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DEPARTMENT OF
WATER RESOURCES

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

In Re SRBA

Case No. 39576

)
) Subcase Nos. 00-92002GP, 02-200,
) 02-201, 02-223 and 02-224

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

INTRODUCTION

COMES NOW, the North Side Canal Company and Twin Falls Canal Company,
(hereinafter collectively referred to as the "Canal Companies"), by and through their counsel the
law firm Barker Rosholt & Simpson, LLP, and submit this Memorandum in Opposition to the
State of Idaho's Motion for Partial Summary Judgment Re: Milner Zero Minimum Flow. The
Canal Companies oppose this Motion for the reason that the State has proposed multiple remarks

concerning the recognition of the Milner Zero Minimum Flow in multiple scenarios that create a question of fact preventing this Court from granting the relief sought at this time. Additionally, water right no. 02-200 should not exist because the State has not followed the requirements under state law to appropriate a valid water right, and until this Court has resolved the issue of whether water right no. 02-200 should be decreed or not, it is premature to declare that the State's proposed remark should be included in any such decree in order to "clarify, further define," or do anything else to a non-existent water right. Lastly, modification of the Director's proposed general provision, or inclusion of a remark in a water right decree which is premised upon concepts that have substantially changed over time, and that will continue to change, is an inappropriate limitation on individual water rights which has the potential to create ambiguity in both the administration of the right, but also the purpose and function of the policies and law that it is allegedly based upon.

STATEMENT OF PERTINENT FACTS

The Canal Companies largely agree with the representations made by the State concerning the historical treatment of the Snake River at Milner divide. There is little doubt that the concept of "two rivers" has long been understood among the agricultural and hydropower users on the Snake River above and below the Milner Dam. The Canal Companies also agree that Idaho Code § 42-203B(2) in its present state expresses the concept of the Milner divide as it relates to hydropower water rights in Basin 02, on the Snake River downstream of the Milner Dam to the end of Basin 02 at approximately Big Bend Irrigation District.

The State Water Plan, 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."¹ Each Idaho State Water Plan also expressly recognizes that "[a]ccording to statute, a formal review of [the] plan must take place every five years."²

In both the 1986 and 1996 State Water Plans, also included was a recitation of the new policy and legal developments that in those Plans shaped the changes evident in the document.³

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.

Legislation in 1988 directed preparation of comprehensive plans for specific geographic areas as components of the State Water Plan [Idaho Code 42-1734A92)]. These plans are prepared within the framework of the policies established by the over-arching State Water Plan.⁴

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 give rise to any claim against, or right to interfere with, the holder of subsequent

¹ Affidavit of Shelley M. Davis In Support of Canal Companies' Memorandum in Opposition to State of Idaho's Motion for Partial Summary Judgment Re: Milner Zero Minimum Flow (hereinafter "Davis Aff."), Ex. 1, Excerpt of Idaho State Water Plan 1992, at p. 1.

² *Id.*

³ Davis Aff., Exs. 2 and 3, Excerpts of the 1986 and 1996 Idaho State Water Plans.

⁴ Davis Aff., Ex. 3, Excerpt of 1996 Idaho State Water Plan.

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.⁵

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.⁶

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.⁷

⁵ See Exhibit 5 to the Affidavit of Michael C. Orr, submitted in Support of the State's Motion for Partial Summary Judgment Re: Milner Zero Minimum Flow (hereinafter "Orr Aff.")

⁶ I.C. § 42-203B(2).

⁷ Davis Aff., Ex. 4, 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.

In his report 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 638.7.⁸

Further, at this time the State and Idaho Power Company have presented to this 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."⁹

The 1996 version of the State Water Plan, which is currently undergoing review for revision by the Idaho Water Resource Board¹⁰, states as its 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."¹¹

⁸ Part 1—Director's Report—Irrigation and Other Uses—Reporting Area 02, Dec. 29, 2006.

⁹ Orr Aff., Ex. 9, pp. 3 and 5.

¹⁰ 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.

¹¹ Orr Aff., Ex. 1, p. 17.

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, the State of Idaho now requests that this Court amend the Director’s remark, and declare the new language to accurately reflect the State of Idaho’s position regarding the concept of “zero flow at Milner.” The proposed language states

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 638.7.¹²

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, deposition, 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.” Id. R. Civ. P. 56(c), *City of Idaho Falls v. Home Indemnity Co.*, 126 Idaho 604, 606, 888 P.2d 383 (1995). 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. *Bonz v. Sudweeks*, 119 Idaho 539, 541, 808 P.2d 876 (1991). At all times, the burden of proving the absence of a genuine issue of material fact rests upon the moving party. *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 517, 808 P.2d 851, 854

¹² State of Idaho’s Motion for Partial Summary Judgment Re: Milner Zero Minimum Flow, p. 2.

