BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF LICENSING WATER RIGHT PERMIT NO. 01-7011 (in the name of Twin Falls Canal Company and North Side Canal Company)	)))))	FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATIONS

On April 29, 2010, the Hearing Officer issued an Opinion and Order Granting Motions for Summary Judgment and Recommendation in response to motions filed by Intervenors. At issue in that proceeding was the extent to which the Canal Companies' hydropower rights at the Milner hydroelectric plant could be subordinated to ground water recharge rights. Remaining issues concern conditions included in the license limiting the term of years for the hydropower right and a volume limitation on the amount of water that can be utilized in exercising the hydropower right. The Intervenors who participated in the subordination proceeding are not participants on these issues.

The Opinion and Order Granting Motions for Summary Judgment and Recommendation issued April 29, 2010, sets forth the factual and procedural background necessary for resolution of that stage of the proceeding. That background is incorporated in this Opinion and Recommendation and is repeated only as necessary for clarity and ease of understanding. Some of the issues raised by the Canal Companies in these proceedings were previously addressed in the hearing concerning the question of subordination. The prior resolution of issues in the April 29, 2010, Opinion, Order and Recommendation is not preclusive of independent consideration of the issues concerning the volume and term limitations that are included in the Director's Final Order.

Evidence was submitted and witnesses were cross-examined in this proceeding. Resolution of the issues depends primarily on an interpretation of the statutes addressing these issues. There is no dispute concerning the procedural history or what the Canal Companies and the Department did. This Opinion and Recommendation constitutes the Findings of Fact and Conclusions of Law reached in this proceeding.

I

THE TERM LIMITATION

1. Paragraph 7 of the Conclusions of Law in the Final Order sets a term limitation co-extensive with the FERC license for the project:

> The Director in exercising authority to limit a permit or license for power purposes to a specific term of years shall designate the number of years through which the term of the license shall extend considering multiple factors, including the term of the approved FERC license for the project. Idaho Code Sec. 42-203B (7). **The Director determines the expiration of the FERC Milner Project License on November 30, 2038 to be the appropriate term for the license of water right no.01-7011.** (emphasis added).

Condition 5 in the Order itself states the following:

> The diversion and use of water for hydropower purposes under this water right is subject to review by the Director after the date of expiration of Milner Project License No. 2899 (11/30/2038) issued by the Federal Energy Regulatory Commission. Upon appropriate findings relative to the interest of the public, the Director may cancel all or any part of the use authorized herein and may revise, delete or add conditions under which the right may be exercised.

2. There is some disconnect between Conclusion of Law 7 and the language of the Order itself. The Conclusion of Law provides for expiration of the hydropower right on November 30, 2038. Condition 5 in the Order provides that "[t]he diversion and use of water for hydropower purposes under this water right is subject to review by the Director after the date of expiration of Milner Project License No. 2899 (11/30/2038) issued by the Federal Energy Regulatory Commission." The implications of this difference are not altogether clear, but some potential issues may be foreseen.

3. If the right expires, the Canal Companies would have to apply for a new right, as well as obtain FERC licensing, if they wished to continue to operate the power facility. It seems this would subordinate the Canal Companies' right to other hydropower rights granted subsequent to the present right and prior to the expiration date – perhaps this is of no consequence since subsequent hydropower rights would be non-consumptive.

4. Termination of the hydropower right in 2038 would be of consequence if the recommendation to subordinate the hydropower right to subsequent recharge rights is overturned in court proceedings. If that were to occur, the Canal Companies would be protected from subordination of the existing right. Presumably issuance of a new hydropower right could

require subordination that otherwise would not exist if the present recommendation for subordination is overturned.

5. There is the potential of contention over other conditions that might be imposed on a new hydropower right. If the right does not terminate but is only "subject to review" there may be a different standard for conditioning the right than would be the case for a new right.

6. These issues are speculative, just as it is speculative to determine what status the hydropower right will have if the FERC license is not renewed. Nonetheless, this is not a dispute without consequence. Concerning a different hydropower right, a Memorandum to Water Right File 65-12096 dated January 10, 2000, authored by Shelley Keen makes this observation:

> Mr. Tucker said that Idaho Power Company is uncomfortable with the temporal provision of the license. As a permanent property right it adds some value to the company's ledger sheet because it could be sold or transferred. For example, if Idaho Power Company does not retain the FERC license to operate at Cascade, it could still potentially retain and sell the water right license. However, if the water right license can be revoked its value is significantly diminished.

