opinion, confounding all of the parties to the litigation,

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[3] Davis Aff., Ex. 3, Application for Permit.
[4] *Id.*
[5] Davis Aff., Ex. 4, Complaint in Ada County Case No. 62237, dated October 21, 1977
[6] *Id.*
[7] Davis Aff., Ex. 5, Memorandum Decision and Order in Ada County Case No. 62237, dated December 10, 1979.
[8] Davis Aff., Ex. 6, Idaho Supreme Court Opinion in Appeal No. 13794, dated November 19, 1982.
[9] *Id.*, at p. 20.

caused substantial fall out. It forced Idaho Power Company to institute another lawsuit against approximately 7,500 water users upstream from the Swan Falls project, and as the public policy implications of a court decision in favor of either of the side of the litigation posed substantial problems to the State of Idaho and the Power Company the two parties began settlement negotiations.

As the issue of hydropower subordination was acutely on the minds of all interested Idaho water users on the Snake River, naturally counsel for the Canal Companies, before encouraging the investment of many more millions of dollars in the Milner hydropower project, needed to take action to ensure that the project would be protected and economically viable in the long term. At the time that the Idaho Supreme Court's opinion regarding subordination of the Swan Falls project was issued, the Milner hydroelectric project was contemplated as being fully funded by the Canal Companies. In a letter to Reed Hansen, then Chairman of the Idaho Water Resource Board, counsel for the Canal Companies explained the necessity for clarification of the Board's position on subordination of the Milner project.[10] Counsel explained that in 1977 when "Permit No. 01-7011 was issued by the Department...no conditions attached...in other words, no subordination of power to irrigation was imposed as a condition of the issued permit."[11] He went on to explain that "[s]ince most of the water at Milner is diverted for irrigation April through October, the Milner project would essentially generate only during the winter time or when flows above the irrigation demand are available."[12] Counsel then officially requested that the Idaho Water Resource Board officially adopt a policy in support of the Milner hydroelectric project, and impose no subordination condition on the permit.[13]

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[10] Davis Aff., Ex. 7, May 3, 1982 letter from Rosholt to IWRB Chairman Hansen.
[11] *Id.*
[12] *Id.*
[13] *Id.*

The Idaho Department of Water Resources sought an opinion from its counsel, Mr. Phil Rassier in response to the Canal Companies request to the Idaho Water Resource Board. Rassier in his response identified that the water right was not presently conditioned and correctly noted that the Canal Companies concerns about imposition of a subordination condition were that such a condition could have the effect of making the Canal Companies unable to get the project financed.[14] He suggested that perhaps the Board explore possible scenarios other than a full subordination including subordinating a portion, but not all of the right, delaying subordination to some future date, or requiring new irrigation projects that interfered with the water right to assume part of the financial burden of the project.[15] In his memo he also pointed out the Idaho Water Resource Board's potential conflict of interest in the project because of the Board's pending application for a large off-stream irrigation storage project.[16] The Department's 1987 Agreement with the Canal Companies evidenced that the Board contemplated the potential conflict between ground water recharge and hydropower at the Milner dam, but nevertheless determined that the first alternative proposed by Mr. Rassier, subordinating some but not all of the right, was the appropriate compromise. In that response to the Canal Companies' counsel's request, the Department agreed that the language of any subordination condition that would attach to the Milner hydroelectric project would read:

> 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

[14] Davis Aff., Ex. 8, July 6, 1982 Memo from Rassier to Young and Haas Re: Milner Power Project
[15] *Id.*, at p. 3.
[16] *Id.*

> recharge within the Snake River basin of the state of Idaho initiated later in time than the priority of this permit.[17]

As the discussions between the Department of Water Resources, the Water Resource Board, and the Canal Companies culminating in the agreement to include the above stated subordination provision were ongoing, the Canal Companies were pursuing a FERC license for the project. The Canal Companies had submitted their initial application for license with FERC in July, 1984.[18] In September, 1985, the Idaho Department of Water Resources sought intervention in the license proceedings before FERC, specifically requesting "the Commission to include the following provision in any license issued for the proposed Milner Hydroelectric Project:

> The Project shall be operated in such manner as will not conflict with the future depletion and flow of the waters of the Snake River and its tributaries, or prevent or interfere with the future upstream diversion and use of such water above the back water created by the project, as needed for upstream development in the public interest, or 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 for any rights to the use of water acquired for the project."[19]

The Motion to Intervene included as an attachment a March 1985 Resolution of the Idaho Water Resource Board proposing the adoption of certain new Snake River policies arising from the Swan Falls Agreement, reached that same year. During the years between the Department's intervention in the FERC proceedings, the Idaho Department of Water Resources, Idaho Water Resource Board, Legislature and Canal Companies had agreed upon the subordination set forth in the November 1987 letter.[20] This turned out to be fortuitous for the State, because in its Order

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[17] Davis Aff., Ex. 9, November 18, 1987 letter from Keith Higginson, Dir. IDWR to John Rosholt, counsel for the canal companies.
[18] Davis Aff., Ex. 10, Excerpted portion of Application for Initial License: Project No. 2899-002, Milner Hydroelectric Project dated July 1984.
[19] Davis Aff., Ex. 11, Motion to Intervene of Idaho Department of Water Resources dated Sept. 23, 1985.
[20] Davis Aff., Ex. 9, November 18, 1987 letter from Higginson to Rosholt.

Issuing License FERC specifically declined to include the subordination condition that had initially been requested by the Idaho Department of Water Resources stating:

> Inclusion in the license of the unsupported open-ended water subordination clause requested by IDWR would in essence vest in IDWR, rather than the Commission, ultimate control over the operation and continued viability of the project. In other words, the subordination clause, which would reserve to the IDWR the right to permit unlimited diversion upstream of the project, could nullify the balance struck by us under the comprehensive planning provisions of Section 10(a)(1) of the FPA in issuing the license. Consequently, inclusion of the open-ended water subordination clause in the license, as requested by IDWR would interfere with the exercise of our comprehensive planning responsibilities under Section 10(a)(1) of the FPA and thus would be inconsistent with the scheme of regulation established by the FPA, which vests in the Commission the exclusive authority to determine whether, and under what conditions, a license should issue.
>
> In light of the above, we will not add the requested open-ended subordination clause to the license for Project No. 2899. However, as we explained in Horseshoe Bend, should IDWR in the future determine that it would be desirable for CC to reduce their use of water for generation to accommodate a specific future upstream water use, IDWR can petition the Commission to have us exercise our reserved authority under Standard Article 12 of the license to require such a reduction. We will provide CC with notice of the request and an opportunity to respond and will act on the request after considering all supporting documents and information submitted by IDWR and CC.[21]

Neither the Department of Water Resources, nor the Idaho Water Resource Board appealed the license issued by the FERC, nor have the agencies, as FERC required, taken the necessary action before FERC to have the newly issued subordination condition approved.

With the necessary assurance from the Idaho Department of Water Resources and FERC that the Milner hydroelectric project would be a viable long term investment, the Canal Companies, after entering into a joint ownership agreement with Idaho Power Company to help finance the project, completed the project. In October 1993, the Canal Companies submitted their proof of beneficial use for the project. A Beneficial Use Field Report was prepared by the Idaho Department of Water Resources recommending a licensed rate of diversion of 5,714.7

[21] Davis Aff., Ex. 12, Order Issuing License for Project No. 2899-003 dated December 15, 1988.

cfs.[22] From 1993 until 2007, when the Department issued its Notice of Intent to Issue license, impermissibly inviting new objections and comments on the Milner hydroelectric project decades after the comment period had closed, the Department took no action to issue the license.

B. THE SWAN FALLS RESOLUTION REVISITED.

The Swan Falls settlement negotiations between the state and Idaho Power Company, which took several years to resolve, resulted in the enactment of a number of laws, and the adoption of a number of policies.[23] Among the laws enacted was Idaho Code § 42-203B titled "Authority to subordinate rights—Nature of subordinated water right and authority to establish a subordination condition—Authority to limit term of permit or license."[24] Idaho Code § 203B(6) states explicitly "the director [of the Department of Water Resources] shall have the authority to subordinate the rights granted in a permit or license for power purposes to subsequent upstream beneficial depletionary uses."[25] This new codified discretionary authority would have been undoubtedly fresh in the mind of Director Higginson in 1987, when he crafted the subordination provision exempting the Milner permit from subordination to other hydropower uses and groundwater recharge. The Swan Falls Agreement and accompanying legislation had consumed a substantial amount of the time and energy of the legislative sessions of 1985 and 1986, during which time the Director and other employees of the Idaho Department of Water Resources were called upon frequently to assist with drafting and interpreting the language of the new laws. Director Higginson had the clear legal authority to enter into the agreement with the Canal Companies in 1987 which did not subordinate their hydropower use to groundwater recharge, pursuant to Idaho Code § 42-203B(6).

