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DEPARTMENT OF
WATER RESOURCES

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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

AFFIDAVIT OF ROBERT L. HARRIS

STATE OF IDAHO)
) ss.
County of Bonneville)

I, Robert L. Harris, do solemnly swear (or affirm) that the testimony given in this sworn statement is the truth, the whole truth, and nothing but the truth, that it is made on my personal knowledge, and that I would so testify in open court if called upon to do so.

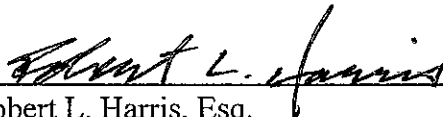
And being so sworn I depose and say:

1. I am an attorney licensed to practice law in the state of Idaho. I am a member of the firm of HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C..

2. Attached hereto are true and correct copies of the following documents referenced in Amici's *Petition to Appear as Amicus Curiae* and accompanying *Amicus Brief*:

- a. Exhibit A: Order Granting Motion to Dismiss Petition for Writ of Mandate, dated January 25, 2008, Jerome County Case No. CV-2007-1093, Judge John Melanson.
- b. Exhibit B: Committee of Nine Minutes from its Annual Meeting held at the Elks Lodge, Idaho Falls, Idaho, March 4, 1986.
- c. Exhibit C: Committee of Nine Resolution 19, dated March 4, 1986.
- d. Exhibit D: Committee of Nine Resolution 22, dated March 1, 1988.
- e. Exhibit E: Current Water District 01 Policy Position regarding zero minimum flow at Milner, found at Resolution 21.

DATED this 12th day of November, 2009.


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

SUBSCRIBED AND SWORN TO before me this 12th day of November, 2009.

(seal)


Notary Public for Idaho
Residing at Idaho Falls, Idaho
My Commission Expires: July 7, 2015

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: cmm@racinelaw.net*
(✓) *Email: rnb@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

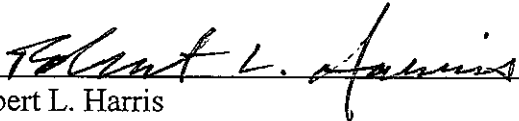
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() *Via Overnight Mail*
() *Facsimile:*
(☒) *Email: David.Gehlert@usdoj.gov*

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*
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() *Via Overnight Mail*


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

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Exhibit A

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JAN 29 2008

DEPARTMENT OF
WATER RESOURCES

SEP 26 2007

Michelle Emerson

[Signature]

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

NORTH SIDE CANAL COMPANY and)
TWIN FALLS CANAL COMPANY,)

Petitioners,)

vs.)

Case No.: CV 2007-1093

David R. Tuthill, Jr., in his official)
Capacity as Director of the Idaho)
Department of Water Resources, and)
THE IDAHO DEPARTMENT OF)
WATER RESOURCES,)

ORDER GRANTING MOTION TO
DISMISS PETITION FOR WRIT OF
MANDATE

Respondents.)

I. PROCEDURAL HISTORY

On September 26, 2007, the North Side Canal Company and Twin Falls Canal Company (collectively as "Petitioners"), through counsel of record Barker Rosholt & Simpson LLP, filed a *Petition for Peremptory Writ of Mandate* ("Petition") petitioning the Court to issue a writ of mandate compelling the Idaho Department of Water Resources ("IDWR" or "Department") and its Director David R. Tuthill Jr. (collectively as "Respondents") to void the Director's September 5, 2007, Order; to close any protest or comment period; and to issue a license to the Petitioners in accordance with Respondents' statutory duties as defined by Idaho Code § 42-219. Also on September 26, 2007, the Petitioners filed an *Application for Alternative Writ of Mandate*.

On the same date, the Honorable John K. Butler filed an *Order of Disqualification*. The case was assigned to the undersigned judge on October 1, 2007, in his capacity as District Judge for the Fifth Judicial District and not in his capacity as Presiding Judge of the Snake River Basin Adjudication.

On October 10, 2007, this Court issued an *Order Denying Petition for Alternative Writ of Mandate*.

On November 6, 2007, the Respondent's filed a *Motion to Dismiss* pursuant to I.R.C.P. 12(b)(1) and (6), together with a *Memorandum and Affidavit in Support*.

On December 14, 2007, the Petitioners filed a *Response to Respondents' Motion to Dismiss*.

