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DEPARTMENT OF
WATER RESOURCES

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

In Re SRBA	)	Subcase Nos. 00-92002GP, 02-00200, 02-00201,
	)	02-00223, and 02-00224
	)	
Case No. 39576	)	CITY OF POCATELLO'S RESPONSE TO STATE
	)	OF IDAHO'S MOTION FOR PARTIAL SUMMARY
_____	)	JUDGMENT RE: MILNER ZERO MINIMUM
		FLOW

Pocatello files this response to the State's Motion for Partial Summary Judgment regarding the Water Board's zero flow right at Milner Dam (2-200) and the zero flow general provision for the reach of the Snake River below Milner Dam (General Provision #4 in Basin 02). The State's motion seeks to confirm the "two rivers" concept -- "no calls" to water rights above Milner from water rights below Milner.¹

¹ If the motion is granted, the following language would become part of general provision 4 for basin 02 (Milner to Swan Falls) and would be included as a condition in the SRBA decree for water right 2-200, the Water Board's zero flow right at Milner:

The flow of the Snake River at Milner Dam may be reduced to zero, and 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.

General Provision 4 would be changed as follows:

The flow of the Snake River at Milner Dam may be reduced to zero, and 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. The minimum daily flows at the Milner gauging station shall remain as zero cubic feet per second. The Milner gauging station is located at Latitude

The State's motion does not address whether the Water Board's zero flow right 2-200 will be enforced at and above Milner Dam in Water District 01.

- The ground water users objected to 2-200 to have that clarified.²
- Idaho Power objected to the existence of 2-200 and also objected to the recommendation of a zero flow general provision (GP#4) in Basin 02.³
- Pocatello filed responses supporting the administration of the zero flow at and above Milner Dam.⁴

42° 31 '41 " , Longitude 114° 01'06"(revised), (NAD83), in the SWII4 NEII4 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.

² "This water right recommendation should be decreed as a Basin 01 water right as necessary to ensure the maintenance of a flow of zero (0) cfs at Milner Dam. This water right should be administered as part of Water District 01." Standard Form 1 Objection by Ground Water Districts regarding 2-200 and General Provisions (December 4, 2007), at 2. Exhibit 1, Affidavit of Josephine P. Beeman, ¶ 3.

³ Standard Form 1 Objection, Subcase 2-200 (Idaho Power Company) (January 30, 2008), at 2, Exhibit 2, Affidavit of Josephine P. Beeman, ¶ 4. Standard Form 1 Objection, General Provision #4 (Idaho Power Company) (December 5, 2007), at 2, Exhibit 3, Affidavit of Josephine P. Beeman, ¶ 5.

⁴ "[2-200] should be decreed as a Basin 01 water right as necessary to ensure the maintenance of a flow of zero (0) cfs at Milner Dam. This right should be administered as part of Water District 01." Standard Form 2 Response to Ground Water Districts' Objection, Subcase 2-200 (City of Pocatello) (February 5, 2008), at 2. Exhibit 4, Affidavit of Josephine P. Beeman, ¶ 6.

"The City of Pocatello responds to support the inclusion of General Provision 4 in Basin 02. General Provision 4 provides for the administration of the Idaho Water Resource Board's zero flow right 2-200. The point of diversion for 2-200 is Milner Dam, although the Milner gauging station is .4 miles below Milner Dam, as explained in the General Provision 4. Pocatello understands General Provision 4 to apply both above and below Milner Dam." Standard Form 2 Response to Idaho Power Objection, Subcase 00-92002GP (City of Pocatello) (February 5, 2008), at 2, Exhibit 5, Affidavit of Josephine P. Beeman, ¶ 7.

"The City of Pocatello responds to support IGWA's general provision objection and to state Pocatello understands that the geographic scope of the requested general provision is "all water rights in the Snake River drainage above the Murphy Gauge." The language of IGWA's objection is included below. Pocatello's understanding of the geographic scope is based on IGWA's reference to the Swan Falls settlement and the State Water Plan.

IGWA's objection: "For the purposes of administering all water rights above the Murphy Gauge, a general provision is required to implement the comprehensive management plan established by the Swan Falls settlement as reflected in the 1986 State Water Plan adopted by the Idaho Water Resource Board (IWRB) and approved by the legislature." Standard Form 2 Response to Ground Water Districts' Objection, Subcase 00-92002GP (City of Pocatello) (February 5, 2008), Exhibit 6, Affidavit of Josephine P. Beeman, ¶ 8.

