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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

Case No. 39576

Subcase Nos. 00-92002GP, 02-00200,
02-00201, 02-00223 and 02-00224

**GROUND WATER DISTRICTS'
SUMMARY JUDGMENT REPLY BRIEF
RE: MILNER ZERO MINIMUM FLOW**

Idaho Ground Water Appropriators, Inc., Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Madison Ground Water District, Magic Valley Ground Water District, North Snake Ground Water District, Fremont-Madison Ground Water District, and Clark-Jefferson Ground Water District (collectively, the "Ground Water Districts"), acting for and on behalf of their members, respectfully submit this brief in reply to *Idaho Power Company's Memorandum in Opposition to State of Idaho's Motion for Partial Summary Judgment Re: Milner Zero Minimum Flow* ("Idaho Power's Response Brief"), *Canal Companies' Memorandum in Opposition to State of Idaho's Motion for Partial Summary Judgment Re: Milner Zero Minimum Flow* ("Canal Companies' Response Brief"), and *Pocatello's Response to State's Motion for Partial Summary Judgment* ("Pocatello's Response").

ARGUMENT

The Court can and should clarify the first sentence of Basin 02 General Provision 4, and add a condition to water right 02-200, to confirm the Miner zero flow as proposed by the State of Idaho. (*State of Idaho's Mot. for Partial Summ. J. Re: Milner Zero Minimum Flow* 1-2.) As

explained below, the Milner zero flow is a definite and fundamental tenet of Snake River water administration that has remained constant—and has been relied upon by water users—for more than a half-century. It is not, as suggested by Twin Falls Canal Company and North Side Canal Company (collectively, the “Canal Companies”), a tenuous policy that is unlikely to persist. While the State Water Plan and Idaho Code 42-203B use differing verbiage to express the Milner zero flow, the expressions are uniform in their effect and are consistent with the language proposed by the State for Basin 02 General Provision 4 and water right 02-200.

I. The differing verbiage used to express the Milner zero flow in the State Water Plan and Idaho Code 42-203B is consistent with the language proposed by the State and does not create genuine issues of material fact.

The Canal Companies attempt to paint the Milner zero flow as a questionable policy that has changed over time and is not likely to persist. That could not be further from the truth. The Milner zero flow is a definite and constant policy of Snake River water administration that has been relied upon by water users and the State of Idaho for the last half-century. Even the Canal Companies admit 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.” (Canal Companies’ Response Br. 2.) The Canal Companies further “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.” *Id.*

Notwithstanding, the Canal Companies object to summary judgment, *purportedly* on the basis that different verbiage used to express the Milner zero minimum flow in the State Water Plan and Idaho Code § 42-203B create genuine issues of material fact. (Canal Companies’ Response Br. 7.) Notably, the Canal Companies’ fail to identify any specific issues of fact that they claim preclude summary judgment. They point out that there are variations in the language that has been used to express the Milner zero flow in the State Water Plan and Idaho Code § 42-203B, but they fail to show that such variations are material or even inconsistent. Nor do the Canal Companies suggest language for Basin 02 General Provision 4 or water right 02-200 that they believe more accurately reflects the Milner zero flow (which, they agree, has long been understood by water users and is reflected in Idaho Code §42-203B). The unavoidable reality is that the Canal Companies’ interest in this proceeding is not to ensure that the Milner zero flow is properly incorporated in Basin 02 General Provision 4 or in water right 02-200, but to get rid of

the zero flow altogether. The Canal Companies have publicly expressed an interest in curtailing water rights above Milner in order to generate hydropower below Milner. Their opposition in this proceeding is an attempt to undermine the zero flow and open that door.

In any case, the argument that the Canal Companies make in this proceeding (and that is made less directly by Idaho Power) is that differing expressions of the Milner zero flow in the State Water Plan and Idaho Code § 42-203B create genuine issues of material fact that preclude summary judgment. There is obviously no disputing that differing verbiage has been used to express the Milner zero flow. Yet differing language does not, by itself, create genuine issues of material fact. Indeed, the language used of the State Water Plan and Idaho Code § 42-203B(2), while differing slightly, is uniform in expressing the purpose and effect of the Milner zero flow.