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[22] Davis Aff., Ex. 13, Beneficial Use Field Report dated October 29, 1993.
[23] Davis Aff., Ex. 14, Swan Falls Settlement Agreement executed October 25, 1984.
[24] I.C. § 42-203B.
[25] *Id.*, emphasis added.

Another important aspect of this legislation was the creation of the "trust water" concept. Trust water is defined by Idaho Code § 42-203B(2), and states:

> A water right for power purposes which is defined by agreement with the state as unsubordinated to the extent of a minimum flow established by state action, shall remain unsubordinated as defined by the agreement. Any portion of the water rights for power purposes in excess of the level so established shall be held in trust by the state of Idaho, by and through the governor, for the use and benefit of the user of the water for power purposes, and of the people of the state of Idaho; provided, however, that application of the provisions of this section to water rights for hydropower purposes on the Snake River or its tributaries downstream from Milner dam shall not place in trust any water from the Snake river or surface or groundwater tributary to the Snake river upstream from 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. [26]

The Director of the Department of Water Resources, entered into an agreement with the Canal Companies which subordinated their water rights for hydropower purposes to all beneficial uses except hydropower uses and groundwater recharge. This was an express agreement which is entitled to the protection afforded by Idaho Code § 42-203B(2).

Additionally, and importantly, the waters above the Milner dam are <u>expressly not subject to trust water</u> treatment by the State of Idaho pursuant to Idaho Code § 42-203B(2). Therefore, the Director did not have the authority to amend the permit and attempt to take back those waters that the project had demonstrated as of 1993 it had put to beneficial use, in order for the Director to attempt to redistribute those water to applicants for groundwater recharge permits issued later in priority than the Milner hydroelectric priority date. They are not trust waters to be reallocated at the whim of the Department once the water has demonstrably been put to use, and in this case, been actively used for seventeen years.

C. <u>THE CANAL COMPANIES EFFORTS TO FINALLY GET A LICENSE</u>.

[26] Idaho Code § 42-203B(2).

On at least two occasions, in 2006 and 2007, the Canal Companies requested that the Department issue a license for the Milner hydroelectric project. On July 27, 2006, then Director Dreher indicated in a letter that "the issuance of a license for the [Milner hydroelectric] water right is pending."[27] In the 2006 legislative session the Idaho House of Representatives attempted to pass House Bill 800, to remove language from Idaho Code §§ 42-234 and 42-4201A that subordinated groundwater recharge to "all prior perfected water rights, including those water rights for power purposes" that were subordinated to future development on the Snake River as a result of the Swan Falls Agreement.[28] The 2006 legislature's intent at that time was to circumvent the litigation that was ongoing as a result of a dispute that had arisen between the State and Idaho Power Company concerning title to certain Basin 02 water rights, and subordinate Idaho Power Company's water rights for hydropower purposes, and consequently all other hydropower water rights in the state, including the Canal Companies prior perfected water right at Milner, to junior priority water rights for groundwater recharge. The bill failed, and Idaho Code §§ 42-234 and 42-4201A continued to subordinate groundwater recharge to prior perfected hydropower water rights until 2009 when, as a result of the Swan Falls reaffirmation agreement reached to resolve the second Swan Falls litigation, the legislature amended those code sections to remove the explicit subordination of groundwater recharge to hydropower water rights.[29]

Also, in an effort to resolve the litigation that had arisen as a result of the Department's recommendations that certain of Idaho Power Company's water rights be licensed in the name of the State of Idaho, Idaho Power and the State entered into a stipulation that subordinated Idaho

[27] Davis Aff., Ex. 15, July 27, 2006 letter from Idaho Department of Water Resources Director Dreher to Senator Charles Coiner.
[28] Davis Aff., Ex. 16, text of House Bill 800 from 2006 Legislative Session.
[29] Davis Aff., Ex. 17, text of Senate Bill 1185 from 2009 Legislative Session.

Power's water rights to two specific recharge water rights that had been assigned to the Idaho Water Resource Board.[30] In April of 2006, the two groundwater recharge water permits that had been assigned to the Idaho Water Resource Board were placed in the state water supply bank for use at diversion points on the Snake River above Milner Dam.[31] Notwithstanding the fact that beneficial use had only been proven for 300 cfs, the Department approved placement of 1,700 cfs into the water bank for the two permits.[32] To the best of the Canal Companies knowledge, the Department did not conduct an investigation or issue any report finding that such actions would not cause injury to other existing water rights, including the Milner hydropower right. During the 2006 season the Canal Companies water right at Milner for hydropower production was curtailed, and yet water for recharge purposes continued to be provided because in Director Dreher's analysis "permit no. 01-07054 ...is not subordinated to any upstream consumptive beneficial uses," even though Idaho Code § 42-234 at that time very clearly stated that it was subordinated to water rights for hydropower purposes.[33] No notice of the recharge event was provided to the Canal Companies, the permit holders who were injured by the Director's determination.

Due to the House Bill 800 controversy, and the Department's clear intent gleaned from the July 27, 2006, letter to Senator Coiner to subordinate the Canal Companies' Milner Permit to the Idaho Water Resource Board's junior priority recharge permits, the Canal Companies verbally requested that the Department issue a license for Milner permit no. 01-7011 on two occasions, but the license did not issue. Instead, several months later, on September 5, 2007, the

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[30] Davis Aff., Ex. 18, April 11, 2006, stipulation between Idaho Power Co. and the State of Idaho re limited subordination to two groundwater recharge permits.
[31] Davis Aff., Ex. 19, IDWR and State Water Supply Bank Records for Groundwater Recharge permit nos. 37-7842 and 01-7054.
[32] *Id.*
[33] Davis Aff., Ex. 15, July 27, 2006, letter from Dir. Dreher to Senator Coiner.

Department issued a Notice of Intent to Issue License, which included an unprecedented invitation to interested persons or entities "addressing the form of the subordination condition that should be included on the license for Water Right No. 01-7011."[34] Unbeknownst to the canal companies, because they had not been served with the correspondence, in January, February, and April of 2007, three parties had served on the Department letters requesting an opportunity to comment on the subordination provision and threatening to protest anything less than full subordination.[35] The Canal Company did not receive notice that the letters had been submitted until the Director issued the Notice of Intent to Issue License inviting additional comments, which now requires the Canal Companies to re-justify and re-defend the Milner Permit even though proof of beneficial use was submitted in 1993, and the statutory protest period had expired decades earlier.

In response to the Notice of Intent to Issue License, which included an unlawful and unprecedented re-opening of the permit to new protests and objections, the Canal Companies on September 28, 2007, filed their Petition for Preemptory Writ of Mandate in the District Court of Idaho in Jerome County.[36] In it the Canal Companies requested that the district court enter an order directing the Department of Water Resources to issue a license for their hydropower water right no. 01-7011 which conformed in all respects to the permit for the water right. On September 27, 2007, in conformance with Idaho Rule of Civil Procedure 74(b), the Canal Companies filed their Application for Alternative Writ of Mandate, seeking additional relief than had been set forth in the initial Petition for Preemptory Writ of Mandate.[37] The district court

[34] Davis Aff., Ex. 20, Sept. 5, 2007 Notice of Intent to Issue License.
[35] Davis Aff., Ex. 21, Jan. 9, 2007 letter from Bingham Groundwater Users, Feb. 5, 2007, letter from Randy Budge, and April 13, 2007, letter from Rob Harris.
[36] Davis Aff., Ex. 22, Petition for Preemptory Writ of Mandate.
[37] Affidavit of Michael C. Orr in Support of Idaho Water Resource Board's Motion for Summary Judgment, (Orr. Aff.), Ex. 8, Application for Alternative Writ of Mandate.

declined to issue the petition, raising a number of questions that he believed needed to be answered on their merits after a hearing, and invited the Canal Companies to notice a hearing on the initial Preemptory Writ.[38] The State then moved to dismiss the action arguing that the Canal Companies had failed to exhaust their administrative remedies before the Department.[39] After hearing, the district court held that the Preemptory Writ proceedings were premature, as the Canal Companies would have an adequate remedy before the Department in the event that the Department did issue the license with the non-conforming subordination condition.[40]

On October 20, 2008, the Department of Water Resources issued a Final Order issuing the Milner License No. 01-7011.[41] The license issued contained the new subordination condition, an additional condition not contained in the permit, and a volumetric limitation that was not included in the permit.[42] The Canal Companies filed their Protest and Petition for Hearing on November 4, 2008.[43] The Idaho Water Resource Board and certain ground water user entities sought intervention which was granted by the hearing officer. Those questions that were not ripe for the district court to hear in the mandamus proceedings are now presented to this hearing officer for resolution.