To demonstrate the importance of the administration of the Water Board's zero flow right 2-200 both below Milner Dam and within Water District 01, Pocatello uses its Response to provide information regarding the point of diversion for 2-200, the history of the zero flow at Milner, the pending designation of SRBA Basin-Wide Issue 91-15, and the contested case proceeding at the Idaho Department of Water Resources (IDWR) involving hydropower license 1-7011 associated with the FERC license for the Milner Project.

The Water Board's zero minimum flow right at Milner Dam is within Basin 01.

The point of diversion for the Water Board's minimum stream flow right 2-200 at Milner Dam is the north abutment of Milner Dam. The Public Land Survey description at the north abutment of Milner Dam is T10S R21E S28 SWSWNW Lot 5 within Jerome County.⁵ Snake River water right records with points of diversion in T10S R21E S28 SWNW Lot 5 are all designated as Basin 01 water rights, with the sole exception of the Water Board's minimum stream flow right 2-200 which is designated for Basin 02 which is downstream from Milner Dam.⁶ A more general search of Snake River water right records with points of diversion in T10S R21E S28 shows that the Water Board's minimum stream flow right 2-200 is the only right not designated as a Basin 01 water right.⁷

⁵ SRBA Claim File for 2-200, from IDWR website, at 1. Exhibit 7, Affidavit of Josephine P. Beeman, ¶ 9.

⁶ IDWR Website: Search results for Snake River water right records with points of diversion in T10S R21E S28 SWNW Lot 5. Exhibit 8, Affidavit of Josephine P. Beeman, ¶ 10. [Permit 37-7891 for hydropower production in basin 37 includes a point of diversion from the Snake River in T10S R21E S28 SWNW Lot 5. The advertisement of the amended application 37-7891 clarified the Snake River point of diversion, although the Snake River right 1-7086 appearing on the advertisement does not have a separate record.]

⁷ IDWR Website: Search results for Snake River water right records with points of diversion in T10S R21E S28. Exhibit 9, Affidavit of Josephine P. Beeman, ¶ 11. [Permit 37-7891 for hydropower production in basin 37 includes a point of diversion from the Snake River in T10S R21E S28 SWNW Lot 5. The advertisement of the amended application 37-7891 clarified the Snake River point of diversion, although the Snake River right 1-7086 appearing on the advertisement does not have a separate record.]

The zero minimum flow protects irrigation development above Milner Dam, as supported by the State Water Plan, the Idaho Legislature, and the Committee of Nine.

The State's memorandum in support of its Motion for Partial Summary Judgment discusses at length that the zero minimum flow at Milner is for two purposes – full development above Milner and protection of that development from uses below Milner (*emphases* by Pocatello):

- the State Water Plan as formulated by the Water Board and approved by the Idaho Legislature has consistently provided for *a zero minimum flow at Milner Dam*;⁸
- the Committee of Nine of Water District No.1 passed a resolution supporting the Swan Falls Agreement only if it was clearly understood that there would continue to be *no obligation to spill water over Milner Dam*;⁹
- the legislative history of the 1986 amendment to Idaho Code § 42-203B(2) demonstrates the Legislature specifically affirmed that the zero minimum flow at Milner means not only that *the river may be fully developed for storage and use above Milner, but also that water rights using water downstream from Milner Dam have no legal standing to impair or interfere with such development*;¹⁰
- the policy of *conserving winter flows and flood waters for irrigation use above Milner* applied to hydropower projects downstream of Milner and even applied when irrigation developments were proposed downstream from Milner;¹¹
- finally, the Milner "zero minimum flow" principle reflects the long-established objective of maximizing the conservation and storage of non-irrigation season flows and flood waters *above Milner Dam for use above Milner*.¹²

⁸ Memorandum in Support of State of Idaho's Motion for Partial Summary Judgment Re: Milner Zero Minimum Flow (October 16, 2009), in Subcase Nos. 00-92002GP, 02-00200, 02-00201, 02-00223, and 02-00224 ("State's Memorandum"), discussion beginning at page 13.

⁹ State's Memorandum, discussion beginning at bottom of page 16.

¹⁰ State's Memorandum, discussion beginning at page 15.

¹¹ State's Memorandum, discussion beginning at page 21, through 48.

¹² State's Memorandum, discussion beginning at page 51.

Administration of the Water Board's minimum stream flow right below Milner Dam and within Water District 01 is consistent with the historical water use, state policies and state laws that established the zero minimum flow at Milner.