The purpose of the Milner zero minimum flow is to enable full development of the Snake River above Milner Dam for irrigation and other consumptive uses. The history of the zero flow is thoroughly explained in the State's *Memorandum in Support of State of Idaho's Motion for Partial Summary Judgment Re: Milner Zero Minimum Flow*, and will not be repeated here. However, given the Canal Companies claim that the different verbiage used to express the zero flow in the State Water Plan and Idaho Code § 42-203B(2) creates general issues of material fact, a brief review of that language is worthwhile here.

The first Idaho State Water Plan, adopted in 1976, utilizes a table to identify a minimum flow at the Milner Gauging Station of 0 cfs. (Orr Aff. Ex. 3 at 116.) The State Water Plan was revised in 1982, but the table identifying a zero flow at Milner remained unchanged. (Orr Aff. Ex. 3 at 42.) When the State Water Plan was amended in 1986, the Plan replaced the table with text, stating: "It is the policy of Idaho that the ground water and surface water of the Basin be managed to meet or exceed a minimum average daily flow of zero measured at the Milner gauging station." (Orr. Aff. Ex. 7 at 35.) The 1992 Plans again maintained the zero flow using slightly different—but perhaps more clear—language: "The exercise of water rights above Milner Dam has and may reduce the flow at the dam to zero." (Orr. Aff. Ex. 8 at 28.) The current Plan, passed in 1996, uses the identical language contained in the 1992 Plan. (Orr. Aff. Ex. 1 at 17.) While the verbiage used to express the zero flow has differed slightly between State Water Plans, the expressions are entirely consistent in their effect—each making clear that development of the upper Snake River Basin may reduce the flow of the Snake River to 0 cfs at the Milner gauging station.

The Milner zero flow was codified in 1986 via an amendment to Idaho Code § 42-203B. At that time, the following language was added to the statute:

For the purposes of the determination and administration of rights to the use of the water 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."

Idaho Code § 42-203B(2). This language demonstrates the effect of the zero flow below Milner, that water users below Milner have no right to seek the administration of water above Milner.

The Canal Companies argue that the difference in verbiage between Idaho Code § 42-203B and the State Water Plan reflect "changing sentiment" about the Swan Falls Agreement. (Canal Companies' Response Br. 2.) They claim that the amendment of Idaho Code § 42-203B created "substantial additional requirements not contemplated at the time the Swan Falls Agreement was ratified." (Canal Companies Response Br. 4.) That statement is utterly false. The well-documented history behind the amendment of Idaho Code § 42-203B clearly shows that the statute was amended to make it consistent with what *was* contemplated at the time of the Swan Falls Agreement, not to add new requirements.

Included in the 1984 Swan Falls Agreement is a condition that the Milner zero flow (which was incorporated into the then-existing State Water Plan) must be maintained. (*See* Swan Falls Agreement ¶ 13.A.i, Orr. Aff. Ex. 5 at 7.) However, shortly after the Agreement was signed, the Idaho Department of Water Resources (IDWR) drafted Proposed Water Allocation Rules that mistakenly gave Idaho Power a right to use its water rights below Milner to seek administration of water rights above Milner. The IDWR's Rules brought on a swift and harsh response from water users who had long-relied upon the Milner zero flow, and who supported the Swan Falls Agreement only on condition that the zero flow be maintained. In response, the legislature amended Idaho Code § 42-203B(2) to "clarify" that the zero flow precluded water users below Milner from demanding administration of water rights above Milner. 1986 Idaho Sess. Laws, ch. 117, p. 308.

Thus, the 1986 amendment of Idaho Code § 42-203B was not to change the Milner zero flow, but to confirm that the Milner zero flow precludes water users below Milner from seeking administration of water rights above Milner. There are simply no contradictions between the expressions of the Milner zero flow in the State Water Plan and Idaho Code § 42-203B. They uniformly reflect the purpose of the Milner zero flow to enable full development of the Snake

River above Milner Dam for irrigation and other depletionary uses, leaving the River below Milner available for hydropower generation.

