

**BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES**  
**OF THE STATE OF IDAHO**

IN THE MATTER OF LICENSING WATER        ) **OPINION AND ORDER GRANTING**  
RIGHT PERMIT NO. 01-7011 (in the name of ) **MOTIONS FOR SUMMARY**  
Twin Falls Canal Company and North Side Canal ) **JUDGEMENT AND**  
Company) ) **RECOMMENDATION**  
\_\_\_\_\_ )

The Idaho Water Resource Board and the Upper Snake Water Users have filed Motions for Summary Judgment which is opposed by the Twin Falls Canal Company and the North Side Canal Company. At issue is the extent to which hydropower rights held by the Canal Companies may be subordinated to recharge rights. The Idaho Water Resource Board and the Upper Snake Water Users and the Ground Water Districts seek to affirm the following condition in the license for water right number 01-7011, issued in the name of the Twin Falls Canal Company and the North Side Canal Company, subordinating the hydropower right to all “subsequent upstream beneficial depletionary uses, other than hydropower...”

The diversion and use of water for hydropower purposes under this water right shall be subordinate to all subsequent upstream beneficial depletionary uses, other than hydropower, within the Snake River Basin of the state of Idaho that are initiated later in time than the priority of this water right and shall not give rise to any right or claim against any junior-priority rights for the depletionary or consumptive beneficial use of water, other than hydropower, within the Snake River Basin of the state of Idaho initiated later in time than the priority of water right no. 01-7011.

The Canal Companies object to this condition and seek to enforce the condition as set forth in a letter dated November 18, 1987, from former IDWR Director R. Keith Higginson to counsel for the Canal Companies which subordinates the hydropower right “to all other rights for the consumptive beneficial use of water, other than hydropower **and groundwater recharge...**”

The rights for the use of water acquired under this permit shall be junior and subordinate to all other rights for the consumptive beneficial use of water, other than hydropower and **groundwater recharge** within the Snake River basin of the state of Idaho that are

initiated later in time than the priority of this permit and shall not give rise to any right or claim against any future rights for the consumptive beneficial use of water, other than hydropower and **groundwater recharge** within the Snake River basin of the state of Idaho initiated later in time than the priority of this permit. (emphasis added).

The hydropower right is a non-consumptive use that allows water to be diverted at the Milner Dam to a facility where electrical power is generated and then flow beyond the facility to return to the Snake River. The generation of hydropower is a recognized beneficial use. In the early days of consideration of the hydropower facility at issue in this dispute the development of the facility was encouraged by personnel at the Department of Water Resources.

Recharge rights are intended to capture excess water that would otherwise pass beyond the Milner Dam to the Snake River by moving the water onto areas where it will enter the aquifer. The current State Water Plan 1J provides: “It is the policy of Idaho that managed recharge be encouraged pursuant to state law.” According to the comment to the policy, “Managed aquifer recharge may enhance spring flow and maintain desirable aquifer levels. Managed recharge should be monitored to document the beneficial effects on the state’s water resources, and to minimize any concerns or issues.”

The hydropower right and recharge rights potentially compete for the same water. If the hydropower right is subordinated to recharge rights, water may be diverted to the aquifer that would otherwise pass through the power facility for the generation of electricity.

## I

### THE PARTIES

**1. The Idaho Water Resource Board** is the body created by Idaho Code Section 42-1732 pursuant to the mandate in Idaho Constitution Article XV, Sec. 7, that the Legislature compose a “State Water Resource Agency” with the power “to formulate and implement a state water plan for optimum development of water resources in the public interest.” Idaho Code Section 42-1734A(1) provides that the Idaho Water Resource Board “shall, subject to legislative approval, progressively formulate, adopt and implement a comprehensive state water plan for conservation, development, management and optimum use of all unappropriated water resources and waterways of this state.” The Board holds recharge water rights 37-7842 and 1-7054 each

with a priority date of August 25, 1980, a date junior to the priority date of the Canal Companies' hydropower right.