Conclusion of Law 7 goes beyond potential revocation. It says the right terminates. This is different from the Condition 5 in the Final Order which provides for review and potential cancellation or revision of conditions.

7. As early as March 22, 1984, the Department stated a policy of including term review conditions in permits issued for power purposes. See Statement of Position of the Idaho Department of Water Resources, attachment 2 to Canal Companies' Post Hearing Briefing. On July 25, 1984, The Water Resource Board adopted a resolution regarding review of hydropower permits, and in August, 1984, a Department newsletter called "Currents" contained an article titled "IDWR Sets Time Limit on Hydro Permits" which included a re-print of a resolution of the Water Resource Board. The resolution expressed the position that "the local public interest requires that all permits and licenses authorizing the diversion and use of waters of the State of Idaho for hydropower purposes be subject to review by the director of the Department of Water Resources." The resolution provided further:

> Normally the review should be made at the end of the operating period specified by the Federal Energy Regulatory Commission authorization, or as otherwise provided by the director of the Department of Water Resources. Pursuant to such review, the director,

> upon appropriate findings, should renew the water right with its original priority date for the benefit of the project with the same or different conditions, or should declare the right to be terminated in whole or in part. Keen testimony, transcript pages 102-103.

Condition 5 in the Final Order is largely consistent with this Resolution. Conclusion of Law 7 goes beyond the Resolution.

8. The policy of allowing the Director to consider term limits acquired statutory status in Idaho Code Section 42-203B(6) which provides the Director with "the authority to subordinate the rights granted in a permit or license for power purposes to subsequent upstream beneficial uses." And, **"The director shall also have the authority to limit a permit or license for power purposes to a specific term."** (emphasis added). Section 203B (7) addresses the considerations in setting a specific term of years which includes the term provided in a FERC license for power purposes. Following the listing of factors that may be considered Subsection 203B (7) sets forth the following provision specific to the setting of a term of years:

> The term of years shall be determined at the time of issuance of the permit, or as soon thereafter as practicable if adequate information is not then available. The term of years shall commence upon application of water to beneficial use. The term of years, once established, shall not thereafter be modified except in accordance with due process of law.

9. Two points emerge from Sections 42-203B (6) and 203B (7). First, the setting of a term limitation is not mandatory. The Director has the authority to limit a license or permit to a specific term, but the statute does not mandate that condition. Failure to include a term does not violate a statutory mandate. Second, there are restraints in terms of time on the exercise of the authority according to subsection 7 of 203B: "The term of years shall be determined at the time of issuance of the permit, or as soon thereafter as practicable if adequate information is not then available." This sets a standard for the exercise of the Director's discretion.

10. There was no mention of a term limitation by the Department in the FERC proceedings or thereafter through the proof of beneficial use process, nor at any time identified in this proceeding until the inclusion in the Final Order in 2007. By December 15, 1988, when the FERC license was issued the Department had "adequate information" upon which to determined a specific term limit, considering the fact that the term set is co-extensive with the term of the FERC license. Unlike some other discretionary decisions that the Director may make which are

not specifically constrained by time, the setting of a term is constrained by statute to either the time a permit is issued or "as soon thereafter as practicable if adequate information is not then available." It was practical to make the determination as soon as the FERC license was issued in 1988.

11. Construction on the project began in 1989, after an extension of time was issued by the Department and the amended permit was issued allowing additional time to submit proof of beneficial use. Had there been notice of a term limit prior to construction the Canal Companies could have made a determination of whether that condition affected the feasibility of the project and could have appealed the issue prior to construction. Whatever might have occurred is speculative, but it is not speculative to say that the Department had "adequate information" to determine a term limit prior to construction and years before licensing.

12. The failure to set a term limit within the constraints of the statute precludes including the term limit in the license. The determination and recommendation is that Conclusion of Law 7 in the Final Order be deleted.