III.
STANDARD OF REVIEW

In order for a movant to be granted judgment on a motion for summary judgment the movant must demonstrate that "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

[38] Orr Aff., Ex .9, Court's Order Denying Alternative Writ.
[39] Orr Aff. Aff., Ex. 10, State's Motion to Dimiss.
[40] Orr Aff., Ex. 14, Court's Order Denying Preemptory Writ
[41] Davis Aff., Ex. 23, Final Order Issuing Water Right License No. 01-7011.
[42] *Id.*
[43] Davis Aff., Ex. 24, Protest and Petition for Hearing.

moving party is entitled to judgment as a matter of law."[44] In consideration of such a motion, the court must construe the facts and inferences contained in the existing record in favor of the party opposing the motion.[45] At all times, the burden of proving the absence of a genuine issue of material fact rests upon the moving party.[46] A motion for summary judgment must be denied if the record contains conflicting inferences or if reasonable minds might reach different conclusions.[47]

However, in cases where the action will be tried to the court, rather than before a jury, the judge is not required to draw all reasonable inferences in favor of the non-moving party, and "is free to arrive at the most probable inferences to be drawn from the uncontroverted evidentiary facts."[48] If the court determines, after a hearing, that no genuine issues of material fact exist, the court may enter judgment for the party it deems entitled to prevail as a matter of law, even in favor of non-moving parties.[49]

IV.
ARGUMENT

A. THE MILNER HYDROELECTRIC PROJECT IS A BASIN 01 ABOVE MILNER WATER RIGHT THAT HAS ALWAYS AND CONTINUES TO COMPLY WITH IDAHO LAW, AND IDAHO WATER POLICY

A water right is defined by the elements set forth in the permit or license for the right.[50] In this case, the water right for the Milner hydroelectric project clearly indicates that it is

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[44] Id. R. Civ. P. 56(c), *City of Idaho Falls v. Home Indemnity Co.,* 126 Idaho 604, 606, 888 P.2d 383 (1995).
[45] *Bonz v. Sudweeks,* 119 Idaho 539, 541, 808 P.2d 876 (1991).
[46] *G & M Farms v. Funk Irrigation Co.,* 119 Idaho 514, 517, 808 P.2d 851, 854 (1991).
[47] *Id.*
[48] *Loomis v. City of Hailey,* 119 Idaho 434, 437, 807 P.2d 1272, 1275 (1991).
[49] *Barlow's, Inc. v. Bannock Cleaning Corp.*, 103 Idaho 310, 312 647 P.2d 766, 768; *see also* e.g. *Rasmuson v. Walker Bank & Trust Co.,* 102 Idaho 95, 625 P.2d 1098 (1981); *Just's, Inc. v. Arrington Const. Co., Inc.,* 99 Idaho 462, 583 P.2d 997 (1978).
[50] I.C. § 42-1411.

diverted above the Milner dam.[51] The Intervenors insist otherwise and argue that the Milner hydroelectric right is subject to the "zero flow at Milner" policy, therefore preventing the water right from having any right to delivery of water arising above the dam. If a water right which diverts above the Milner dam is not an above Milner use entitled to the use of waters arising above the dam, then it is unclear where the Intervenors would draw such a line. At what point on the Snake River does a point of diversion above Milner dam, become a below Milner diversion?

The Idaho Water Resource Board initially intervened in the Canal Companies protest action for license No. 01-7011 broadly alleging that the purpose of its "intervention would be to support the application of the policies of the State Water Plan, as adopted and amended by the Idaho Legislature, to the Licensing of Water Right Permit No. 01-7011."[52] The Board went on to state "[i]n all likelihood, Water Right Permit No. 01-7011 will be the most important water right licensed by the Department in which the Department considers proper application of the elements of the State Water Plan quoted above."[53] The IWRB further alleges that because it is the body responsible for formulation and implementation of the plan, then its intervention is necessary to see to it that "the Department of Water Resources [includes] conditions in the license for Water Right Permit No. 01-7011 for Milner Dam that reflect the requirements of the State Water Plan."[54] The Board prayed for relief seeking "that the license awarded to the applicants North Side Canal Company and Twin Falls Canal Company for Water Right No. 01-07011 contain all conditions necessary to comply with the State Water Plan."[55] At no point does

[51] Davis Aff., Ex. 25, Milner drawing attached to permit application depicting point of diversion, and TFCC and NSCC place of use maps.
[52] Davis Aff., Ex. 26, All Intervenors Petitions for Intervention in Protest of Water Right License No. 01-7011.
[53] *Id.*, (emphasis added).
[54] *Id.*
[55] *Id.*

the Board indicate its full knowledge and participation in the negotiations surrounding the 1987 subordination agreement.

Instead, Intervenors seek an order affirming the inclusion of the altered condition added to the license at issuance in 2008, apparently urging this hearing officer to find that Director Higginson, who applied the 1987 subordination condition, relying on the same law and policy as the Director who later changed the subordination provision, had no authority to do use his discretion. It is illogical to submit that between two Directors of the Department of Water Resources, operating under identical law, policy and facts, one had the authority to apply a subordination condition, and the other did not. The Intervenors submit that the controlling question to be answered in this proceeding

> [i]s whether the Director, as part of his duty to ensure that a water right license complies with Idaho law and is consistent with the State Water Plan, Idaho Code §§ 42-219(1), 42-1734B(4), properly conditioned the license for water right no. 01-7011 to prevent a hydropower use located below Milner Dam from interfering with ground water recharge uses of the Snake River above Milner Dam.[56]

The Canal Companies disagree with the Board's description of the controlling question at issue in this proceeding, and instead argue that the controlling question is whether a permittee, who has in all respects complied with the law, Idaho State Water Plan and terms of its permit, and made proof of beneficial use fifteen years prior to issuance of a license, is entitled to a license confirming such use. The Intervenors have failed to allege how the subordination condition that was agreed to between the state and the Canal Companies in 1987 violates either the law or the policy of the State of Idaho, for the very simple reason that the Milner hydroelectric project is an above Milner use, and does not violate the law.

Both the Board and ground water Intervenors would have this tribunal believe that there is but one appropriate expression of the "zero flow at Milner" concept, and that it is as expressed

[56] Memorandum in Support of Idaho Water Resource Board's Motion for Summary Judgment, p. 3.

in the State Water Plan, which is importantly, once again being revised. The State Water Plan, and other state policies, have been interpreting and re-interpreting the concept of zero flow at Milner since long before there ever was such a thing as an Idaho State Water Plan. The zero flow concept has been expressed in different forms in at least the following: (1) the legislation intended to codify the Swan Falls agreement in 1985; (2) the Water District 01 Resolutions; (3) Idaho Code § 42-203B(2) as it was amended in 1986 relating to hydropower rights; (4) all of the separately adopted State Water Plans; (5) a stipulation submitted by the State and Idaho Power Company in sub-case number 00-92003; and (6) in the Director's Report for Basin 02. All of the documents which contain the expressions of the zero flow at Milner concept are subject to change, and have changed over time. Indeed, Director Dreher of the Idaho Department of Water Resources himself recognized that the State Water Plan constitutes in many cases only a "nonbinding policy statement of the Idaho Water Resource Board[.]"[57] There should be no argument that the concept of zero minimum flow at Milner has been subject to varying interpretations and constructions for at least half a century in Idaho. Therefore, the Intervenors allegation that they are the sole body responsible for promulgating, interpreting, and enforcing the concept of 'zero flow at Milner' is incorrect.

The State Water Plan, formulated by the Board, in its many incarnations, has always recognized the two rivers concept, but over time it has used different language and a changing sentiment to express this recognition. In fact, the State Water Plan has always expressly represented that it is a "dynamic document, subject to change to reflect citizen's desires and to be responsive to new opportunities and needs."[58] Each Idaho State Water Plan also expressly recognizes that "[a]ccording to statute, a formal review of [the] plan must take place every five

[57] Davis Aff., Ex. 27, June 23, 2004 Memorandum from Director Dreher to Senator Noh and Representative Raybould.
[58] Davis Aff., Ex. 28, Excerpt of Idaho State Water Plan 1992, at p. 1.

years."[59] Even Director Dreher cautioned against broad interpretations of policy statements in the State Water Plan where "valuable property rights....would have been affected by such an interpretation."[60] The Board's own interpretation of what constitutes zero flow at Milner has changed substantially over the years, and is subject to continuing change. Making a property interest in a water right contingent on what the Board may view as the 'zero flow at Milner' policy in any given year, for any given reason, for purposes of issuing a water right license, would strip water right permit holders of the necessary security one needs to commit to invest millions of dollars in a project.