A hearing was held on the *Motion to Dismiss* on December 21, 2007. At the conclusion of the hearing, the Court took the matter under advisement. Also on December 21, 2007, the Respondents filed an *Answer*. Following the hearing, the Court received an *Amicus Brief*, together with a supporting affidavit, filed on behalf of Mud Lake Water Users, Independent Water Users, Jefferson Canal Company, Montevieu Canal Company, Producers Canal Company, Fremont-Madison Irrigation District and Eastern Idaho Water Rights Coalition (collectively as "Amici").

II. MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument occurred in this matter on December 21, 2007. The parties did not request the opportunity to submit additional briefing, and the Court does not require any additional briefing on this matter. Therefore, this matter is deemed fully submitted for decision the next business day, or December 24, 2007.

III. FACTS

On March 30, 1977, the Petitioners filed an *Application for Permit* with IDWR to appropriate water from the Snake River for year-round hydropower production at the Milner power plant at a rate of diversion up to 12,000 cfs. Notice was published in accordance with

Idaho Code § 42-201. As no protests were filed a permit was issued to the Petitioners on June 29, 1977 ("Milner Permit").

The deadline for filing proof of beneficial use under the permit was originally June 1, 1982. As a result of delays, the Petitioners sought and received deadline extensions in 1982, 1987, 1990, and 1992. Prior to seeking an extension of the 1987 deadline, the Swan Falls Agreement was executed and the Legislature passed Idaho Code § 42-203B, which among other things authorized IDWR to subordinate hydropower rights to future upstream consumptive uses. As a result, in 1987 when the Petitioners sought the second extension, the Chief of Operations Bureau for IDWR, L. Glen Saxton, notified the Petitioners that the granting of the extension would be conditioned on the Petitioners acceptance of the following subordination provision:

The rights for the use of water acquired under this permit shall be junior and subordinate to all other rights for the use of water, other than hydropower, within the state of Idaho that are initiated later in time than the priority of this permit and shall not give rise to any right or claim against any future rights for the use of water, other than hydropower, within the state of Idaho initiated later in time than the priority of this permit.

Attachment G to *Petition*.

In a letter dated May 8, 1987, counsel for Petitioners raised the following concern with the proposed condition:

At the time of the issuance of the Hells Canyon license, the subordination was to irrigation of lands and other beneficial consumptive uses in the Snake River Water Shed. In your proposed language, non-consumptive uses such as groundwater recharge could take the total flows of the upper Snake available to the Milner Power Plant and put them underground eliminating any generation at the project. The language would also facilitate a non-consumptive diversion of water above the project for fish propagation or some other non-consumptive purpose with the return of the water below the project. Finally, the language would facilitate a diversion of surplus flows of the Snake River to the Bear River Basin for any purpose.

Attachment H to *Petition*. Counsel for Petitioners then proposed the following amendments to the condition:

The rights for use of water acquired under this permit shall be junior and subordinate to all other rights for the consumptive beneficial use of water, other than hydropower and groundwater recharge within the Snake River Basin of the State of Idaho that are initiated later-in-time than the priority of this permit and shall not give rise to any right or claim against any future rights for the

consumptive beneficial use of water, other than hydropower and groundwater recharge within the Snake River Basin of the State of Idaho initiated late-in-time than the priority of this permit.

Id. (emphasis added).

In a letter dated November 18, 1987, the Respondents notified the Petitioners that they would use the amended language proposed by counsel for Petitioners as a condition of approval on the extension request. This is the condition that appears in the Milner Permit.

On October 29, 1993, the Petitioners submitted proof of beneficial use for 5,714.7 cfs, of the 12,000 cfs for which application was originally made. Since that time the Petitioners have relied on the Milner Permit and have been beneficially using water under the permit.

In 2006 and the spring of 2007, the Petitioners verbally requested that the Respondents issue a license for the Milner Permit. On September 5, 2007, in response to the Petitioners' request, the Respondents issued a *Notice of Intent to Issue License*. Attachment P to *Petition*. The *Notice of Intent* set forth the background and status of the Milner Permit and then provided, in relevant part:

Proof of beneficial use having been submitted under the permit, the Department is prepared to issue a license for the water right pursuant to Idaho Code § 42-219. Counsel for Permit Holders have orally requested that the Respondent issue a license for the water right.