13. Condition 5 in the Final Order is problematic in that it is not a term limit as such. It is a condition that the license may be reviewed "after the date of expiration of Milner Project License No. 2899 (11/30/2038) issued by the Federal Energy Regulatory Commission." And, "[u]pon appropriate findings relative to the interest of the public, the Director may cancel all or any part of the use authorized herein and may revise, delete or add conditions under which the right may be exercised." This bears a relationship to the resolution adopted by the Water Resource Board in July, 1984, during the development stage of the Canal Companies' project that, "[p]ursuant to such review, the director, upon appropriate findings, should renew the water right with its original priority date for the benefit of the project with the same or different conditions, or should declare the right to be terminated in whole or in part."

14. Subsequent to the Water Resource Board's resolution the Legislature adopted sections 42-203B (6) and (7) which defined the right of the Director to establish a term limit and the time limits for doing so. To the extent that Condition 5 is interpreted to establish an undefined right to terminate or re-condition the power right "in the public interest" it fails to comply with the statutory process for determining term limits. To the extent that it states the

power of the Director to review the water right for compliance with the license or to limit or cancel it for justifiable cause, e.g. failure to apply the water to a beneficial use, it seems to be no more than a reiteration of authority of the Director regardless of the Condition.

15. Read in conjunction with Conclusion of Law 7 and coordinating the review of the Canal Companies' water right with the termination of the FERC license implies that more is intended by Condition 5 than the customary power of the Director to review compliance by a right holder with the established conditions of a right and the customary bases upon which a right may be forfeited or re-conditioned. As the prior recommendation concerning subordination makes clear, hydropower rights do occupy a special status constitutionally and by their treatment in the Legislature. However, the Legislature has defined the power and the limits upon the Director concerning term limitations on those hydropower rights.

16. To the extent Condition 5 sets forth the continuing authority of the Director to review water rights it is unnecessary. To the extent that it is a term limitation creating additional rights in the Director, it violates I.C. 42-203B (6) and (7). It is recommended that it be deleted.

II

THE VOLUME LIMITATION

1. The Final Order provides for a Diversion Rate of 5,714.70 cfs and an annual Diversion Volume of 2,390,000.0 acre feet. The beneficial use report did not set forth an annual volume, and there was no annual volume limitation in the permit. If the diversion rate in the beneficial use report were used to calculate an annual volume, that amount would be significantly higher than the amount set by the Department. There is no evidence that the Milner hydropower facilities cannot apply 5,714.70 cfs to a beneficial use when the water is available. The evidence is that 5,714.70 cfs can be applied to the beneficial use of generating electrical power.

2. The Department used 1996 as representative year of the actual annual volume put to use although the beneficial use report was completed in 1993. The volume was calculated by the Department using 1996 as a standard in the belief that there was unreliability in the testing gages at the earlier time when the beneficial use examination was completed. There is a question of

fact as to whether 1996 was a representative year. However, that dispute is not material to the recommendation made in this opinion.

3. Inclusion of the volume limitation creates the anomaly of a restriction on the use of water under the hydropower right even when water is available and can be applied to a beneficial use consistent with licensed diversion rate and without harm to other water rights:

> Q. Okay. So if, for example, there is a year in which Twin Falls and North Side in the operation of the power plant in the exercise of the water right, generates with a volume of water that meets the 2.39 million acre-feet figure. At that point in time, is that a limitation then on the exercise of the water right?
>
> A. I believe that it is. When the Department puts a volume figure on water right licenses, that's intended to be an annual diversion volume limit.
>
> Q. So then there is no right to generate once that limit is met?
>
> A. Yes
>
> Q. Okay.
>
> A. I believe that's correct.
>
> Q. Must the water then be spilled past the facilities?
>
> A. There is possibly. I mean, Milner is an interesting case in that there is no obligation of the state to deliver water from upstream of Milner to below Milner. So if there are other beneficial uses that could take that water at Milner, they certainly could do that.
>
> But if the water reaches Milner, and there is no other beneficial use, then – and the annual diversion volume on the license has been exceeded by the power generator. Then, yes, under that circumstance I believe water would need to be spilled past the dam.

Shelley Keen testimony, transcript pages 62-63.

4. In 1997 the facilities at Milner utilized 3.6 million acre-feet of water to generate power, and in 1998 the facilities utilized 2.8 million acre feet. Both amounts are significantly higher than the volume amount subsequently established in the license but are within the diversion rate of the beneficial use report and license. There is reality to the anomaly that operating the Milner facility within the diversion rate established may violate the volume limitation even though the water is applied to a beneficial use consistent with the license and without harm to other water rights. See exhibit 12.5.