Both the 1986 and 1996 State Water Plans included a recitation of the new policy and legal developments that in which arose from the Swan Falls Agreement in 1985.[61] The 1996 State Water Plan stated:

> The State Water Plan was updated and re-adopted in 1982, 1986, and 1992. The Plan continues to evolve as an instrument in the adoption and implementation of policies, projects, and programs that develop, utilize, conserve, and protect the state's water supplies. Changes were made in 1985 to reconcile any differences created by the Swan Falls Agreement entered into by the State and the Idaho Power Company. The 1986 and 1992 updates involved changes in objectives and policy reorganization.[62]

Similarly, since its initial adoption in 1985 Idaho Code § 42-203B has been amended. When it was originally proposed as a piece of the legislation to resolve the dispute between the State of Idaho and the Idaho Power Company arising from the Swan Falls litigation it stated:

> 42-203B. AUTHORITY TO SUBORDINATE RIGHTS—NATURE OF SUBORDINATED WATER RIGHT AND AUTHORITY TO ESTABLISH A SUBORDINATION CONDITION—AUTHORITY TO LIMIT TERM OF PERMIT OR LICENSE. The director shall the authority to subordinate the rights granted in a permit or license for power purposes to subsequent upstream beneficial depletionary uses. A subordinated water right for power use does not

[59] *Id.*
[60] Davis Aff., Ex. 27, June 23, 2004, Memo from Director Dreher to Sen. Noh and Rep. Raybould.
[61] Davis Aff., Exs. 29 and 30, Excerpts of the 1986 and 1996 Idaho State Water Plans.
[62] Davis Aff., Ex. 30, Excerpt of 1996 Idaho State Water Plan.

> give rise to any claim against, or right to interfere with, the holder of subsequent upstream rights established pursuant to state law. The director shall also have the authority to limit a permit or license for power purposes to a specific term.[63]

After adoption by the Idaho Legislature in 1985, this Code section was amended in 1986 to include numerous and substantial additional requirements not contemplated at the time the Swan Falls Agreement was ratified. The statute has not been amended since 1986 and currently reads as follows:

> Any portion of the water rights held for power purposes in excess of the level so established shall be held in trust by the State of Idaho, by and through the governor, for the use and benefit of the user of the water for power purposes, and of the people of the State of Idaho; provided, however, that application of the provisions of this section to water rights for hydropower purposes on the Snake river or its tributaries downstream from Milner Dam shall not place in trust any water from the Snake river or surface or ground water tributary to the Snake river upstream from 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 water of the Snake river or surface or ground water tributary to the Snake river upstream from Milner Dam shall be considered. The rights held in trust shall be subject to subordination to and depletion by future upstream beneficial users whose rights are acquired pursuant to state law, including compliance with the requirements of section 42-203C, Idaho Code.[64]

The water users in Water District 1, which includes all water users in Basin 01 above Milner Dam, through its governing assembly, the Committee of Nine, adopted a policy position at or near the time of the adoption of the first Idaho State Water Plan which states:

> WHEREAS, the water users of Water District 1 and their representatives, the Committee of Nine, wish to have a clear representation of the position of the Snake River Irrigators, and establish the following as the guiding principles in any all negotiations and litigation:...B. The zero minimum flow at Milner as established in the State Water Plan be recognized as the Water District 1's position, and that there be no call for deliveries below Milner by downstream interests.[65]

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[63] Davis Aff., Ex. 14, Swan Falls Agreement and Framework.
[64] I.C. § 42-203B(2).
[65] Davis Aff., Ex. 31, Water District 1, 2009 Draft Resolutions.

The resolutions of Water District 01 are reviewed at least annually to determine whether they still accurately reflect the policy positions of the water users in the District and their representatives on the advisory committee, the Committee of Nine. It is important to remember that the Milner hydropower license is a Basin 01 license, numbered 01-7011.

In his report to the Snake River Basin Adjudication for Basin 02 the Director of the Idaho Department of Water Resources recommended that a general provision be adopted for Basin 02, which states:

> The minimum daily flow at the Milner gauging station shall remain as zero cubic feet per second. The Milner gauging station is located at Latitude 42°31'41", Longitude 114°01'06" (revised), (NAD83), in the SW1/4NW1/4 of section 29 in Township 10 South, Range 21 East, Boise Meridian, Twin Falls County Hydrologic Unit 17040212, on the left bank 200 ft downstream from the highway bridge at Milner, 0.4 mile downstream from Milner Dam, at mile 638.7.

Further, as result of the second Swan Falls resolution, referred to as the Swan Falls Reaffirmation Agreement, the State and Idaho Power Company presented to the SRBA court for its approval a stipulated remark to be included in Idaho Power Company's Basin 02 water rights, which is intended to express the zero flow at Milner concept in those water rights. It reads, "[f]or purposes of the determination and administration of this water right, 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."[66]

The 1996 version of the State Water Plan, the plan that is presently in place but that is currently undergoing review for revision by the Idaho Water Resource Board[67], states as its

[66] Davis Aff., Ex. 32, Examples of partial decrees proposed pursuant to Swan Falls Reaffirmation Agreement.
[67] It is important to note, that while the entire State Water Plan revision process which has been ongoing for more than 18 months has been transparent as to most of the policies covered in the plan, the group of policies which represent the IWRB's position concerning the Snake River are being drafted by the Idaho Attorney General's office and have not yet been made available for public review.

position relating to zero flow at Milner, "[t]he exercise of water rights above Milner Dam has and may reduce the flow at the Dam to zero."[68]

With all of these differing expressions of the concept of "zero flow at Milner," from the State Water Plan, Idaho Code, the Swan Falls Agreement and Reaffirmation Agreement, the Water District 01 Resolutions, and the existing Director's Report, in the SRBA proceedings for subcase 02-200, *et seq.*, the state then requested that the SRBA Court amend the proposed Director's remark for Basin 02, and declare a new, and entirely different expression to accurately reflect the State of Idaho's position regarding the concept of "zero flow at Milner." The proposed language there stated

> The flow of the Snake River at Milner Dam may be reduced to zero, and water rights using downstream from Milner Dam have no right to call for the delivery, or seek administration, of the flow of the Snake River or surface and ground water tributary to the Snake River upstream from Milner Dam. The Milner gauging station is located at Latitude 42°31'41", Longitude 114°01'06" (revised), (NAD83), in the SW1/4NW1/4 of section 29 in Township 10 South, Range 21 East, Boise Meridian, Twin Falls County Hydrologic Unit 17040212, on the left bank 200 ft downstream from the highway bridge at Milner, 0.4 mile downstream from Milner Dam, at mile 638.7.[69]

Now the Board takes the position that the appropriate expression to govern the concept of "zero flow at Milner" is the 1986 language adopted in I.C. § 42-203B and the summary expression of the zero flow intent as represented in the *Clear Springs* Order.[70] This ignores both the history of the development of Idaho Code § 42-203B, the history of the development of the State Water Plan, and the legal tenets which dictate this tribunal's statutory interpretation.

Importantly, this hearing officer is guided by the following as it considers the Board's Motion for Summary Judgment:

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[68] Davis Aff., Ex. 30, Excerpts of 1996 State Water Plan.
[69] Davis Aff., Ex. 33, State of Idaho's Motion for Partial Summary Judgment Re: Milner Zero Minimum Flow in sub-case no. 02-200, *et seq.*, p. 2.
[70] Idaho Water Resource Board's Memorandum in Support of Motion for Summary Judgment, p. 26.

> In construing a statute, this Court examines the language used, the reasonableness of the proposed interpretations, and the policy behind the statute. *Hagerman Water Right Owners,* 130 Idaho at 733, 947 P.2d at 406. Moreover, "the application of a statute is an aid to construction, especially where the public relies on that application over a long period of time." *Id.* As this Court has stated:
>
> It is ... improper to construe [statutes] in the abstract, without taking into consideration the historical framework in which they exist.... Correlatively, such information is also relevant when deciding what the statute means to others because it is important to know how people affected by an act understand it. *State v. Hagerman Water Right Owners*, 130 Idaho 727, at 733-4, 947 P.2d at 406-7 (quoting Sutherland Stat. Const. § 49.01 (5th ed.1992)). [71]

In *Pocatello*, the Court was asked to review the SRBA court's determination that the City of Pocatello was entitled to claim a federally conferred water right based on historical tribal treaty lands. There the Court was asked to review federal treaties, state law and federal law to determine whether a clear and unambiguous grant of water rights had been conferred. No such clear and unambiguous statement was found after a review of all of the historical and legal precedent was read together.