The Department received written requests for notice of an opportunity to be heard on the form of the subordination condition to be included in the license for Water Right No. 01-7011 from the Bingham Ground Water District on January 11, 2007; from the Idaho Ground Water Appropriators, Inc. on February 7, 2007, for and on behalf of its ground water districts and other members, represented by the law firm of Racine Olson Nye Budge & Bailey, Chartered; and from the Mud Lake Water Users, Independent Water Users, Jefferson Canal Co., Montevieu Canal Co., and Producer's Canal Co., on April 16, 2007, represented by the law firm of Holden Kidwell, Hahn & Crapo, P.L.L.C.

NOW THEREFORE NOTICE IS HEREBY GIVEN that the Department will accept and consider written Comments from the Permit Holders and other interested persons or entities addressing the form of the subordination condition that should be included on the license for Water Right No. 01-7011. Any Comments submitted should be addressed to Director, Idaho Department of Water Resources, P.O. Box 83720, Boise, Idaho 83720-0098 and received by the Department or post marked on or before October 10, 2007.

In response, the Petitioners initiated this action seeking a writ of mandate to compel the Respondents to issue a license for the Milner Permit in accordance with Idaho Code 42-219 and to prohibit the actions the Respondents were taking as provided by the September 5, 2007, *Notice of Intent to Issue License*. The Petitioners did not submit written comments to IDWR as provided by the *Notice* nor did they request a hearing before the Director.

IV. DISCUSSION

A. Arguments

The Respondents have now moved to dismiss the Petition alleging that the Petitioners have failed to exhaust available administrative remedies. The Respondents argue that Petitioners must wait until the license is issued and then pursue these remedies through the administrative process and the Idaho Administrative Procedures Act, Idaho Code § 67-5201 *et seq.*

The Petitioners argue that there are no more administrative remedies available because Idaho Code § 42-219 requires that the Petitioners perform the ministerial function of issuing the license after proof of beneficial use has been submitted. The Petitioners argue that Respondents are acting outside the scope of their authority by reopening the administrative record to comments after the protest period has closed, the permit issued, diversion works completed, and beneficial use proven. The Petitioners argue that the considerable investment in the diversion (hydropower) project was made in reliance on the issuance of the permit and the conditions ultimately negotiated and agreed upon. By permitting the record to be reopened to comments at this stage allows for protests to cloud an administrative record that was previously free of protests when the *Application for Permit* was approved and the diversion works completed in reliance on said approval.

B. Standards of Review

1. Motion to Dismiss, I.R.C.P 12(b)(1) and (6).

The Respondents' *Motion to Dismiss* is brought pursuant to I.R.C.P. 12(b)(1) "lack of jurisdiction over subject matter" and I.R.C.P. 12(b)(6) "failure to state a claim upon which relief can be granted." The failure to exhaust administrative remedies can implicate subject matter jurisdiction because a "district court does not acquire subject matter jurisdiction until all the administrative remedies have been exhausted." *Owsley v. Idaho Industrial Com'n*, 141 Idaho 129, 135, 106 P.3d 455, 461 (2005) (citing *Fairway Development v. Bannock County*, 119 Idaho 121, 125, 804 P.2d 294, 298 (1990)). The failure to exhaust administrative remedies can also be brought under I.R.C.P. 12(b)(1). *Id.* If a claimant fails to exhaust administrative remedies, then dismissal of the claim is warranted. *White v. Bannock County Comm'rs*, 139 Idaho 396, 401, 80 P.3d 332, 337 (2003) (string citations omitted). On a motion to dismiss, "the Court looks only at the pleadings and all inferences are viewed in favor of the non-moving party." *Id.* at 133, 106 P.2d at 459 (citing *Young v. City of Ketchum*, 137 Idaho 102, 1094, 44 P.3d 1157, 1159 (2002)).

The Idaho Administrative Procedures Act provides that "[a] person is not entitled to judicial review of an agency decision until that person has exhausted all administrative remedies required in this chapter." I.C. § 67-5271(1). However, "[a] preliminary, procedural or intermediate agency action or ruling is immediately reviewable if review of the final agency action would not permit an adequate remedy." I.C. § 67-5271(2). There are two recognized exceptions to the exhaustion requirement: (1) When the interests of justice so require and (2) when an agency has acted outside its authority. *American Falls Reservoir Dist #2 v. IDWR*, 143 Idaho 862, 154 P.3d 433 (March 15, 2007). In *American Falls Reservoir Dist #2*, the Idaho Supreme Court recently held:

Important policy considerations underlie the requirement for exhaustion of administrative procedures, such as providing the opportunity for mitigating or curing errors without judicial intervention, deferring to the administrative body, and the sense of comity for the quasi-judicial functions of the administrative body.