**2. The Upper Snake Water Users and Ground Water Districts** are representative entities inclusive of irrigators, businesses, and municipalities holding water rights with priority dates both before and after the priority date of the hydropower right at issue in this case. Their members are potentially affected by the existence or non-existence of a subordination agreement that either includes or excludes a subordination of recharge rights subsequent to the priority date of the hydropower right. In this proceeding they support the licensing provision subordinating the hydropower right to all other consumptive uses, including recharge rights.

**3. The Twin Falls Canal Company and North Side Canal Company** are representative bodies that hold hydropower water right permit number 01-7011 from the State of Idaho which the Director's Final Order licensing the right subordinates to "all subsequent upstream beneficial depletionary uses, other than hydropower" rights. The extent to which that right is subordinated or not subordinated to subsequent recharge rights has a potential effect upon the reliability of the water supply necessary to operate the hydropower facility that is in place and licensed by the Federal Energy Regulatory Commission. The Canal Companies were initially named as the licensees on the Federal Regulatory Commission's license for the Milner hydropower project. Idaho Power was added later as a co-licensee. Subsequently, the Canal Companies transferred their interest in the FERC license to Milner Dam, Inc. Idaho Power operates the Milner hydropower project pursuant to an agreement with the Canal Companies. This proceeding concerns the Canal Companies' rights under the State of Idaho licensing of permit number 01-7011.

## II

### THE STANDARD OF REVIEW

Idaho Rule of Civil Procedure 50(c) provides that in determining a motion for summary judgment, the moving party 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 moving party is entitled to judgment as a matter of law." In determining whether there are genuine issues of material fact all evidence is viewed in the light most favorable to the non-moving party. *Spur Products Corp. v. Stoel Rives, L.L.P.*, 142 Idaho 41, 43-44, 122 P.3d 300, 302-303 (2005).

## III

### THE FACTUAL AND PROCEDURAL HISTORY

1. The Final Order entered by the Director of the Idaho Department of Water Resources on October 20, 2008, sets forth a substantial factual and procedural background leading to the

present dispute. Those facts are accepted for purposes of this opinion unless successfully contravened by the parties or inconsistent with the facts shown in the record submitted on the pending motions and recited in this opinion and recommendation.

2. Milner Dam was constructed in 1905 as a diversion dam and is owned by the two Canal Companies who divert water from the dam to members of their companies and other irrigators in the Magic Valley. The dam is located on the Snake River east of Murtaugh at a significant geographic division. Above Milner, the Snake River is not deeply entrenched. Consequently diversion from the river is practical across much of the Eastern Snake Plain. Below Milner, the Snake River descends into a deep canyon which made irrigation from the river largely impractical until the advent of high lift pumping in the recent past.

3. The reliable natural flow of the Snake River above Milner was fully appropriated shortly after 1900. Subsequently there have been significant reclamation projects constructed to capture excess flows and hold them in storage for use by property above the Milner Dam. Apparently, there is property irrigated by water from the Milner Dam that is below the Dam, but the water is from sources above the Dam.

4. Below Milner, the river is recharged by spring discharges in the canyon and other flows not available above the dam. As a consequence of the differences in geography and the history of appropriations, the use of the water from the Snake River above Milner has been primarily for irrigation while the water below Milner has primarily served the needs of hydropower production. This distinction is not absolute, but it plays a significant role in defining the development of the State water policy, particularly the so-called "zero flow" below Milner Dam.

5. The steps towards the development of the Milner hydropower facility began in 1977. At that time the Department of Water Resources was involved and cooperative in the planning of the hydropower project. C. Stephen Allred, Administrator, Investigations Division of IDWR, stated in a January 7, 1977, letter to counsel for the Canal Companies that it appeared there "is a potential for the installation of power at these facilities." And, "We would be glad to work with your clients if they wish to pursue the matter further." Canal Companies exhibit #1. Subsequently the Canal Companies applied for a permit for the water right necessary for the project, and on June 29, 1977, the Department of Water Resources issued the initial permit to appropriate water from the Milner Dam for hydropower production, requiring proof of beneficial use by June 1, 1982. The time for proving beneficial use was extended several times and that proof was submitted November 1, 1993.