Nor is this case susceptible to one simple interpretation. The agreement on the subordination language which exempted the Milner hydroelectric project from subordination to ground water recharge was entered into between the Canal Companies and the Idaho Department of Water Resources in November, 1987, when undoubtedly the 1986 amendments to both Idaho Code § 42-203B and the Idaho State Water Plan were fresh on the mind of Director Higginson and the State.[72] At that time no one questioned the authority of the Director to enter into such an agreement, which was not as the ground water Intervenors would have you believe, hidden from the public. Counsel for the Canal Companies had approached the legislature and the Idaho Water Resource Board as early as 1982 with concerns about the potential subordination

[71] *Pocatello v. State*, 145 Idaho 497, 502, 180 P.3d 1048, 1053 (2008).
[72] Davis Aff., Ex. 9, Nov. 18, 1987 letter from Higginson to Rosholt.

provision.[73] Director Higginson clearly understood the authority that was conferred upon him by Idaho Code § 42-203B(6) and exercised that discretion when he placed the subordination condition on the Canal Companies permit in 1987, before the Canal Companies had spent millions of dollars developing the Milner project.

In the 1986 State Water Plan the expression of the zero flow at Milner policy was stated at Policy 5A: Snake River Basin

> 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, 3,900 cfs from April 1 to October 31 and5,600 cfs from November 1 to March 31 measured at the Murphy gauging station, and 4,750 cfs measured at [the] Weiser 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.[74]

The Director, when he exercised his authority to subordinate the Milner hydropower license to all upstream uses except other hydropower projects and ground water recharge, did not violate either the law or policy of the state of Idaho. The Director's decision was entirely consistent with the State Water Plan, because the Milner hydropower project is an above Milner use. Ground water recharge, while considered by some for many years to be a possible means to store more water on the Eastern Snake Plain Aquifer, was not a recognized beneficial use in Idaho until 1994, one year after the Canal Companies had made proof of beneficial use for the Milner hydroelectric project. Even after ground water recharge was made a beneficial use it was subordinated to all other beneficial uses, including hydropower until changes were made to Idaho Code § 42-234 and 42-4201A in 2009. Therefore, it was perfectly lawful and logical that the Director would recommend that the right be exempted from subordination to ground water recharge.

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[73] Davis Aff., Exs. 7 and 2, May 3, 1982 letter from Rosholt to the IWRB, and Joint Statement of Canal Companies on HB 459 dated Feb. 4, 1984.
[74] Davis Aff., Ex. 29, Excerpt of 1986 Idaho State Water Plan.

The state cannot invite someone to develop a hydropower project, as Idaho did the Canal Companies in 1977, issue them a permit, negotiate a term of that permit, encourage the development at extraordinary cost to the water right holder, and then, after 33 years, change its mind about that policy, stripping that project of all financial viability and accuse the water right holder of then being in derogation of the law. It is fundamentally illogical to the point of absurdity. Neither the law nor the public policy of the State of Idaho support the Intevenor' position that one Director has the discretion, under application of an identical law and policy, to insert a subordination provision and then 21 years later a different Director has the discretion to undo that action to the substantial detriment of the water right holder. The Milner hydroelectric project as permitted by agreement with the State of Idaho never violated any laws or policies of the State of Idaho.

B. THE FEDERAL ENERGY REGULATORY COMMISSION'S EXCLUSIVE LICENSING AUTHORITY AS IT RELATES TO THE SUBORDINATION CONDITION PRECLUDES THE DEPARTMENT FROM ADDING THE NEW SUBORDINATION PROVISION TO THE LICENSE.

The Federal Energy Regulatory Commission has final licensing authority over all large hydropower projects in the United States as a result of the Federal Power Act.[75] The Act, when it was originally drafted, took great efforts to protect the interests of States to regulate the private property interests, which has traditionally always been within the purview of the States to regulate. The interrelationship of these two competing interests in the development of hydropower projects was well described by the Unites States Supreme Court *in First Iowa Hydro-Electric Cooperative v. Federal Power Commission (State of Iowa, Intervenor)*, 328 U.S. 152, 66 S.Ct. 906 (1946), wherein the court stated

[75] Some small hydropower developments, those anticipate to produce less than 5 Megawatts, are not required to be licensed by the FERC. However, in those cases, the developer is still required to apply to FERC for an exemption from licensing.

> In the Federal Power Act there is a separation of those subjects which remain under the jurisdiction of the states from those subjects which the Constitution delegates to the United States and over which Congress vests the Federal Power Commission with authority to act. To the extent of this separation, the Act establishes a dual system of control. The duality of control consists merely of the division of the common enterprise between two co-operating agencies of Government, each with final authority in its own jurisdiction. The duality does not require two agencies to share in the final decision of the same issue. Where the Federal Government supersedes the state government there is no suggestion that the two agencies shall both have final authority.[76]

The State of Idaho is well aware of the effect of the Federal Power Act on the state's authority to place limitations on a federally licensed power facility, which is why the Idaho Department of Water Resources intervened in the Milner hydroelectric facility licensing proceedings in 1985.[77] In their petition for intervention the State sought the inclusion of the following subordination provision:

> The Project shall be operated in such manner as will not conflict with the future depletion and flow of the waters of the Snake River and its tributaries, or prevent or interfere with the future upstream diversion and use of such water above the back water created by the project, as needed for upstream development in the public interest, or 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 for any rights to the use of water acquired for the project."[78]

After the 1985 Motion to Intervene, the Idaho Department of Water Resources, Idaho Water Resource Board, and legislature, after consultation with the Canal Companies, agreed upon the subordination provision set forth in the November 1987 letter, exempting the Milner hydropower project from subordination to other hydropower uses and groundwater recharge.[79] In its *Order Issuing License,* FERC specifically declined to include the subordination condition that had initially been requested by the Idaho Department of Water Resources stating:

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[76] *Id.*, at 167-168, 66 S.Ct. at 913.
[77] *See* Idaho Department of Water Resources Petition to Intervene in this action.
[78] *Id.*
[79] Davis Aff., Ex. 9, November 18, 1987 letter from Higginson to Rosholt.

> Inclusion in the license of the unsupported open-ended water subordination clause requested by IDWR would in essence vest in IDWR, rather than the Commission, ultimate control over the operation and continued viability of the project. In other words, the subordination clause, which would reserve to the IDWR the right to permit unlimited diversion upstream of the project, could nullify the balance struck by us under the comprehensive planning provisions of Section 10(a)(1) of the FPA in issuing the license. Consequently, inclusion of the open-ended water subordination clause in the license, as requested by IDWR would interfere with the exercise of our comprehensive planning responsibilities under Section 10(a)(1) of the FPA and thus would be inconsistent with the scheme of regulation established by the FPA, which vests in the Commission the exclusive authority to determine whether, and under what conditions, a license should issue.
>
> In light of the above, we will not add the requested open-ended subordination clause to the license for Project No. 2899. However, as we explained in *Horseshoe Bend*, should IDWR in the future determine that it would be desirable for CC to reduce their use of water for generation to accommodate a specific future upstream water use, IDWR can petition the Commission to have us exercise our reserved authority under Standard Article 12 of the license to require such a reduction. We will provide CC with notice of the request and an opportunity to respond and will act on the request after considering all supporting documents and information submitted by IDWR and CC.[80]

Neither the Department of Water Resources, nor the Idaho Water Resource Board appealed the license issued by the FERC denying their requested subordination condition, nor have the agencies, as FERC required, taken the necessary action before FERC to have the newly issued subordination condition approved. Instead, some twenty years later, the Department has attempted to accomplish what it was prevented from doing by FERC in December 1988.

The Department's new subordination condition is an impermissible collateral attack on the federal licensing authority of the FERC, and for this reason, the Director's attempts to modify the Milner hydropower license subordination condition cannot be sustained. A similar situation to the case now before this hearing officer was decided by the United States Supreme Court in 1990. In *California v. FERC*, 492 U.S. 490, 110 S.Ct. 2024 (1990), the Commission

> After considering the project's economic feasibility and environmental consequences, FERC set an interim "minimum flow rate" of water that must

[80] Davis Aff., Ex. 12, Order Issuing License for Project No. 2899-003 dated December 15, 1988.