Id. at 872, 154 P.3d at 443 (citing *White v. Bannock County Comm'rs*, 139 Idaho 396, 401-02, 80 P.3d 332, 337-38 (2003)).

2. Writ of Mandate.

Idaho Code § 7-302 provides that a writ of mandate “may be issued . . . to compel the performance of an act which the law especially enjoins as a duty resulting from the office, trust or station” Idaho Code § 7-303 provides that the “writ must be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law.” In *Idaho Falls Redevelopment Agency v. Countryman*, 118 Idaho 43, 794 P.2d 632 (1990), the Idaho Supreme Court stated “[m]andamus will lie if the officer against whom the suit is brought has a ‘clear legal duty to perform the desired act and if the act sought to be compelled is ministerial or executive in nature.’” *Id.* at 44, 794 P.2d 633 (quoting *Utah Power & Light Co. v. Campbell*, 108 Idaho 950, 953, 703 P.2d 714, 717 (1985)). A ministerial act is:

That which is done under the authority of a superior; opposed to *judicial*. That which involves obedience to instructions, but demands no special discretion, judgment or skill. Official’s duty is ‘ministerial’ when it is absolute, certain and imperative, involving merely execution of a specific duty arising from fixed and designated facts.

Ausman v. State, 124 Idaho 839, 842, 864 P.2d 1126, 1129 (1993).

Further, the “[e]xistence of an adequate remedy in the ordinary course of law, whether legal or equitable in nature will prevent issuance of a writ . . . and the party seeking the writ must prove that such remedy exists. . . . [M]andamus is not a writ of right and the allowance or refusal to issue a writ of mandate is discretionary. *Id.* (citations omitted).

3. Discretion of Court.

A court acts within its discretion when it: 1) correctly perceives the issue as one of discretion; 2) acts within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) reaches its decision by exercise of reason. *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993 1000 (1991).

C. Analysis

1. The Petitioners have failed to exhaust all available administrative remedies.

The Court holds that the Petitioners may not use a writ of mandate as a substitute for following the grievance process set forth in Idaho Code § 42-219(8) and Idaho Code § 42-1701A(3). Idaho Code §§ 42-219(8) and 42-1701A(3) set forth the administrative procedure for contesting IDWR's action with respect to issuing a license or failing to issue a license based on a permit. Idaho Code § 42-219(8) states:

In the event that the department shall find applicant has not fully complied with the law and the conditions of the permit, it may issue a license for a portion of the use which is in accordance with the permit, may refuse issuance of the license and void the permit. Notice of such action shall be forwarded to the permit holder by certified mail.

I.C. § 42-219(8). The statute then provides: "The applicant may contest such action by the department pursuant to section 42-1701A." *Id.*

Idaho Code § 42-1701A(3) provides:

Unless the right to a hearing before the director or the water resources board is otherwise provided by statute, any person aggrieved by any action of the director, including any decision, determination, order or other action, including action upon any application for a permit, license, certificate, approval, registration, or similar form of permission required by law to be issued by the director, who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action. The person shall file with the director within fifteen (15) days after receipt of written notice . . . a written petition stating the grounds for contesting the action by the director and requesting a hearing.

I.C. § 42-1701A(3). Idaho Code § 42-1701A(4) then provides:

Any person who is aggrieved by a final decision or order of the director is enabled to judicial review. The judicial review shall be had in accordance with the provisions and standards set forth in Chapter 52, title 67, Idaho Code.

The Petitioners filed proof of beneficial use on October 29, 1993. On July 27, 2006, Director Dreher indicated in a letter that "the issuance of a license for the water right is pending." Petitioners then verbally requested that Respondents issue a license in 2006 and again in 2007. In response Director Tuthill, who succeeded Director Dreher issued the *Notice of Intent to Issue*

License. The *Notice* referred to the communications received from other water users regarding the subordination provision and stated that the Department would receive comments on the issuance of the license on or before October 10, 2007. The *Notice* did not reopen a protest period nor did it give those submitting comments party status. The Petitioners did not respond to the *Notice*, nor otherwise object to the Director's reopening of the record to comments, nor did they ask for a hearing before the Director on the issue. The Petitioners also could have waited until the license was issued and then request a hearing. The Petitioners argue that continuing with the administrative process will result in the administrative record becoming improperly clouded with additional facts after the protest period has already closed resulting in prejudice and ultimately precluding any adequate remedy. The Petitioners also argue that after the beneficial use examination for the permit the issuance of the license is ministerial and because IDWR is acting outside the scope of its authority all administrative remedies have been exhausted. This Court disagrees.