6. The permit issued June 29, 1977, did not contain a subordination clause or condition.

7. The Canal Companies applied for a preliminary permit from the Federal Energy Regulatory Commission to study the alternative sites for development of the hydropower site.

There were three other competing applicants, but FERC issued a preliminary permit to the Canal Companies on August, 1981, excluding the other applicants.

8. The issue of subordination was on the table for consideration early in the process. In a May 3, 1982, letter directed to the Chairman of the Idaho Water Resources Board counsel for the Canal Companies asked the Board to adopt a position on subordination:

On past occasions we have generally discussed the Milner Power Project with members of the Idaho Water Resource Board. The purpose of this letter is to ask the Board to officially consider and adopt a position in regard to the project. Canal Companies exhibit 7.

The letter noted that, "Since 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."

9. The Canal Companies made the following observation in a joint statement dated February 4, 1984, on House Bill 459 directed to Walter Little, Chairman of the House State Affairs Committee:

We authorized our counsel to send a letter to the Idaho Water Resources Board (Exhibit "D" attached hereto) and to appear before them to discuss the subordination issue for the Milner project even though the water right had not been subordinated when issued. We knew that to undertake the preparation of an application for license would require an expenditure of substantial monies, and we wanted an advance opinion from the water board as to whether or not they would seek subordination as a part of the FERC licensing proceeding since the Department of Water Resources had not attempted to assert a subordination provision on the water permit. Counsel met with the Idaho Water Resource Board in the summer of 1982 prior to the reversal of the District Court's opinion in the Swan Falls case. The water board had made no decision concerning subordination by November of 1982 when the Supreme Court decision was issued.

10. The joint statement continued to state that passage of House Bill 459 might impact the construction of the hydroelectric plant after the expenditure of one million dollars and listed the water permits that were prior to and junior to the Milner permit in the event the permit was not subordinated by the enactment of House Bill 459. Canal Company exhibit 2.

11. The Canal Companies made Application for Initial License: Project No. 2899-002 to the Federal Regulatory Commission in July, 1984. Canal Company exhibit 10.

12. On September 23, 1985, the Idaho Department of Water Resources moved to intervene in the FERC proceedings, seeking inclusion of the following provision in any license issued for the Milner 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.

The Motion noted that Idaho had adopted Idaho Code Section 42-203B in 1985 “which further implements the state’s policy of subordinating hydropower water rights to upstream consumptive uses.” Further, “Because the state water plan establishes a zero minimum flow at the Milner gaging station, it is important that the Milner Project be subordinated to upstream depletionary uses in order to allow for some new water uses above Milner.” Canal Company exhibit 11. The Motion attached a March 1, 1985, Resolution of the Idaho Water Resource Board adopting Policy 32 concerning management of ground water and surface water in the Snake River Basin. Neither the Motion nor the IWRB Resolution specifically referenced ground water recharge.

13. The Federal Energy Commission entered its Order Issuing License for the Milner Hydropower Project December 15, 1988, finding that the issuance of the license for the project was consistent with the zero minimum flow below Milner required by the Idaho State Water Plan “since the license would not require that minimum flows be provided below Milner.” FERC declined to enter the subordination provision sought by the Department of Water Resources:

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 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....

Having determined that inclusion of the requested subordination provision would be inconsistent with the scheme of regulation established by the FPA, the FERC Order provided that “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.” Canal Company exhibit 12. pp. 27, 28.

14. The decision of FERC to deny inclusion of the subordination agreement sought by the Department of Water Resources was not appealed, and this record shows no effort by IDWR or the Water Resource Board to amend the FERC decision to include the subordination provision the Board now defends.

15. Prior to the entry of the FERC Order Issuing the License, there were continuing discussions between the Canal Companies and the Department of Water Resources concerning the terms of subordination for the hydropower right. On November 18, 1987, in response to a letter from counsel for the Canal Companies, the former Director of the Idaho Department of Water Resources replied by letter that” [t]he 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, since the approval being sought is in connection with a permit, rather than an application for permit.” The condition, stated in the Director’s letter, subordinated the hydropower right “to all other rights for the consumptive beneficial use of water, other than hydropower and ground water recharge within the Snake River basin...” Canal Company exhibit 9.