> remain in the bypassed section of the stream and thus remains available to drive the generators. The State Water Resources Control Board (WCRB) issued a state water permit that conformed to FERC's interim minimum requirements, but reserved the right to set different permanent ones. When WRCB later considered a draft order requiring permanent minimum flow rates well in excess of the FERC rates, the licensee petitioned FERC for a declaration that FERC possessed exclusive jurisdiction to determine the project's minimum flow rates.[81]

FERC in the *California* case ordered the licensee to conform to the federal rates, and California intervened to object. FERC denied the California intervention and concluded "that the state sought to impose conflicting license requirements, and reaffirmed its conclusion that it has exclusive jurisdiction to determine the rates.[82] The Court of Appeals also affirmed holding:

> That FPA § 27-which saves from supersedure state "laws...relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein" as construed in First Iowa, did not preserve the State's right to regulate minimum flow rates, and that the FPA pre-empted WRCB's minimum flow rate requirements.[83]

The United States Supreme Court affirmed again holding that "the California requirements for minimum stream flows cannot be given effect and allowed to supplement the federal flow requirements."[84] It further stated:

> FERC has indicated that the California requirements interfere with its comprehensive planning authority, and we agree that allowing California to impose the challenged requirements would be contrary to congressional intent regarding the Commission's licensing authority and would 'constitute a veto of the project that was approved and licensed by FERC.'[85]

The Milner license is being subjected to the same collateral attack on its project. The Order Issuing the FERC license for the project makes it very clear that FERC considered the open-ended subordination provision proposed by the Department in its intervention and

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[81] *Id.* at 490, 110 S.Ct. at 2025.
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *California v. FERC*, 495 U.S. at 506-507, 110 S.Ct. at 2034 (1990).

expressly rejected it because such a provision "would in essence vest in IDWR, rather than the Commission, ultimate control over the operation and continued viability of the project. In other words, the subordination clause, which would reserve to the IDWR the right to permit unlimited diversion upstream of the project, could nullify the balance struck by us under the comprehensive planning provisions of Section 10(a)(1) of the FPA in issuing the license."[86] The United States Supreme Court has affirmed that this area of Milner hydroelectric license is strictly reserved to FERC, and the Department's attempted end run around FERC authority by issuing the subordination provision that FERC expressly forbade over 20 years ago, cannot be sustained as it would constitute a veto of the project that was approved and licensed by FERC.

C. THE DEPARTMENT EMPLOYED UNLAWFUL PROCEDURE WHEN IT REOPENED THE MILNER LICENSE FOR NEW COMMENT AND OBJECTION AND ULTIMATELY CHANGED THE TERMS OF THE VESTED MILNER HYDROELECTRIC WATER RIGHT.

The Canal Companies, in developing the Milner hydroelectric project, conformed in every respect to the laws of the State of Idaho and the rules of the Idaho Department of Water Resources when it completed the Milner hydroelectric project. In 1987 the Department and Canal Companies agreed upon a form of subordination condition that was consistent with the newly adopted Idaho Code § 42-203B, but that did not appear in the initial permit. In 1993 the Canal Companies submitted proof of beneficial use for the project, which was confirmed by the Department. At this point it was incumbent upon the Department to carefully examine the proof of beneficial use "and if the department is satisfied that the law has been fully complied with and that the water is being used at the place claimed and for the purpose for which it was originally intended, the department *shall issue to such user or users a license confirming such use*."[87] The

[86] Davis Aff., Ex. 12, Dec. 15, 1988, Order Issuing FERC license.
[87] I.C. § 42-219(1).

Department failed to perform its duty in this case. By reopening the Milner hydroelectric permit for public comment fourteen years after proof of beneficial use had been submitted, and by creating and inserting new conditions in the license that did not appear in the permit during the preceding twenty years, the Department exceeded its statutory scope and authority.

Once an applicant submits a completed application, the Department processes the application and publishes notice of the proposed diversion and project, inviting interested parties to protest the same.[88] The Department then considers the application, any protest, or lack thereof, and makes various findings.[89] The Department can approve, partially approve, approve upon conditions, or reject the application for permit.[90] Upon approval, the applicant has a specified period of time to construct the project and "prove up" the water right.[91] Again, once this procedural process is complete, both the Department and the applicant have *agreed* upon the terms by which the proposed project will be constructed and the water put to beneficial use consistent with Idaho law and policy.

Once the project is completed and water is put to use for the intended beneficial purpose, the applicant must file proof of completion and proof of beneficial use with the Department, and the Department must examine the evidence to ensure the conditions were met, and proving beneficial use.[92] Changing the conditions at this point in the process exceeds the Department's authority. Water right permit holders rely heavily upon the terms of the permit in order to make the necessary cost and benefit analysis, and to determine the feasibility of any given project.

In this case, the Canal Companies did everything that was required of them by the law, and the policy of the state of Idaho at the time that they submitted proof of beneficial use in

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[88] I.C. § 42-203A(1)-(4).
[89] I.C. § 42-203(5).
[90] *Id.*
[91] I.C. § 42-204.
[92] *See* I.C. §§ 42-217, 42-219.

October 1993. Thereafter, the Department failed to issue the license for fifteen years, and when it did, the Director exceeded his authority by employing unlawful procedures and fundamentally changing the rights of the Canal Companies. Rather than "confirming such use," the Director changed the terms of the project to the point of substantially jeopardizing the continued existence of the project.

As has been previously discussed, after the enactment of the Swan Falls legislation, in 1987, due to subsequent delays with FERC, the Canal Companies sought a second extension of time to submit its proof of beneficial use for the project. In response to the request an analysis memorandum was prepared by a Department employee concluding that the extension should be approved pursuant to the delay of FERC, and noted, that in order to be consistent with the new Idaho Code § 42-203B "[t]he department should add a subordination condition to the request for extension of time if approved."[93]

In an April 13, 1987, letter the Chief of Operations Bureau for IDWR, L. Glen Saxton, notified the Canal Companies that the granting of the extension would be conditioned on the applicant's 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.[94]

In response, counsel for the Canal Companies raised the following concerns with the proposed condition:

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[93] Davis Aff., Ex. 34, April 9, 1987, memo from L. Glenn Saxton to File for water right no. 01-7011.
[94] Davis Aff., Ex. 35, Saxton Letter dated April 13, 1987 to Canal Companies.

> 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.[95]

Counsel 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 <u>and groundwater recharge</u> 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 <u>and groundwater recharge</u> within the Snake River Basin of the State of Idaho initiated later-in-time than the priority of this permit.[96]

In a letter dated November 18, 1987, six months after the Canal Companies' correspondence, Director Higginson agreed upon the form of the subordination provision proposed by the Canal Companies stating:

> The department will use the amended language which you suggested in your letter for the subordination condition to be placed as a condition of approval on the extension request, <u>since the approval being sought is in connection with a permit rather than an application for permit</u>...[97]

Director Higginson in the above quoted passage explicitly recognizes that the condition would be acceptable, because the approval "is in connection with a permit rather than an application for a permit," recognizing that the Canal Companies had acquired a vested interest in the 1977 by the

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[95] Davis Aff., Ex. 36, May 8, 1987 letter from John Rosholt letter to L. Glenn Saxton.
[96] *Id.*
[97] Davis Aff., Ex. 9, November 18, 1987 letter from Higginson to Rosholt, <u>emphasis added</u>.

time the 1987 amendment was negotiated, and further, fulfilling his obligation pursuant to the licensing statutes.[98] Also importantly is that the new condition, as inserted by the Department, had to be compliant with the newly adopted provisions of Idaho Code § 42-203B. In fact, as explained by the Department's correspondence on September 1, 1985, the reason the Department was even reviewing the 01-7011 permit was because of the recent enactment of the legislation "to determine whether they comply with the provisions of Chapter 2 Title 42, Idaho Code."[99] Therefore, Director Higginson, when he issued the subordination condition exempting the Milner hydroelectric project from subordination to ground water recharge, was implicitly finding that the project, when it was completed would comply with Idaho law.

In the Intervenors Memoranda in Support of their Motions for Summary Judgment they confuse the arguments made concerning the zero minimum flow provisions, the "long-established practice of subordinating hydropower uses to agricultural development," and improperly implying that hydropower water rights have long been subordinated to ground water recharge. The Canal Companies agree that developers of hydropower water rights have long agreed to subordinate their rights in order to allow additional upstream development. The Canal Companies further agree that ground water recharge had long been considered a possible means to acquire additional storage on the Eastern Snake Plain Aquifer, however the legal standing of ground water recharge in relation to hydropower development was substantially different than it is characterized by the Intervenors.

Ground water recharge was not a legally recognized beneficial use until 1994, and even then was statutorily mandated as *secondary* to *prior perfected* hydropower water rights until

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[98] *Id.*
[99] Davis Aff., Ex. 37, September 1, 1985 letter to Canal Companies from Department.

legislative action taken in 2009.[100] The Department excepted ground water recharge from the amended 1987 Milner subordination condition in full compliance with Idaho law, including the 1986 enactment of the Swan Falls legislation.