The Petitioners had the opportunity to raise with the Director the issue of receiving comments by submitting their own comment or by specifically requesting a hearing on the alleged irregularities in the process in accordance with Idaho Code § 42-1701A(3). The Petitioners also still have the opportunity to raise and be heard on the issue once the license is issued. Ultimately, if the Director issues the license according to the subordination condition now included in the permit, the Petitioners have no grievance. If the Director modifies the condition the petitioners can raise the issue with Director and ultimately seek judicial review in accordance with Idaho Code § 42-1701A(4). Because the issue of whether the Director can appropriately consider additional comments after the beneficial use examination presents a threshold question of law a reviewing Court would be not be bound by the Director's determination on this issue as would be the case with the Director's factual determinations. Were it ultimately determined that the Director could not appropriately consider the comments there would be no prejudice to the Petitioners as the comments would be excluded from consideration. Accordingly, the Court finds no prejudice to the petitioners by continuing with the administrative process and exhausting their administrative remedies.

2. The issuance of the license following the beneficial use examination is not a ministerial duty.

The Petitioners raise the argument that following the proof of beneficial use examination the issuance of the license is simply a ministerial act. Idaho Code § 42-219(1) requires an intermediate step prior to the issuance of the license. After all evidence is filed in relation to proof of beneficial use, IDWR is then charged with “carefully examining the same, *and if the department is satisfied that the law has been fully complied with . . .* the department shall issue . . . a license confirming such use.” I.C. § 42-219(1)(emphasis added). The statute then provides that if IDWR finds that the applicant has not complied with the law or the conditions of the permit “it *may* issue a license for that portion of the use which is in accordance with the permit or *may* refuse issuance of the license and void the permit.” I.C. § 42-219(8) (emphasis added). Because IDWR has some level of “discretion” in conjunction with making the compliance determination prior to issuing the license the duty of issuing the license is not a simple ministerial act. At this stage, IDWR has not made such a determination with respect to the form of the subordination language that should be included in the license despite the November 18, 1987, agreement between the Petitioner and IDWR. Simply because there is a prior agreement in place with respect to the form of the subordination remark does not make the duty to issue the license ministerial. If a determination is made contrary to the terms of the agreement then the issue of the effect and enforceability of the agreement can still be raised with the Director and through judicial review if necessary.

In *Cantlin v. Carter*, 88 Idaho 179, 397 P.2d 761 (1964), the state engineer approved the applicant’s permit application. Eighteen months later the applicant completed the diversion works and submitted proof of completion. The applicant then sought to file proof of application of water to beneficial use. In the meantime, the state engineer received protests regarding the issuance of the license for the water right. As a result, the state engineer issued an order denying the proof submitted by the applicant and cancelled the permit on the basis that there was no available water for appropriation. *Id.* at 182, 397 P.2d at 764. The action of the state engineer was upheld by the Idaho Supreme Court. *Id.* at 187, 397 P.2d at 769.

A similar issue also arose in the context of the SRBA. In *Memorandum Decision and Order on Challenge; Order on State of Idaho's Motion to Dismiss Claimant's Notice of Challenge (Subcase 36-08099, River Grove Farms) (Jan 11, 2000)(River Grove Farms)*, an applicant filed a permit application for a hydropower right in 1982. The permit application was approved in 1983. The permit did not include a subordination remark for hydropower.

Construction of the diversion works, the application of the water to beneficial use and the beneficial use examination were completed in 1985. The applicant received a letter from IDWR indicating that the licensing examination had been completed but that it would be awhile before the license was issued because of the pending Swan Falls dispute. Approximately six years elapsed before the license was ultimately issued in 1992. In the meantime the Idaho legislature enacted Idaho Code § 42-203B (6) authorizing IDWR to subordinate hydropower rights to future upstream consumptive uses. When the license was issued it included a subordination remark. The applicant failed to contest the inclusion of the remark after the license was issued but objected to the remark in the SRBA proceedings. One of the many arguments raised was that the water right vested at the time the water was applied to beneficial use and not upon the issuance of the license. Therefore I.C. § 42-203B (6) could not be retroactively applied to diminish the scope of the vested hydropower right. In essence the issuance of the license is more of a formality.