16. On October 29, 1993, C. E. Brockway submitted his Beneficial Use Examination Report, indicating a maximum combined flow to the hydropower facilities of 5714.7 cfs. Canal Company exhibit 13. A period passed from the proof of beneficial use in 1993 until September 5, 2007, when the Department of Water Resources issued a Notice of Intent to Issue License. The Notice stated that the Department had “received written requests for notice and an opportunity to be heard on the form of the subordination condition to be included on the license for Water Right No. 01-7011” from various entities. The Notice made the following provision:

NOW THEREFORE NOTICE IS HEREBY GIVEN that the Department will accept and consider written Comments from the Permit Holders and other interested persons or entities addressing the form of the subordination condition that should be included on the license for Water Right No. 01-7011.

17. Prior to the Department's Notice, questions had arisen as to priorities between the hydropower right and recharge rights, as indicated by former Director Dreher's letter of July 27, 2006, to Idaho State Senator Charles H. Coiner concerning diversion of natural flow from the Snake River under water rights for recharge. After the Notice was issued, the various parties that seek affirmation of the subordination of the hydropower right in this proceeding did communicate that position to the Director. Among the comments made by those responding to the Notice is that of counsel for the Idaho Ground Water Appropriators in a letter to the Director dated February 5, 2007:

This Application was originally filed by Twin Falls Canal Company (TFCC) and North Side Canal Company (NSCC) on March 30, 1977 seeking a permit to appropriate 12,000 cfs for power purposes at Milner Dam. Notice of the Application was published May 16 and 26, 1977. At that time, well before the Swan Falls controversy and resulting settlement, there was a widespread assumption and belief that all power rights were subordinate to all upstream depletions. After the publication, we are informed by Department representatives and upstream users that numerous inquiries were made to the Department expressing concerns about the Application and whether protests were needed to protect their interests. In response, Department representatives, including then Eastern Region Manager and District One Watermaster, Ronald D. Carlson, provided assurance that the proposed hydro power water rights were unquestionably subordinated to all upstream uses and development and that there was no reason to be concerned or protest the Application. Protests were not filed in reasonable reliance upon those representations.

18. On September 28, 2007, the Canal Companies filed a Petition for Peremptory Writ of Mandate in the District Court seeking "to void the Director's order dated September 5, 2007, to close any protest or comment period, and, without delay to issue a license to the Petitioners, in accordance with the Respondents statutory duties under Idaho Code Section 42-219."

19. The District Court entered its Order Granting Motion to Dismiss Petition for Writ of Mandate on January 28, 2008, concluding that the issuance of a license was not a ministerial act subject to mandamus and that the Canal Companies had failed to exhaust their administrative remedies.

20. On October 20, 2008, the former Director entered the Final Order licensing water right no. 01-7011 with a priority date of March 30, 1977, and including the subordination provision at issue in these proceedings.

## IV

### **THE SEPTEMBER 5, 2007, NOTICE FROM THE DIRECTOR ALLOWING COMMENTS AS TO THE FORM OF THE SUBORDINATION AGREEMENT IS NOT A BASIS TO INVALIDATE THE SUBORDINATION CONDITION.**

**1. The Canal Companies maintain that the September 5, 2007, Notice from the Director which allowed written comments addressing the form of the subordination condition utilized an unlawful procedure that reopened public comment on the Milner permit beyond the time allowed.** In *North Side Canal Company and Twin Falls Canal Company v. Tuthill and The Department of Water Resources*, Case No.: CV 2007-1093, Fifth Judicial District, County of Jerome, decided January 28, 2008, the District Court granted the Motion to Dismiss the Canal Companies' Petition for Writ of Mandate, determining that they had failed to exhaust all available administrative remedies. Further, "The *Notice* did not reopen a protest period nor did it give those submitting comments party status. The Petitioners did not respond to the *Notice*, nor otherwise object to the Director's reopening of the record to comments, nor did they ask for a hearing before the Director on the issue." Id. P.9. The District Court continued:

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

**2. The Director did not consider the comments that were submitted in response to the September 5, 2007 Notice:**

The Canal Companies have asserted that the Director acted outside the scope of his authority by reopening the administrative record to comments after the protest period closed. Although the comments submitted are included in the agency record, they were not considered by the Director. As addressed below, the form of the subordination condition in the license for water right no.-7011 is controlled by and is based solely on provisions of state law and the Idaho State Water Plan.