(1991). A motion for summary judgment must be denied if the record contains conflicting inferences or if reasonable minds might reach different conclusions. *Id.*

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 inference 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.” *Loomis v. City of Hailey*, 119 Idaho 434, 437, 807 P.2d 1272, 1275 (1991).

ARGUMENT

I. Genuine Issues of Material Fact Concerning the Appropriate Remark to Reflect the Historic Division of the River at Milner Exist, Precluding Summary Judgment on this Motion:

The State is asking this Court, in the context of several differing interpretations and expressions of the concept of zero flow at Milner, to declare as a matter of law that its newly created remark should be adopted as the final expression of the law as to zero flow at Milner, and to include it in a decree to a disputed water right. 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) the 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 concept are subject to change, and have changed over time. Based on the many separate expressions of the zero flow at Milner concept, it would be inappropriate for this Court to issue an order on summary judgment declaring that the State’s present incarnation represents that “as a matter of law under the State Water Plan and controlling Idaho statutes, the zero minimum flow established at the Milner Dam means that the flow of the Snake

River above Milner Dam may be reduced to zero, and that water rights using water downstream from Milner Dam have no right to call for the delivery, or seek the administration, of the flow of the Snake River or surface and ground water tributary to the Snake River upstream from Milner Dam.”¹³

In this case, there is 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. The State, in its Memorandum in Support of its Motion, expounds at great length the many scenarios, both legislative and in the context of litigation and negotiation, in which the concept has been debated and reiterated. The State’s historical exposition further supports the position of the Canal Companies that an Order on summary judgment declaring the State’s newest expression to be the appropriate final expression of the zero minimum flow concept is inappropriate.

Importantly, this Court is guided by the following as it considers the State’s Motion:

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)). We first consider the historic context of the 1888 Act.

Pocatello v. State, 145 Idaho 497, 502, 180 P.3d 1048, 1053 (2008). 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

¹³ Memorandum in Support of State of Idaho’s Motion for Partial Summary Judgment Re: Milner Zero Minimum Flow, p. 2.

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 grant was clearly and unambiguously conferred after a review of all of the historical and legal precedent was read together.

Similarly, here, the legislature has expressed its opinion of the Milner divide in the context of hydropower water rights at Idaho Code § 42-203B(2) where it states:

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.¹⁴

The Idaho State Water Plan in 1976 expressed the policy concerning Milner zero flow with the statement:

Therefore, main stem Snake River flows will be protected against further appropriations and preserved to provide the following average daily flows at the following U.S. Geological Survey stream gaging stations:

Gaging Station	Protected Flow (Average Daily)
Milner	0 cfs ¹⁵

However, when the plan was amended in 1986, the language adopted stated “[t]he establishment of a zero minimum flow at the Milner gauging station allows existing uses to be continued and for some new uses above Milner.”¹⁶ Again, when the Plan was amended in 1992 the language was amended to state

¹⁴ I.C. § 42-203B(2)

¹⁵ Orr Aff., Ex. 3, p. 116.

¹⁶ Orr Aff., Ex. 7, p. 35.

The minimum flows established for the Snake River at Murphy and Weiser gauging stations are management and permitting constraints; they further insure that the state will be able to assure an adequate hydropower resource base and better protect other values recognized by the state, such as fish propagation, recreation and aesthetic interests, all of which would be adversely impacted by an inadequate stream flow. The zero flow at Milner Dam is not a target or a goal to be achieved, and may not necessarily be desirable. It is rather, a recognition of the current condition in which zero flow passes Milner Dam during certain periods of time. The state would seek acquire water whenever it becomes available in order to mitigate the impacts of low flow below the Dam.¹⁷

Again in 1996 when the State Water Plan was amended, the statement was restated as “[t]he exercise of water rights above Milner Dam has and may reduce the flow at the Dam to zero.”¹⁸

Water District 01 expressed the policy stating “[t]he zero minimum flow at Milner, as established in the state water plan [should] be recognized as the Water District 1’s position, and that there can be no call for deliveries below Milner by downstream interests.”¹⁹ The Canal Companies are water users in Water District 01 and support this policy as recognized by resolution. A clear understanding of the effect and breadth of the concept of zero flow at Milner is imperative, but cannot be summarily ruled upon at this time based on the present record.

