

RECEIVED

NOV 16 2009

DEPARTMENT OF
WATER RESOURCES

COPY

Robert L. Harris (ISB # 7018)
Luke H. Marchant (ISB # 7944)
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
P.O. Box 50130
1000 Riverwalk Drive, Suite 200
Idaho Falls, Idaho 83405
Telephone: (208) 523-0620
Facsimile: (208) 523-9518

Attorneys for Fremont-Madison Irrigation District, Egin Bench Canal Company, Idaho Irrigation District, and New Sweden Irrigation District

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. 00-92992GP, 02-00200, 02-00201, 02-00223 and 02-00224

**PETITION TO APPEAR AS
AMICUS CURIAE**

Fremont-Madison Irrigation District, Egin Bench Canal Company, Idaho Irrigation District, and New Sweden Irrigation District (collectively referred to as "Amici"), by and through counsel, Robert L. Harris of HOLDEN, KIDWELL, HAHN & CRAPO, PLLC, hereby petition this court to participate in the above-numbered subcases on an *amicus* basis.

I. PETITION FOR LEAVE OF COURT.

A. Introduction.

Fremont-Madison Irrigation District, Idaho Irrigation District, and New Sweden Irrigation District are irrigation districts organized and existing under Idaho law pursuant to Title 43 of the Idaho Code. Egin Bench Canal Company is a private canal company formed and existing pursuant to Title 30 of the Idaho Code. These entities possess water rights which authorize the diversion and beneficial use of surface water from the Snake River for irrigation and other purposes above Milner Dam. Additionally, these entities possess rights for the use of storage water stored in the Upper Snake River Reservoir system.

B. Argument.

Since 1976, the bedrock principle of “zero flow at Milner” was officially established in Idaho’s State Water Plan, and has been firmly entrenched in the management of Idaho’s water. This bedrock principle is now under attack by the North Side Canal Company and Twin Falls Canal Company (the “Canal Companies”), as set forth in their recently filed *Canal Companies’ Memorandum in Opposition to State of Idaho’s Motion for Partial Summary Judgment RE: Milner Zero Minimum Flow*.¹ This memorandum was in response to the *Memorandum in Support of State of Idaho’s Motion for Partial Summary Judgment RE: Milner Zero Minimum Flow* filed by the State of Idaho on October 16, 2009.

The implications that could result from litigation of the Milner Zero Minimum Flow policy will have far-reaching effects on water users above Milner Dam, which include the *Amici*. This statewide policy is vital to the utilization and management of Idaho’s water resources, and as such, *Amici* desire to participate in the above-entitled matter. The adjudication of these water rights

¹This document was filed on November 5, 2009.

potentially has a statewide impact on the management Snake River System and the Eastern Snake Plain Aquifer (“ESPA”), which Amici are interested and invested in.

Idaho courts, including the SRBA Court, have, in the past, allowed parties such as Amici to participate as *amicus curiae*. In *State v. United States*,² the Idaho Supreme Court heard an appeal from an SRBA matter involving Subcase No. 36-15452. The special master in that case denied a petition to intervene by Twin Falls Canal Company, North Side Canal Company, A & B Irrigation District, and Burley Irrigation District, but did permit these entities to participate as *amicus curiae*. The Idaho Supreme Court held that there was no abuse of discretion in allowing these parties to participate as *amicus curiae*.³

Additionally, in a related matter to the zero minimum flow at Milner principle, Judge Melanson allowed parties to submit briefing on an *amicus* status in the case of *North Side Canal Company and Twin Falls Canal Company v. Tuthill*, where Judge Melanson dismissed a petition for writ of mandate regarding issuance of the hydropower license for the Milner hydropower project (License No. 01-7011).⁴ The *amicus* parties were Mud Lake Water Users, Independent Water Users, Jefferson Canal Company, Montevue Canal Company, Producers Canal Company, Fremont-Madison Irrigation District and the Eastern Idaho Water Rights Coalition. Judge Melanson granted *amicus* status to these parties, and considered their briefing in their decision.⁵

In his discussion of the *amicus* petition, Judge Melanson analyzed the issue thusly:

² 134 Idaho 106, 996 P.2d 806 (2000).

³ *Id.* at 108, 996 P.2d at 808.

⁴ See Exhibit A to Affidavit of Robert L. Harris (*North Side Canal Company v. Tuthill*, Case No. CV-2007-1093, Fifth Judicial District Case in and for Jerome County, Jan. 5, 2008).

⁵ *Id.* at 14.

The decision of whether to limit participation to amicus curiae is discretionary with the trial court. *State v. United States (In Re SRBA Case No. 39576, Minidoka National Wildlife Refuge)*, 134 Idaho 106, 111, 996 P.2d 806 (2000); 4 Am. Jur. 2d *Amicus Curiae* § 8. The principle role of amicus curiae is to aid the court on questions of law. 4 Am. Jur. 2d at § 6. Among other things, a court may evaluate whether the proffered information is timely, useful, or otherwise necessary to the administration of justice. Additionally, a court should look to whether the parties to the lawsuit will adequately present all relevant legal arguments. *Id.* § 8.