Final Order, October 20, 2008, Conclusion of Law 1.

**3. Whether the Director should have or should not have allowed comments is moot in light of the fact he did not consider them.**

V

**THE FEDERAL ENERGY REGULATORY COMMISSION'S DENIAL OF THE SUBORDINATION CONDITION SOUGHT BY THE IDAHO DEPARTMENT OF WATER RESOURCES DOES NOT PREVENT THE DIRECTOR FROM CONDITIONING THE LICENSE WITH THE SUBORDINATION PROVISION IN ISSUE IN THIS CASE.**

**1. FERC's action in licensing the hydropower right is subject to its own interpretation, but nothing in that action precludes the State of Idaho from including the subordination condition included by the Director in issuing the license.** FERC was not called upon to accept or reject the condition now included in the license. The subordination condition IDWR sought in the FERC proceeding was broad and unlimited which, according to FERC, potentially intruded in areas reserved to it. Correspondingly, the license that was issued by FERC does not purport to determine issues left to the State. Any claim that the subordination condition imposed by the Director on the State hydropower right interferes with the terms of the FERC license ultimately would be resolved by FERC and the federal courts. It appears, however, that those standards allow the subordination condition in dispute.

**2. Section 27 of the Federal Power Act provides that, "Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other use, or any vested right acquired therein."** 16 U.S.C. Section 821. In *First Iowa Hydroelectric Cooperative v. FPC*, 328 U.S.

152 (1946), the Court construed the term “other use” to be of the same nature as irrigation or municipal uses, express terms in the statute. In *California v. FERC*, 495 U.S. 490 (1990), the Court applied this construction to an attempt by California to impose a minimum flow requirement on a hydropower facility higher than the flow requirement in the facility’s license. The California effort was directed at protecting the stream’s fish. The Court rejected the California position, determining that the protection of fish was not of the same nature as the use of water for irrigation or municipal purposes.

**3. The recharge rights are intended maintain desirable aquifer levels, creating a form of storage to provide water for irrigation and municipal purposes and other possible proprietary uses of the same nature, including enhancing spring flows.** See State Water Plan 1J. Maintenance of desirable aquifer levels is designed to enhance the reliability of ground water pumping for irrigation and municipal uses and aquaculture relying on spring flows. On their face the recharge rights are of the nature recognized in federal law as being within the prerogative of the State to regulate.

## VI

### **THE RIGHT TO SUBORDINATE HYDROPOWER RIGHTS IS RECOGNIZED IN IDAHO CONSTITUTIONAL AND STATUTORY LAW AND IS PRESENT IN THE STATE WATER PLAN.**

**1. Article XV, Section 1 of the Idaho Constitution provides the following:**

The use of all waters now appropriated, or that may hereafter be appropriated for sale, rental or distribution; also of all water originally appropriated for private use, but which after such appropriation has heretofore been, or may hereafter be sold, rented, or distributed, is hereby declared to be a public use, and subject to the regulations and control of the state in the manner prescribed by law.

This establishes the framework for subsequent enactment of statutes and regulations defining rights to the use of water.

**2. Article XV, Section 3 of the Idaho Constitution provides that, “The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power**

**purposes.”** This explicit recognition of the State’s right to regulate and limit the use of water for power purposes came from concerns that absent such a provision, hydropower rights could foreclose the development of agriculture.

**3. Article XV, Section 7, of the Idaho Constitution was ratified in 1964 providing for the creation of a Water Resource Agency and amended in 1984, providing that, “the State Water Resource Agency shall have power to formulate and implement a state water plan for optimum development of water resources in the public interest.”** The Legislature has the authority to amend or reject the state water plan in a manner provided by law. Thereafter the authority of the Resource Agency is conditioned upon the right of the Legislature to amend or reject changes in the state water plan within sixty days of their submission to the Legislature.