Importantly also, the State and the Idaho Power Company have recently submitted to this Court in the Swan Falls sub-case 00-92003, currently pending before this Court, a different proposed remark to capture the concept of zero flow at Milner which states “[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.”²⁰ The State now asks this Court to adopt a separate remark to express the same

¹⁷ Orr Aff., Ex. 8, p. 28.

¹⁸ Orr Aff., Ex. 1, p. 17.

¹⁹ Davis Aff., Ex. 4.

²⁰ Orr Aff., Ex. 9, pp. 3 and 5.

concept for different claimed water rights within Basin 02, even though the concept of zero flow at Milner has been, and is currently subject to, differing interpretations and application even by the State itself. Based on the present state of the law and policy concerning zero flow at Milner, this Court cannot as a matter of law declare that the language proposed by the State should be the final and declarative statement of law and policy concerning the concept. "If the evidence is conflicting on material issues, or if reasonable minds could reach different conclusions, summary judgment is not appropriate. A material fact is one upon which the outcome of the case may be different." *O'Guin v. Bingham County*, 139 Idaho 9, 13, 72 P.3d 849, 853 (2003), internal citations omitted. The Court should deny the State's Motion for Partial Summary Judgment.

II. As the Validity of the State's Claimed Water Right No. 02-200 is Presently Disputed, and As the Proposed Remark Could Affect All Water Rights Within Basin 02, the Relief Requested by the State in Its Motion Should be Denied:

Eight ground water districts, the Idaho Power Company, the City of Pocatello, and the Canal Companies all responded to the State of Idaho's claim for water right no. 02-200, objecting to the water right for one reason or another. The Idaho Power Company and Canal Companies argue that the water right should not exist because the State has not followed any lawfully prescribed method to claim and appropriate the water right. In its Motion for Partial Summary Judgment the State has not requested that the Court determine the validity of the water right. Instead, the State has requested that the Court determine that its newly proposed language be adopted as a remark on the decree for water right no. 02-200. As the validity of the water right is disputed, it is premature for the Court to determine whether the proposed remark should be included in any decree that may or may not issue for the claimed right. In essence, it is

premature for the Court to rule on any necessary remarks for the water right when the Court has not had an opportunity to comprehensively review the validity of the claimed right.

The function of the Snake River Basin Adjudication was the topic of substantial debate during the 1994 legislative session, and resulted in a report to the 1994 Interim Legislative Committee on the Snake River Basin Adjudication.²¹ The first goal articulated by the Committee for the SRBA was that

[A]ll water rights within the Snake River Basin should be defined in accordance with Chapter 14, Title 42 so that all users can predict the risks of curtailment in times of shortage. It is vital to all water users that they have as high a degree of certainty as possible with respect to their water rights. Uncertainty discourages development, undermines the ability of agencies to protect stream systems and fosters litigation²²

The purpose of the SRBA is to provide finality and certainty with regard to the individual water rights being decreed within the adjudication, which are, after all, individual property rights.

Olson v. Bedke, 97 Idaho 825, 830, 555 P.2d 156, 161 (1976). Further, the purpose of remarks included in individual SRBA decrees is to promote the effective and efficient administration of a water right. Including a remark that ignores at least thirty years of differing expressions and interpretations of the concept of zero flow at Milner, and modifying the director's recommended general provision relating to zero flow at Milner to adopt the language proposed by the State would undermine the SRBA's goal of providing finality and efficient administration of water rights.

CONCLUSION

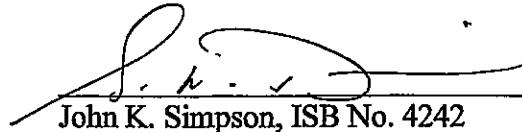
For all of the foregoing reasons, the Canal Companies respectfully request that the Court DENY the State's Motion for Partial Summary Judgment Re: Milner Zero Minimum Flow.

²¹ Davis Aff., Ex. 5, Excerpts of 1994 Interim Legislative Committee Report on the Snake River Basin Adjudication.

²² *Id.*, at p. 32.

Dated this 5th day of November, 2009

BARKER ROSHOLT & SIMPSON LLP

A handwritten signature in black ink, appearing to read "J. K. Simpson", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of November, 2009, I served a true and correct copy of the foregoing document, **CANAL COMPANIES' MEMORANDUM IN OPPOSITION TO STATE OF IDAHO'S MOTION FOR PARTIAL SUMMARY JUDGMENT RE: MILNER ZERO MINIMUM FLOW**, upon the following persons via the method indication below:

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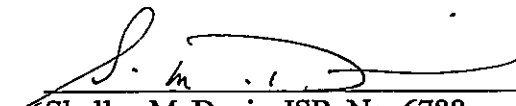
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