A plan for common administration within Basin 01
is being considered for basin-wide designation at the SRBA court

The zero minimum flow at Milner should be included in any efforts to decree a common plan for the administration of the Snake River in Basin 01. The SRBA court is presently considering a motion to designate Basin Wide Issue 91-15:

The proposed basin-wide issue is as follows: What is the "common plan for administering the operation of the Snake River" that should be ratified, confirmed and approved, and incorporated into the water right decrees in Basin 01.

Notice of Hearing and Order Setting Procedures on Motion to Designate a Basin Wide Issue, Subcase 00-91015 (October 8, 2009), at 1. Exhibit 10, Affidavit of Josephine P. Beeman, ¶ 12.

The State Water Plan policy represented by the zero minimum flow at Milner Dam is an important consideration in the licensing hearing at IDWR for the proposed hydropower water right license 1-7011 associated with the Milner Project.

IDWR is holding contested case proceedings on the proposed hydropower water right license for 1-7011, one of the Snake River water rights with a point of diversion in T10S R21E S28.¹³ Hydropower water right 1-7011 is associated with Milner Project License No. 2899 issued by the Federal Energy Regulatory Commission.¹⁴ The Water Board has intervened in the IDWR

¹³ Proposed water right license for 1-7011 obtained from the IDWR website. Exhibit 11, Affidavit of Josephine P. Beeman, ¶ 13. Final Order, in the Matter of Licensing Water Right Permit No. 01-7011, in the Name of Twin Falls Canal Company and North Side Canal Company (Before the Department of Water Resources of the State of Idaho) (October 20, 2008). Exhibit 12, Affidavit of Josephine P. Beeman, ¶ 14. Scheduling Order, in the Matter of Licensing Water Right Permit No. 01-7011, in the Name of Twin Falls Canal Company and North Side Canal Company (Before the Department of Water Resources of the State of Idaho) (August 28, 2009). Exhibit 13, Affidavit of Josephine P. Beeman, ¶ 15.

¹⁴ Proposed water right license for 1-7011 obtained from the IDWR website. Exhibit 11, Affidavit of Josephine P. Beeman, ¶ 13.

proceedings for 1-7011 stating that, “The purpose of the IWRB's 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, and to protect its water rights listed in Paragraph 6.1. In 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” (in original Petition to Intervene).¹⁵

The Water Board's water right 2-200 for the zero minimum flow at Milner Dam (priority December 29, 1976) is senior by three months to the hydropower water right 1-7011 (priority March 30, 1977) associated with FERC License No. 2899 for the Milner Project.¹⁶

¹⁵ Idaho Water Resource Board Petition to Intervene, in the Matter of Licensing Water Right Permit No. 01-7011, in the Name of Twin Falls Canal Company and North Side Canal Company (Before the Department of Water Resources of the State of Idaho) (January 29, 2009), at 4. Exhibit 14, Affidavit of Josephine P. Beeman, ¶ 16. Idaho Water Resource Board Motion to Amend Its Petition to Intervene, in the Matter of Licensing Water Right Permit No. 01-7011, in the Name of Twin Falls Canal Company and North Side Canal Company (Before the Department of Water Resources of the State of Idaho) (September 30, 2009), at 3. Exhibit 15, Affidavit of Josephine P. Beeman, ¶ 17.

¹⁶ SRBA Claim File for 2-200, found on the IDWR website. Exhibit 7, Affidavit of Josephine P. Beeman, ¶ 9. Proposed water right license for 1-7011 obtained from the IDWR website. Exhibit 11, Affidavit of Josephine P. Beeman, ¶ 13.

Conclusion

The State's Motion should be granted only if the Water Board's minimum stream flow right at Milner Dam is designated 1-200 and/or conditioned to clarify that it is administered by priority within Water District 01 and administered not solely downstream from Milner Dam.

DATED this 5th day of November 2009.

BEEMAN & ASSOCIATES, P.C.
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By Josephine P. Beeman
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CERTIFICATE OF SERVICE

I certify that on this 5th day of November 2009, I caused to be served a true and correct copy of the foregoing POCATELLO'S RESPONSE TO STATE'S MOTION FOR PARTIAL SUMMARY JUDGMENT on the following parties by U.S. Mail:

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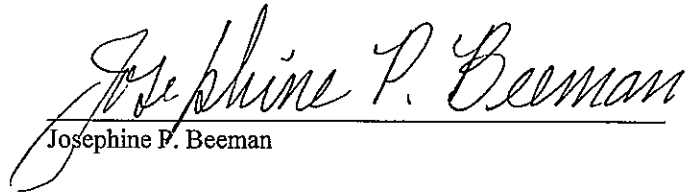
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