**4. The Legislature established the Idaho Water Resource Board in 1965 and authorized it to formulate “a comprehensive state water plan.”** Idaho Code Section 42-1732. See also 42-1734A (1). The initial state water plan was adopted December 29, 1976, and became effective as of that date without Legislative action. Policy 32 of the state water plan provided an average daily protected flow of “0 cfs” at the U.S.G.S. gauging station below Milner Dam.

**5. Idaho Code Section 42-1736B was adopted in 1978, providing that, “All future filings, permits and decrees on the unappropriated water of the state shall be determined with respect to the effect such filings, permits and decrees will have on the minimum daily flow of the affected stream or river...”**

**6. The 1982 revision of the State Water Plan reaffirmed the zero minimum daily flow policy at Milner and provided that: “Application for future water permits shall not be approved if they are in conflict with the State Water Plan adopted by the Idaho Water Resource Board in the public interest.”**

**7. The potential of hydropower rights limiting the further development of agriculture, as well as limiting agricultural water rights acquired subsequent to the Idaho Power rights, became a possibility in the Swan Falls controversy.** The settlement of this controversy led to the so-called Swan Falls Agreement between the State and Idaho Power. In

1985 the Idaho Legislature authorized the Director to subordinate a hydropower water right to “subsequent upstream beneficial depletionary uses.” Idaho Code Section 42-203B (6).

**8. The 1996 State Water Plan, which is the current plan, was amended by the Legislature to provide: “The exercise of water rights above Milner Dam has and may reduce the flow at the dam to zero.”** 1997 Session Laws 71; 1996 State Water Plan, 5B, p. 17.

**9. Idaho Code Section 42-203B(2) provides in part: “For purposes of the determination and administration of waters of the Snake river or its tributaries downstream from Milner dam, no portion of the waters of the Snake river as surface or ground water tributary to the Snake river upstream from Milner shall be considered.”**

## VII

### **THE PHYSICAL LOCATION OF THE MILNER POWER PLANT BELOW MILNER DOES NOT BY ITSELF VIOLATE THE ZERO FLOW BELOW MILNER POLICY.**

**1. The hydropower project utilizes the irrigation works of the Twin Falls Company to divert and convey water to the power plant approximately 1.6 miles downstream from the Milner Dam.** This means that water flows beyond Milner Dam when the hydropower plant operates. However, the same can be said of water diverted to points of irrigation that are located below the Milner Dam. Apparently nobody maintains that such irrigation uses geographically below the Milner Dam violate the zero flow policy.

**2. Use below the Milner Dam for irrigation with water from the Dam is consistent with the zero flow policy.** The policy is intended to promote the development of agricultural uses, and the use of the water in areas below the Milner Dam for irrigation is consistent with that policy. Any water that reenters the Snake River after being diverted for irrigation is incidental to its use for irrigation and not by a right requiring passage of water from the Snake River beyond the Milner Dam.

**3. The use of water for the hydropower project is a non-consumptive use that passes water that might otherwise be captured for agricultural or municipal use.** It is this aspect of the hydropower project that is inconsistent with the zero flow policy, not the physical location of the project. Water passing Milner Dam for hydropower use reenters the Snake River where it

may be utilized for other non-consumptive uses including aquaculture and further hydropower use, not for full development of the Eastern Snake Plain above Milner. Water may pass beyond Milner Dam with no violation of State policy when there is an excess. The zero flow policy comes into play when there are claims for the use of the water above the Milner Dam, including recharge rights at issue in this proceeding.

## VIII

### **FORMER DIRECTOR HIGGINSON'S LETTER OF NOVEMBER 18, 1987, DOES NOT BIND THE PRESENT DIRECTOR IN DETERMINING THE SUBORDINATION CONDITION TO BE INCLUDED IN THE LICENSE AND WOULD BE INCONSISTENT WITH IDAHO LAW AND POLICY.**

**1. On November 18, 1987, former Director Higginson replied to a letter from counsel for the Canal Companies, stating the hydropower right would be subordinated “to all other rights for the consumptive beneficial use of water, other than hydropower and ground water recharge within the Snake River basin...”** This was a condition of approval of an extension request, apparently necessitated by delay in the FERC proceedings. It enhanced the position of Canal Companies in financing the project.