On April 7, 1994, the Idaho legislature approved I.C. § 42-234(2), codifying for the first time ground water recharge as a beneficial use to any user in the State of Idaho. From 1994 through 2009, I.C. § Section 42-234(2) stated as follows:

> The legislature hereby declares that the appropriation and underground storage of water for purposes of ground water recharge shall constitute a beneficial use and hereby authorizes the department of water resources to issue a permit for the appropriation and underground storage of unappropriated waters in an area of recharge. The rights acquired pursuant to **any permit and license obtained as herein authorized shall be secondary to all prior perfected water rights, including those water rights for power purposes** that may otherwise be subordinated by contract entered into by the governor and Idaho power company on October 25, 1984, and ratified by the legislature pursuant to section 42-203B...[101]

Idaho Code § 42-234 was amended in 2009, drastically changing the statute to read as follows:

> The legislature hereby declares that the appropriation of water for purposes of ground water recharge shall constitute a beneficial use of water. The director of the department of water resources is authorized to issue permits and licenses for the purpose of ground water recharge, pursuant to the provisions of this chapter and in compliance with other applicable Idaho law and the state water plan.[102]

The Canal Companies submitted proof of beneficial use prior to ground water recharge being considered a beneficial use pursuant to I.C. § 42-234 in 1994, which begs the question how

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[100] I.C. § 42-234, prior to 2009 amendments.
[101] *Id.*, (*emphasis added*)
[102] *See* I.C. Section § 42-234(2).

the 1987 subordination condition could be considered inconsistent with Idaho Law. Even during the subsequent years from 1994 through the issuance of the license in 2008, I.C. § 42-234(2) made any ground water recharge permit secondary to all *prior perfected rights*, which included water right 01-7011. The Department cannot delay issuing a license until it deems fit, waiting for future legislation to completely change the conditions of the permit or license to the detriment of the permittee. The instant case is in fact more egregious. The Department originally suggested that a hydroelectric project should be developed at the Milner Dam, issued a permit to the Canal Companies for the project and then negotiated a subordination condition that expressly exempted the Canal Companies from subordination to ground water recharge so that the project would be financeable and economically viable. Now the Intervenors argue that Director Higginson in 1987, applying the same law now being relied upon to justify Director Tuthill's authority to change the condition, did not have the authority or discretion to take such action. Alternatively they argue that Director Higginson acted outside of the law when he negotiated the subordination condition, but the Canal Companies have demonstrated that the law has not changed and that the subordination condition exempting them from subordination to recharge is entirely lawful. In fact, it is Director Tuthill who acted outside of the law when he took a second bite at the apple and issued a license which did not confirm the Canal Companies use under the permit. Director Tuthill violated Idaho Code § 42-219 when he issued the Milner hydropower license in 2008. Such a reckless and arbitrary change of position by Department, which the Intervenors argue muse be affirmed, should not be condoned by this tribunal.

Pursuant to I.C. § 42-219, upon receipt "of all the evidence in relation to such final proof, it shall be the duty of the Department to carefully examine the same, and if the Department is satisfied that the law has been fully complied with and that the water is being used at the place

claimed and for the purpose for which it was originally intended, the Department shall issue to such user or users a license confirming such use."[103] The Department breached its legal duty to the Canal Companies in this case.

D. THE CANAL COMPANY GAINED A PROTECTABLE AND COMPENSABLE VESTED INTEREST ONCE IT COMPLETED ITS PROJECT, AND SUBMITTED PROOF OF BENEFICIAL USE TO THE DEPARTMENT

The Petitioners argue that in the instant case the Canal Companies have acquired nothing—an inchoate right, a mere hope—nothing more than someone who submitted an application for permit yesterday, and therefore the Director can change the conditions accordingly. As evidenced above, the Canal Companies acquired the permit over 30 years ago, went through FERC licensing, agreed to alter and subordinate the permit, and spent millions of dollars to complete the project associated with the permit, and still after meeting all the conditions of the permit and the law, Intervenors argue the Canal Companies have no vested rights until the Department issues the license. This cannot be the policy behind the statutory permitting and licensing process and would render the process moot, as the Department would have unfettered and inequitable powers to refuse to perform its statutory duties, with drastic and unconscionable results, in the instant case subjecting the Canal Companies to fifteen plus years of possible changes in water policy and legislation. This has not been the historical practice and was not what the legislature envisioned. The Canal Companies have gained a protectable right, and by operation of law, the license should issue as of the date the Canal Companies submitted proof of beneficial use.

Integral to the statutory permit process, Chapter 2 of Title 42 sets forth the necessary steps for an applicant to follow to acquire a water right. Simplistically, an applicant files and application for permit with the Department; the Department processes the application and

[103] I.C. § 42-219(1).

publishes notice to the public inviting comment; the Department then makes various findings and decided if or how to approve the permit on conditions that would be consistent with Idaho law.[104] Upon approval, the applicant then has a specified period of time to complete construction of the project and "prove up" the water right.[105] After the applicant receives its permit with conditions for compliance, the applicant goes through the business judgment process of analyzing the permit, the conditions of the permit, and ultimately whether the project is worth the thousands, or millions of dollars to complete. Again, once this procedural process is complete, both the Department and the applicant have essentially *agreed* upon the terms by which the opportunity to construct the project and put water to beneficial use will occur.

Once the construction is complete, water put to beneficial use, and proof of beneficial use is submitted, the applicant has now complied with its statutory duty under the licensing process, and it is now up to the Department to perform its statutory duty of examining the evidence proving beneficial use, and issuing a license confirming the water right.[106]

Idaho law provides that once an applicant has conformed to the provisions of the law and permit, the Department must issue a license.

> Upon receipt by the Department of water resources of all the evidence in relation to such final proof [of beneficial use], it shall be the duty of the department to carefully examine the same, and if the department is satisfied that the law has been fully complied with and that the water is being used at the place claimed and for the purpose for which it was originally intended, the department shall issue to such user or users a license confirming such use.[107]

Further, the Department's own beneficial use examination rules demand that once an applicant has provided lawful proof of beneficial use, a license is "issued by the director...confirming the

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[104] *See* I.C. § 42-202, *et seq.*
[105] *See* I.C. § 42-204.
[106] *See* I.C. § 42-219.
[107] I.C. § 42-219(1), emphasis added.

extent of diversion and beneficial use of the water that has been made in conformance with the permit conditions."[108]

In viewing the licensing pathway and lengthy process an applicant must take, it would be irrational to think that once an applicant has complied with the conditions, completed its project and submitted proof of beneficial use, the Department can sit back and do nothing, and eventually even change the terms and conditions of a water right. This type of discretionary unpredictable exercise of power by the Department would create a chilling effect on water resource development, because an applicant would never have anything except a mere hope in perpetuity until the Department decides to eventually act, as it did in this case more than eighteen years after the Canal Companies made proof of beneficial use. This is difficult to reconcile with the Department's statutory responsibility of optimizing development and beneficial use of the resource.

Intervenors urge this tribunal to adopt the position that the only time an applicant gains protectable interest in its water right is when the license is issued. However, the status of an applicant in the permitting and licensing process is crucial to determining what, if any, vested or otherwise protectable rights the applicant has acquired. Under their argument, the Department could modify a permit unilaterally based upon its own internal policy or perspective, because until the Department decides otherwise an applicant has nothing.

Idaho case law states that prior to a permit issuing, or upon an applicants' request to amend a permit, the applicant has acquired nothing except an inchoate right—which may be subject to change. However, the law states that once a permit has issued, if an applicant does not seek to amend the permit, and completes a project which abides the law of the state, and submits

[108] IDAPA 37.03.02.010.15.

proof of beneficial use, then that permittee has acquired more than "a mere hope" of a water right.

In *Hidden Springs Trout Ranch v. Allred*, 102 Idaho 623, 636 P.2d 745 (1981), the applicant had filed an application for permit when the legislature enacted I.C. Section 42-203A(5).[109] Hidden Springs challenged the application of the statute to its application for permit, however the court held that an applicant possesses no vested right which could be interfered with by application of legislation, **where such legislation was enacted while the permit application was still pending.**[110] The applicant gains but an inchoate right upon filing of the application which may ripen into a vested interest following proper statutory adherence."[111] Likewise, *A & B Irr. Dist. v. Aberdeen American Falls Ground water District*, 141 Idaho 746, 118 P.3d 78 (2005), stands for the proposition that, "a party is not entitled to vested rights in a water right by virtue of filing a permit application." Similarly to *Hidden Springs,* A & B Irrigation District was still at the very early stage having merely submitted an application for permit.