The Hon. R. Barry Wood, then presiding judge of the SRBA, disagreed. Judge Wood held that the water right vested at the time the license was issued. The Court relied on the holding in *Cantlin v. Carter*, the statutory scheme itself and various other cases holding that a water right is inchoate until the license is issued.¹ Judge Wood ruled:

River Grove's assertion that a water right vests upon application to beneficial use, and not upon the issuance of the license by IDWR, may well be a correct statement of the law as to water rights made under the constitutional method (versus the permit method) and made prior to the 1971 statutory amendments making the permit process the exclusive method of appropriation. To the extent that the cases cited by River Grove correctly state the law as it existed prior to 1971, this aspect of the cases was legally altered by the legislature upon enactment of the aforementioned statutory amendments. Furthermore, the cases cited by River Grove are limited in that water right was acquired solely under the permit system . . . [I]t is clear that the legislature intended the issuance of the license to mark the point at which a water right becomes vested.

¹ The following cases were cited for the proposition that a right to use the waters of this state remains inchoate until a license is actually issued by IDWR. *Hardy v. Higginson*, 123 Idaho 485 (1993)(Director can properly impose conditions on request to amend water permit, because permittee only has an inchoate right, not a vested right); *Hidden Springs Trout Ranch v. Allred*, 102 Idaho 623 (1981)(Director could consider the "local public interest," even though authority to do so was not granted by legislature until after applicant had applied for permit, because vesting of applicant's right was "contingent upon future statutory adherence and issuance of a license"); *Big Wood Canal Co. v. Chapman*, 45 Idaho 380 (1927)(statutory amendments, which increased the time allowable to submit proof of application to beneficial use, were not unconstitutionally retroactive, because permittee has an inchoate right, not a complete appropriation).

...

In 1971 the legislature amended I.C. §§ 42-103 and 42-201 to the effect that surface water rights could thereafter only be acquired by following the application, permit, and license procedures set forth in Title 42 of the Idaho Code. Chapter 2 of Title 42 sets forth the steps that must be completed before a water right comes into existence. Briefly, one who wishes to appropriate the unappropriated waters of this state must first make application to IDWR for a permit, and include certain information such as the source, point of diversion, purpose of use, etc. I.C. § 42-202. IDWR then publishes notice of the proposed diversion, inviting interested parties to protest the application. I.C. § 42-203A(1)-(4). IDWR then considers the application, protest or not, and makes various findings as to whether (a) the proposed diversion will reduce the quantity of water for existing water rights, (b) the water supply is sufficient for the proposed use, (c) the application is made in good faith, (d) the applicant has sufficient financial resources, (e) the proposal will not conflict with the local public interest, and (f) the proposal is not contrary to conservation of water resources. I.C. § 42-203A(5). Depending upon these findings, IDWR can approve, partially approve, approve upon conditions, or reject the application. *Id.* Upon approval, the applicant has a specified period of time to construct the proposed diversion works. I.C. § 42-204. Once the works are completed, the applicant must file proof of completion with IDWR, and IDWR will conduct a field examination thereof. I.C. § 42-217. IDWR is to then carefully examine the evidence proving beneficial use, and if satisfied, issues a license confirming the water right. I.C. § 42-219. If IDWR finds that the applicant has not fully complied with the law and the conditions of the permit, **IDWR may refuse to issue the license.** I.C. § 42-219(6). Once the license is issued, I.C. § 42-220 states that “[s]uch license shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein, and shall be prima facie evidence as to such right . . .” It is clear from this statutory scheme that it is the intent of the legislature that all of the steps -- **including issuance of the license** -- be completed before the water right vests, and until such time the right to the use of water remains an inchoate right. Because I.C. § 42-219(6) gives IDWR the responsibility to find the facts as to whether the permit conditions were complied with, it is untenable to assert that a water right may vest prior to this step in the permit and licensing process.

River Grove Farms at 24-25. Although the decision was never appealed from, this Court finds it to be on point and persuasive.