**2. For purposes of summary judgment it must be assumed that there was reliance by the Canal Companies and entities involved with financing upon the condition as stated by the former Director.**

**3. The condition in the letter did not constitute a final order that determined the terms of the license when issued.** According to the letter “[t]he 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, since the approval being sought is in connection with a permit, rather than an application for permit.” This was a step in the process of obtaining a license with vested rights. Reliance upon the Director’s statement must be assumed to be reasonable for purposes of summary judgment, but there were additional steps necessary before any rights became vested, including proof of beneficial use and review by the Director before issuance of a license to assure that the terms of the license are consistent with the law and the State Water Plan.

**4. Idaho Code Section 42-219(1) provides as follows:**

Upon receipt by the department of water resources 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.

**5. Idaho Code Section 42-1734B (4) provides in part as follows:**

All state agencies shall exercise their duties in a manner consistent with the comprehensive state water plan. These duties include but are not limited to the issuance of permits, licenses and certifications...

**6. Idaho Code Section 42-1736B (1) provides as follows:**

All future filings, permits and decrees on the unappropriated waters of this state shall be determined with respect to the effect such filings, permits and decrees will have on the minimum daily flow of the affected stream or river, or on the maintenance level of the affect lake or reservoir.

**7. In 1994 ground water recharge was specifically addressed as a beneficial use.**

Apparently there had been specific instances of ground water recharge previously authorized by the Legislature prior to the enactment in 1994 of Idaho Code Section 42-234(1) which addresses the concept as a general state policy, such recharge projects being entitled to “maximum support.”

GROUND WATER RECHARGE – AUTHORITY OF DEPARTMENT TO GRANT PERMITS AND LICENSES. (1) It is the policy of the state of Idaho to promote and encourage the optimum development and augmentation of the water resources of this state. The legislature deems it essential, therefore, that water projects designed to advance this policy be given maximum support. The legislature finds that the use of water to recharge ground water basins in accordance with Idaho law and the state water plan may enhance the full realization of our water resources potential by furthering water conservation and increasing the water available for beneficial use.

Section 42-234(2) declared “that the appropriation of water for purposes of ground water recharge shall constitute a beneficial use of water.”

**8. As has been stated by the District Court, the issuance of a license is not a ministerial act that follows from the issuance of a permit and proof of beneficial use.** The Director is required to determine if the license will be consistent with State law and the State Water Plan which is part of that State law.

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

**10. The Director would act inconsistent with State law and policy if he were to license the hydropower right with the subordination clause sought by the Canal Companies.**

## IX

### CONCLUSIONS

**1. There are no material issues of fact that preclude entry of summary judgment.** The events leading to the present controversy are not in dispute. Only the legal effect of those facts is in dispute.

**2. It is established that former Director Higginson sent a letter to the Canal Companies agreeing, as a condition on an extension of time, to the subordination condition the Canal Companies seek to enforce.** The letter does not constitute a binding agreement upon the current Director who must condition the license consistent with State law, including the policies of the State Water Plan.

**3. The Final Order entered on October 20, 2008, is consistent with State law and policy.**

**4. The delay in the permit process and licensing does not preclude the Director from conditioning the license as provided in the October 20, 2008, Final Order.** Had

licensing occurred earlier it should have contained the subordination condition presently included in the Director's Final Order.

**5. These proceedings do not determine whether there is any right to compensation by the Canal Companies as a result of the Director's licensing condition.**

**6. These proceedings do not address the powers and responsibilities the Director has in monitoring the effects of recharge rights in terms of achieving the results desired and the effects they may have.**

X

### ORDER AND RECOMMENDATION

The Motions for Summary Judgment filed by the Idaho Water Resource Board and the Upper Snake Water Users and Ground Water Districts are granted in this proceeding. It is recommended that the Director of the Department of Water Resources proceed in accordance with the Final Order issued October 20, 2008.

DATED this 29 day of April, 2010.

  
GERALD F. SCHROEDER  
Hearing Officer

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 29<sup>th</sup> day of April, 2010, the above and foregoing document was served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

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