Importantly, the meaning and effect of the Milner zero minimum flow is clearly expressed in the proposed language for Basin 02 and water right 02-200. Obviously, the Court need not insert into Basin 02 General Provision 4 and water right 02-200 every plausible expression of the Milner zero flow. A single statement that clearly and succinctly expresses the effect of the zero flow below Milner is adequate and appropriate. The language proposed by the State does just that. The language first states that flows in the Snake River may be reduced to zero at the Milner Gauge (State Water Plan language), and states that water rights below Milner have no entitlement to seek administration of water rights above Milner (I.C. §42-203B language), to wit:

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 water and ground water tributary to the Snake River upstream from Milner Dam.

(State of Idaho's Mot. for Partial Summ. J. Re: Milner Zero Minimum Flow 2.)

Idaho Power suggests the Court should adopt different language than is proposed by the State. (Idaho Power's Reply Br. 8.) Viewing the State's and Idaho Power's proposals side-by-side is instructive:

State's Proposal

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, or seek the administration of, the flow of water of the Snake River or surface water or ground water tributary to the Snake River upstream from Milner Dam.

Idaho Power's Proposal

For the purposes of the determination and administration of water rights in Basin 02, 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. No water right in Basin 02 may be administered or enforced against any diversions or uses of the waters identified in this paragraph.

The Ground Water Districts strongly oppose Idaho Power's proposal for three reasons. First, Idaho Power's language critically fails to make any reference to the Snake River being reduced to zero at Milner Dam. That omission alone makes Idaho Power's proposal incomplete and inadequate. Second, Idaho Power makes a subtle attempt to narrow the application of the

Milner zero flow by asking that it apply only to Basin 02 water rights, rather than to all "use of the waters of the Snake River or its tributaries downstream from Milner dam" as provided in Idaho Code § 42-203B(2). Third, the statement in Idaho Power's proposal that "[n]o water right in Basin 02 may be administered or enforced against any diversions or uses of the waters identified in this paragraph" appears nonsensical, and would likely lead to confusion as to the administrative effect of the Milner zero minimum flow. (Idaho Power's Response Br. 8.)

In sum, both Idaho Power and the Canal Companies agree with the factual history presented in the State's brief. There are *no* disputes of fact on this record. While the English language is broad enough to have allowed different expressions of the zero flow in the State Water Plan and Idaho Code § 42-203B, the expressions are entirely consistent, and they are consistent with the language proposed by the State for Basin 02 General Provision 4 and water right 02-200. Therefore, the Ground Water Districts—along with the State of Idaho, United States, and numerous irrigation entities in the upper Snake River Basin—ask this Court to grant the State's request for summary judgment.

II. Idaho Water Resource Board water right 02-200 can be decreed with zero flow provision in this proceeding.

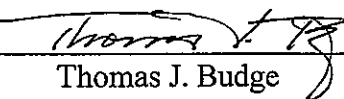
In addition to opposing the Milner zero flow generally, the Canal Companies object to summary judgment relative to water right 02-200 on the basis that objections have been filed challenging the validity of that water right. (Canal Companies' Response Br. 11.) Yet there is no need to postpone disposition of the zero flow issue with respect to water right 02-200. This is a motion for *partial* summary judgment. Other issues, such as objections to overall validity of the right, will certainly be preserved for subsequent determination. If water right 02-200 is disallowed by the SRBA court, the zero flow remark in the right would obviously be disallowed simultaneously.

CONCLUSION

For the reasons set forth above, the *State of Idaho's Motion for Partial Summary Judgment Re: Milner Zero Minimum Flow* should be granted.

DATED this 12th day of November, 2009.

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By 
Thomas J. Budge

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of November, 2009, the above document(s), was served upon the following persons in the manner indicated:

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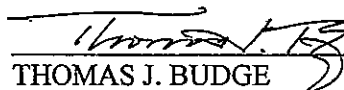
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