In *Hardy v. Higginson*, 123 Idaho 485, 849 P.2d 946 (1993), the applicant had applied for and received a water right permit, and later applied to amend the permit for an additional point of diversion. The court there found that during an application for amendment of a permit, a permittee only has an inchoate right, not a vested right, and therefore new conditions can be added.[112] The court further stated, however, "if a permittee finds the conditions to be unsatisfactory, the permittee should be allowed to withdraw the application for amendment and be left with what the permittee had before submitting the application to the IDWR," suggesting

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[109] This section provided that the new criterion, "local public interest," was a valid consideration in the application proceedings.
[110] *Hidden Springs v. Allred*, 102 Idaho 623, 663 P.2d 745 (1981) (emphasis added).
[111] *Id.* at 625, 663 P.2d at 747.
[112] *Id.* at 489, 849 P.2d at 950.

that even that stage a permittee has a vested interest in the permit as it stands prior to amendment.[113]

Similarly, the *Memorandum Decision and Order on Challenge; Order on State of Idaho's Motion to Dismiss Claimants Notice of challenge, Snake River Basin Adjudication District Court Subcase No. 36-08099* cited by the Intervenors in support of the contention that the Canal Companies had acquired nothing more than a hope of a license, is distinguishable. The Intervenors argued that the case stands for the proposition that a water right vests when a license is issued, and "that a right to use the waters of this state remains inchoate until a license is actually issued by IDWR."[114] However, what they are citing is mere dicta by the court, which has been contradicted by later SRBA and district court decisions as discussed below.[115]

In *Riley v. Rowan*, 131 Idaho 831, 965 P.2d 191 (1998), the SRBA court, Honorable Daniel C. Hurlbutt, Jr., concluded that "the failure of IDWR to perform its statutory duty to issue the license in a reasonable time requires the finding that Water Permit 22-07280 became a license by operation of law," on the date the applicant submitted proof of beneficial use.[116] The facts of *Riley v. Rowan*, demonstrate that the Department failed to issue a water right license until twelve years after proof of beneficial use had been submitted.[117] Ultimately, the court concluded the license was a real property interest which was part of the land and effective as of the date proof of beneficial use was submitted.[118] Relying upon Idaho Code § 42-219(1), the court reasoned that IDWR has a duty to timely issue licenses following proper application,

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[113] *Id.* at 491, 849 P.2d at 952.
[114] *Id.*, pg. 7.
[115] The court in sub-case no. 36-0899 held that River Grove's assertion was an improper collateral attack, and that it did not exhaust its administrative remedies. The rest was mere dicta by the court, and the case was not appealed.
[116] Davis Aff., Ex. 38, Memorandum Decision of District Court in *Riley v. Rowan*, p. 10.
[117] *Id.*
[118] *Id.* at 12.

permitting, proof of beneficial use, and department examination.[119] The court ultimately held "where IDWR has breached its duty to timely license the water right, this court deems the license to be effective and in force as of the date proof of beneficial use was submitted."[120]

Another similar case dealing with this issue is the Brownlee license appeal titled *Idaho Power Company v. Idaho Department of Water Resources, In the Matter of Licensed Water Right No 03-7018 In the Name of Idaho Power Company*, Case No. CV-2009-1883.[121] In that case, Idaho Power Company filed a petition for judicial review of a final agency order by the Department, and the District Court of the Third Judicial District of the State of Idaho concluded that the addition of a new condition in the license by the Department exceeded its statutory authority, and violates the statutory provisions governing the issuance of a water right license, ordering the matter remanded to the Department to strike the condition and issue the license pursuant to the terms as found within the permit.[122]

In the Brownlee license appeal, Idaho Power Company had similarly constructed its project years ago, pursuant to the conditions of the permit, made proof of beneficial use, and the Department inserted a new condition arising from subsequent legislation at the licensing phase, after the Department's after many years delay in performing its duties.[123] Specifically, that case involved the inclusion of a new term limit condition inserted pursuant to the subsequent adoption of I.C. Section 42-203B(7), which is similar to the newly inserted term limit condition in the instant case, although not directly at issue in this summary judgment proceeding. At the outset the court generically summarized, "Idaho Power appeals from the agency order, asserting that

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[119] *Id.*
[120] *Id.*
[121] Davis Aff., Ex. 39, Memorandum Opinion in Brownlee License Appeal dated January 13, 2010. The Idaho Department of Water Resources has appealed this opinion to the Idaho Supreme Court.
[122] *Id.*
[123] *Id.*

the Department's insertion of a particular condition into the license, which had **not** been included in the water right permit previously issued to Idaho Power for the project on January 29, 1976, exceeds the Department's statutory and constitutional authority."[124] The court in Brownlee reasoned:

> ...a reasonable approach [would be] under which a potential hydropower appropriator can obtain a permit with eyes wide open as to the conditions and restrictions **before** embarking upon an expensive water project. Conversely, the notion that the Department can grant a permit and authorize a permitee to invest substantially in a project, and then after completion of the works and commencement of beneficial use, insert significant new restrictions, strikes the Court as an unreasonably harsh interpretation; the Court sees nothing in the statutory language evidencing an intent to work such a hardship or oppressive result. See, e.g. Lawless v. Davis, 98 Idaho 175, 560 P.2d 497 (1977).... Were the Court to interpret the statute in the manner asserted by the Department, essentially stripping away Idaho Power's rights because the Department delayed issuance of the license for many years, during which time the law changed, the end result for Idaho Power would be oppressive.[125]

Citing to *Bassinger v. Taylor*, 30 Idaho 289, 164 P. 522 (1917), the District court in Brownlee concluded "[t]he license itself is prima facie evidence of a water right, confirming the water right, but it is upon proof of beneficial use under the permit when the right, or entitlement, is created."[126]

Like R*iley v. Rowan* and *Idaho Power Company v. Idaho Department of Water Resources,* it is clear that the Canal Companies have acquired a vested interest in water right no. 01-7011, and an entitlement that the Department cannot act contrary to its duties without protection and recourse to the Canal Companies. Therefore, by operation of law the license should issue confirming the right as it was permitted at the time proof of beneficial use was made. To hold otherwise would condone the Department's dilatory practice of issuing licenses

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[124] *Id.* at 1-2.
[125] Davis Aff., Ex. 39, Brownlee License Appeal, *Memorandum Decision and Order on Appeal*, pg. 12-13.
[126] *Id.*

decades after submission of proof of beneficial use, which would allow for unpredictable future legislative interference of property rights, give the Department unfettered discretion to interfere with valuable property rights, and cause an increase in litigation.

V.
CONCLUSION

The Intervenors Motions for Summary Judgment must be denied. The Federal Energy Regulatory Commission, which has exclusive authority relating to the subordination provision in this case, denied the Department's attempt to include the open-ended subordination provision that the Director now seeks to insert, and the Department cannot do so in contravention of the FERC Order. The Milner hydroelectric water right is an above Milner use, and does not in any way offend either the law or policy of the State of Idaho relating to the 'zero flow at Milner policy.' The Department did not have the authority to add the new subordination condition twenty-one years after the subordination condition was included in the Milner permit, after re-opening the permit process for new objections in derogation of even its own administrative rules. Finally, the Canal Companies Milner hydropower water right vested not later than the date that proof of beneficial was made, and the Department's duty was at that time to issue the license in this action in conformance with the permit.

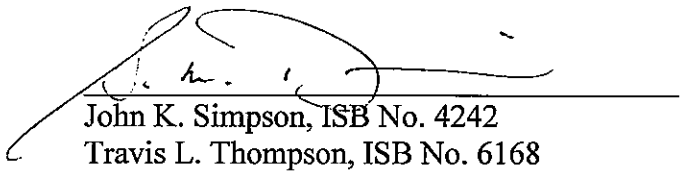
The Canal Companies contend that the Milner hydroelectric project was completed in compliance with all law and policies of the State of Idaho, and therefore Director Tuthill amended the terms of the permit in violation of Idaho Code § 42-219 when he issued the license in 2008. The Intervenors contend that Director Higginson either did not have the authority to exercise the discretion that he exercised in 1987, when he issued the subordination provision in the amended permit, or that he exercised his authority in an unlawful manner. This leaves

questions of material fact which preclude this tribunal from entering summary judgment in favor of Intervenors on either of their Motions.

FOR THE FOREGOING REASONS, the Canal Companies hereby request an Order of this hearing officer **DENYING** the Idaho Water Resource Board's Motion for Summary Judgment and the Upper Snake Water Users' and Ground Water Districts' Motion for Summary Judgment.

Dated this 5th day of March, 2010.

BARKER ROSHOLT & SIMPSON LLP



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of March, 2010, I served a true and correct copy of the foregoing **CANAL COMPANIES' MEMORANDUM IN OPPOSITION TO IDAHO WATER RESOURCE BOARD, UPPER SNAKE WATER USERS' AND GROUND WATER DISTRICTS' MOTIONS FOR SUMMARY JUDGMENT** upon the following persons via the method indication below:

Interim Dir., Gary Spackman Idaho Department of Water Resources 322 E. Front St. Boise, Idaho 83720-0098	____ U.S. Mail, Postage Prepaid __X_ Hand Delivered ____ Overnight Mail ____ Facsimile
Randall C. Budge Candice M. McHugh Racine Olson Nye Budge & Bailey, Chtd. P.O. Box 1391 Pocatello, ID 83204-1391 Fax No. (208)232-6109	____ U.S. Mail, Postage Prepaid __X_ Hand Delivered ____ Overnight Mail ____ Facsimile
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Lawrence Wasden Steven L. Olsen Michael S. Gilmore Idaho Atty. Gen. Office P.O. Box 83720 Boise, ID 83720-0010 Fax No. (208) 854-8073	____ U.S. Mail, Postage Prepaid __X_ Hand Delivered ____ Overnight Mail ____ Facsimile

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