5. From the time the beneficial use examination was completed on October 29, 1993, until the time of licensing the permit holders were not notified of any issues with respect to the beneficial use examination and there was no notice to the Canal Companies of the intention to include a volume limitation in the license. Under those circumstances, it is the Department's position that during that period of time the Canal Companies' use of volumes in excess of 2.39 million acre-feet to a beneficial use in the operation of the Milner facility was within their rights. Once the license was issued with the 2.39 acre-feet limitation, however, use in excess of that limitation will violate the conditions of the water right even if the diversion rate is not exceeded. The Department's position is that the Canal Companies' remedy is to apply for a second right to make up for the difference between the volume allowed in the license and the amount that can actually be applied to a beneficial use consistent with the diversion rate.

6. In effect the volume limitation amounts to a method of subordinating the hydropower right in the event the subordination provision in the license is set aside and the hydropower right is not subordinated to later recharge rights. Presumably a new application for an additional hydropower right could be subordinated to existing or future recharge rights.

7. The best prognosis is that if the subordination provision in the license is set aside, other conditions set forth in the license that are not included in the permits will also fail. The subordination provision stands on a more solid legal basis than either the term limitation or the volume limitation. In any event, each issue should be determined on its individual merits, not as a method to achieve a secondary result that might otherwise be precluded.

8. Judge Wood addressed the necessity of a volume specification in *In Re SRBA,* Case No. 39576, In the District Court of the Fifth Judicial District of the State of Idaho, In and for the County of Twin Falls, filed December 29, 1999, concerning a volume limitation, stating the issue as follows: "Did the [respective] Special Master err in ruling that facility volume is not necessary for the definition of the right, for clarification of any element of a right, or for administration of the right by the director?" The case involved non-consumptive fish propagation facilities. The Court determined that facility volume was not necessary for the definition of the right, for clarification of any element of a right or for administration by the Director. The logic of that decision is applicable in this case.

9. Idaho Code Section 42-1411(2) (c) provides as follows:

> (2) The director shall determine the following elements, to the extent the director deems appropriate and proper, to define and administer the water rights acquired under state law:

****

> (c) the quantity of water used describing the rate of water diversion or, in the case of an instream flow right, the rate of water flow in cubic feet per second or annual volume of diversion of water for use or storage in acre-feet per year as necessary for the proper administration of the water right;

10. Nothing in the statute requires both a diversion rate and an annual volume for a non-consumptive hydropower right that has been subordinated. In fact, to the extent that an annual volume differs from the amount that could be applied under the diversion rate, the administration of the right becomes more complex. Both must be monitored and apparently action taken if the Canal Companies apply the water to a beneficial use as allowed by the diversion rate but reach the volume limitation. Apparently that action would be to stop the use of the water at the Milner facility and allow it to pass on without generating power to the detriment of the Canal Companies and potentially to power users and the public.

11. Beneficial Use Examination Rule 37.03.02.035.01.j (Rule 35.01.j) provides that, "The field examiner does not need to show total volume of water for municipal and fire protection uses on the field report unless the project works provide for storage." The exclusion of a total volume showing for municipal and fire protection uses in the field examiner's report does not compel inclusion of an annual volume in the licenses that are issued for other water rights, particularly non-consumptive uses. The annual volume can be co-extensive with the diversion rate over the course of a year. With the subordination condition in the license, the Canal Companies cannot make a call against other water users. As has been recognized in earlier proceedings, the Canal Companies get what water is available. If there isn't enough water to meet the amount specified in the diversion rate, they cannot compel others to surrender water. On the other hand, if there is an annual volume limitation that is less than can be put to a beneficial use under the diversion rate, the Canal Companies will be required to spill water beyond their facility without generating electricity from that water. That does not maximize the

benefits that can be derived from the use of the available water and neither serves the interests of the Canal Companies nor the public.

RECOMMENDATIONS

1. It is recommended that the term limitation specified in the Final Order be deleted from the license.

2. It is recommended that the annual volume limitation in the Final Order be deleted from the license. Alternatively, if consistency of application is deemed significant, the annual volume limitation should be specified to be consistent with the diversion rate set forth in the Final Order.

Dated this 30 day of July, 2010

GERALD F. SCHROEDER
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of July, 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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