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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

Case No. 39576

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

AMICUS BRIEF

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 provide this Amicus Brief for the aid of the special master.

I. BACKGROUND.

The legal status of Amici and their interests in the above-entitled matter are set forth in the accompanying *Petition to Appear as Amicus Curiae* filed in connection herewith. The critical issue now before the court is a motion for summary judgment regarding a bedrock of water law and

administration in Idaho: the zero minimum flow at Milner policy. After reviewing the briefing submitted so far in the above-entitled matter relative to the State of Idaho's motion for summary judgment, Amici urge the special master to grant summary judgment in favor of the State of Idaho. There are no material issues of fact that have been raised by the North Side Canal Company or the Twin Falls Canal Company (the "Canal Companies").

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.

II. ARGUMENT.

A. **The Zero Minimum Flow at Milner Principle is Clear and Unambiguous and Has Been for Decades.**

The State of Idaho's *Memorandum in Support of State of Idaho's Motion for Partial Summary Judgment RE: Milner Zero Minimum Flow* filed on October 16, 2009 excellently and clearly sets forth the historic development and understanding of the zero minimum flow at Milner policy. Amici fully support the State of Idaho's brief and incorporate by reference the arguments and supporting documentation set forth therein. The State of Idaho's legal position on this issue is entirely consistent with Amici's understanding of the zero minimum flow at Milner principle.

While not very clear from the Canal Companies' response brief, the Canal Companies appear to argue that because the zero minimum flow at Milner principle over the past decades has been expressed in different ways, that this creates disputed issues of fact. To use the Canal Companies' words, they asserts that "over time it has used different language and a changing sentiment to express this recognition."¹ Amici could not disagree more.

¹ *Canal Companies' Memorandum in Opposition to State of Idaho's Motion for Summary Judgment RE: Milner Zero Minimum Flow*, at 2 (hereinafter, "Canal Companies' Memorandum").

As set forth in the State of Idaho's brief in support of their motion for summary judgment, there is substantial historical information relative to the zero minimum flow at Milner policy. In the interest of brevity, Amici will not recount them in their entirety here, but is satisfied that the policy was recently succinctly summarized by Judge Melanson: "In brief terms, the State Water Plan sets a 'zero flow' at Milner Dam to allow for full development of the River above Milner."²

"Zero" means "nothing."³ "Flow" means water which "move[s] along in a stream."⁴ Milner Dam is a known geographic feature. Thus, the zero flow at Milner policy means that the State of Idaho may issue water rights and manage the water resource to permit the full development of Snake River water such that the flow of the Snake River may be reduced to zero at the geographic feature known as Milner Dam.⁵ This principle is straightforward and has always been consistent. There has been no changing sentiment. There have been no changing opinions as to its meaning.

Attached to the *Affidavit of Robert L. Harris* filed herewith are additional documents for the special master's consideration demonstrating the consistent understanding and policy of the zero minimum flow at Milner principle. Exhibit B to the *Harris Affidavit* are minutes from the Water District 01 annual meeting held on March 4, 1986. The minutes document the passing of Resolution 19, which is found at Exhibit C to the *Harris Affidavit*. Resolution 19 contains two very important principles. First, that "the upper Snake has always been managed separately from the lower Snake," and second, that Water District 01 supported Senate Bill 1358, which amended Idaho Code § 42-

² *Memorandum in Support of State of Idaho's Motion for Partial Summary Judgment RE: Milner Zero Minimum Flow*, at 10.

³ WEBSTER'S UNIVERSAL COLLEGE DICTIONARY at 915 (2001).

⁴ *Id.* at 308.

⁵ Clearly, however, if all upstream needs are met, and there is excess Snake River water above the needs of upstream users, excess water can and has been spilled past Milner.

203B: “. . . that the Idaho State Legislature be encouraged to enact into law Senate Bill 1358.” Water District 01 clearly supported and approved the language to be contained in Idaho Code § 42-203B, and it now appears that the language is trying to be changed by the Canal Companies.

Additionally, attached as Exhibit D to the *Harris Affidavit* is Resolution 22 from the Committee of Nine, which was signed on March 1, 1988. Resolution 22 states that “a zero flow below Milner has been established in the State Water Plan and by state law[.]” and further states that “the existing water rights structure have dictated the flow at Milner for the past fifty years[.]”⁶

Lastly, attached at Exhibit E is the current Water District 01 Policy regarding zero minimum flow at Milner, found at Resolution 21:

The zero minim flow at Milner, as established by the state water plan be recognized as the Water District 1's position, and that there can be no call for deliveries below Milner by downstream interests.⁷

Regarding this position, Water District 01 further states that “[a]dministration of water rights have been or **will be adjudicated in the SRBA must recognize traditional distribution and water management.**”⁸

Amici agree entirely with Water District 01's resolution that the adjudication of the above subcases must recognize the traditional distribution and water management in their final partial decree. The zero minimum flow at Milner principle is a bedrock principle of Idaho water law and management, and must be included as a general provision in the above subcases. There has been no change in the understanding of this principle, no change in the application of this principle, and no dispute heretofore regarding its meaning. The Canal Companies' argument that there have been

⁶ *Id.* at Exhibit D.

⁷ *Id.* at Exhibit E (¶ B).

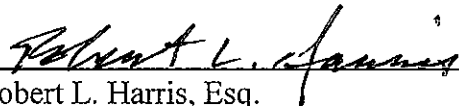
⁸ *Id.* (¶ A) (emphasis added).

changing opinions on this principle and its application is truly out of left field and is simply unfounded. Idaho Code § 42-203B(2) has remained unchanged since its amendment in 1986. The statement of the Milner policy in the State Water Plan likewise has remained unchanged since 1992. There is simply no foundation alleging that the policy is unclear. The Amici are in total agreement with the State of Idaho's position on its motion for summary judgment, and request that this court grant its motion. There is no dispute of fact regarding the zero minimum flow at Milner policy.

III. CONCLUSION.

For the reasons set forth above, the State of Idaho's motion for summary judgment should be granted.

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.

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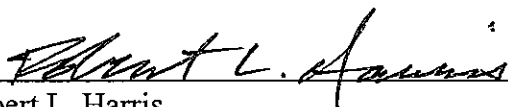
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