In the instant case, the Court's decision turns on a question of law. The Amicus brief does not raise any new issues. The legal issue has broader reaching application than just the instant case. In cases such as this a certain degree of liberality in allowing a brief to be filed is warranted. While the Court has some concerns regarding the timeliness of the brief, on balance the Court **grants** the amicus participation and has considered the brief.⁶

Thus, there is clear precedent from the SRBA, which was affirmed by the Idaho Supreme Court, and the Fifth Judicial District of Idaho which allows for the participation of water users as *amicus curiae*. Just as Judge Melanson determined that the legal issue in his case had "broader reaching application than just the instant case," so to does the matter now before this court have broad-reaching application in the above-numbered subcases. Amici desire that the special master understand and recognize the significant concern that Amici have regarding the appropriate adjudication of the above subcases to incorporate the zero minimum flow at Milner principle.

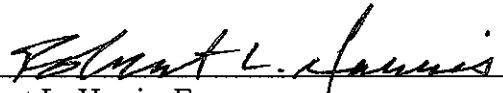
Based on this precedent set forth above, Amici seek leave to appear as *amicus curiae* and submit the attached *Amicus Brief* and its associated documents to this court. Amici do not seek leave to participate in oral argument, or introduce new issues to this matter. Amici seek only to support the zero minimum flow at Milner principle and offer unequivocal support for the State of Idaho's position.

⁶ *Id.* at 13-14 (bold in original).

II. CONCLUSION.

For the reasons set forth above, Amici respectfully requests this court to allow the Amici to appear as *amicus curiae*, and further consider the *Amicus Brief* accompanying this *Petition to Appear as Amicus Curiae*.

DATED this 12th day of November, 2009.


Robert L. Harris, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, a true and correct copy thereof on this 12th day of November, 2009.

DOCUMENT SERVED:

AFFIDAVIT OF ROBERT L. HARRIS

PARTIES SERVED:

Clerk of the SRBA Court
PO Box 2707
Twin Falls, ID 83303-2707

(☒) *First Class Mail*
(☐) *Hand Delivery*
(☐) *Facsimile*
(☐) *Via Overnight Mail*
(☒) *Facsimile: 208-736-2121*

State of Idaho
Represented by:
Clive Strong, Deputy A.G.
Michael C. Orr, Deputy A.G.
Natural Resources Division
PO Box 44449
Boise, ID 83711-4449

(☐) *First Class Mail*
(☐) *Hand Delivery*
(☐) *Facsimile*
(☐) *Via Overnight Mail*
(☐) *Facsimile: 208-735-244*
(☒) *Email: clive.strong@ag.idaho.gov*
(☒) *Email: michael.orr@ag.idaho.gov*

Idaho Power Company
Represented by:
James C. Tucker
PO Box 70
Boise, ID 83707

(☐) *First Class Mail*
(☐) *Hand Delivery*
(☐) *Facsimile*
(☐) *Via Overnight Mail*
(☐) *Facsimile: 208-388-6935*
(☒) *Email: JamesTucker@idahopower.com*

Idaho Power
Represented by:
James S. Lochhead
Michael A. Gheleta
Browstein Farber Hyatt Shrek, P.C.
410 17th St., Ste. 2200
Denver, CO 80202

(☐) *First Class Mail*
(☐) *Hand Delivery*
(☐) *Facsimile*
(☐) *Via Overnight Mail*
(☐) *Facsimile: 303-223-0904*
(☒) *Email: mgheleta@bhfs.com*
(☒) *Email: jlochhead@bhfs.com*

Randall C. Budge
Candice M. McHugh
T.J. Budge
Racine Olson Nye Budge & Bailey
101 S. Capitol Blvd., Ste. 208
Boise, ID 83702

(☐) *First Class Mail*
(☐) *Hand Delivery*
(☐) *Facsimile*
(☐) *Via Overnight Mail*
(☐) *Facsimile: 208-433-0167*
(☒) *Email: comm@racinelaw.net*
(☒) *Email: rcb@racinelaw.net*
(☒) *Email: tjb@racinelaw.net*

Josephine P. Beeman
Beeman & Associates, P.C.
409 W. Jefferson St.
Boise, ID 83702

() *First Class Mail*
() *Hand Delivery*
() *Facsimile*
() *Via Overnight Mail*
() *Facsimile: 208-331-0954*
(☒) *Email: jo.beeman@beemanlaw.com*

Dana Hofstetter
Hofstetter Law Office
608 West Franklin St.
Boise, ID 83702

() *First Class Mail*
() *Hand Delivery*
() *Facsimile*
() *Via Overnight Mail*
() *Facsimile: 208-424-8774*
(☒) *Email: dana@idahowaterlaw.com*

David W. Gehlert
Trial Attorney, Natural Resources
Section
Environmental & Natural Resources
Division
United States Dept. of Justice
1961 Sout Street, 8th Floor
Denver, CO 80294

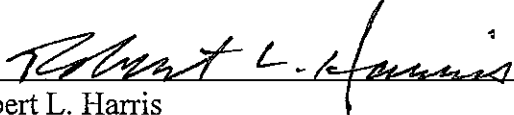
() *First Class Mail*
() *Hand Delivery*
() *Facsimile*
() *Via Overnight Mail*
() *Facsimile:*
(☒) *Email: David.Gehlert@usdoj.gov*

United States Dept. of Justice
Environmental & Natural Resource
Division
550 We. Fort St., MSC 033
Boise, ID 80294

(☒) *First Class Mail*
() *Hand Delivery*
() *Facsimile*
() *Via Overnight Mail*
() *Facsimile:*

IDWR Document Depository
PO Box 83720
Boise, ID 83720-0098

(☒) *First Class Mail*
() *Hand Delivery*
() *Facsimile*
() *Via Overnight Mail*


Robert L. Harris
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.