This Court holds that following the beneficial use examination the issuance of the license is not a ministerial act. The Department must first make a determination whether the use complies with the law and the terms of the permit. While the Court does have some concern with the length of time it takes for IDWR to complete its final determination and issue the license the statute does not provide for a time limit.

3. **Mandamus is not an appropriate remedy.**

Having determined that the act of issuing the license is not a ministerial act and having determined that the Petitioner's still have administrative remedies available in the ordinary course of law, this Court in the exercise of its discretion concludes that mandamus is not an appropriate remedy.

D. Conclusion.

The Court holds that Petitioners have failed to exhaust their available administrative remedies. For the reasons previously discussed the Petitioners are not giving up any rights by waiting until IDWR issues a license and then if necessary requesting a hearing before the Director and seeking judicial review. Aside from the issue of clouding the record with additional facts, which this Court addressed, the Petitioner's concern is further delay in the issuance of the license. Counsel for the Respondents stated that the license would have been issued by now but for this intervening action. Ultimately, depending on the form of the subordination remark included in the license further proceedings may not be necessary. Recent experience has shown that by issuing a writ at this stage significant delay would result while the parties litigated the propriety of the writ. For the above-stated reasons the Respondent's *Motion to Dismiss* is granted.

V. ORDER ON AMICUS PARTICIPATION

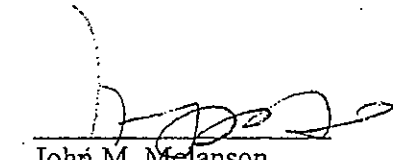
The decision on whether to limit participation to amicus curiae is discretionary with the trial court. *State v. United States (In Re SRBA Case No. 39576, Minidoka National Wildlife Refuge)*, 134 Idaho 106, 111, 996 P.2d 806 (2000); 4 Am. Jur. 2d *Amicus Curiae* § 8. The principle role of amicus curiae 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.

IT IS SO ORDERED

DATED: January 25, 2008


John M. Melanson
District Judge

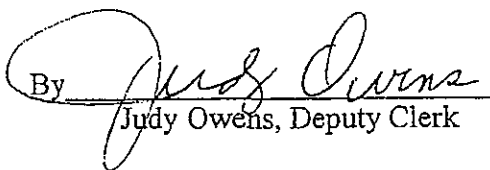
CERTIFICATE OF MAILING

I, the undersigned, hereby certify that on the 28 day of January, 2008 a true and correct copy of the Order of Assignment was faxed and mailed, postage paid to the following persons.

Travis Lee Thompson
Attorney at Law
P. O. Box 485
Twin Falls, ID 83303-0485
(mailed)

Phillip Rassier
Idaho Attorney General
P. O. Box 83720
Boise, ID 83720-0098
(mailed)

By


Judy Owens, Deputy Clerk

CERTIFICATE OF MAILING/DELIVERY

Exhibit B

COMMITTEE OF NINE MINUTES
ANNUAL MEETING

Elks Lodge, Idaho Falls, Idaho
March 4, 1986

The annual meeting of Water District 1 was preceeded by a legislative report by Sherl Chapman. Some of the legislation of special interest to upper Snake water users included:

HB 369 which would, among other things, provide that using stored water on more land does not represent an expansion of the water right.

HB 433 which would reduce liability for canal board members.

SB 1260 would confirm the tax exempt status of water districts.

SB 1358 would clarify that trust water only exists below Milner.

SB 1394 would create a State Wild and Scenic River System.

Elmer McDaniels then presented the Education Committee Report. Elmer said that during 1985 the Otto Otter Program was shown to 10,500 third graders. Because of the liability benefits of this program the insurance industry contributed \$2,000 for the program. Elmer said that last year the IWUA held two law seminars and several workshops.

At 9:50 a.m. Ronald Carlson called the meeting to order and called for nominations of a temporary chairman. Bob Reichert was nominated and elected temporary chairman. Reed Murdock was then nominated to be temporary secretary. Reed was elected by acclamation.

Reed Murdock then read the minutes from the 1985 annual meeting. The minutes were approved as read.

At 10:12 a.m. the chairman designated the meeting places for the various areas and adjourned the meeting for caucus. The result of the caucus votes is attached. The committees on Credentials and Order of Business were excused and Lyle Swank read the results of the roll call taken at the door. Ronny Ard reported for the Committee on Order of Business. After the report for the Committee on Credentials was given, it was moved and seconded that both reports be accepted for the annual meeting. The motion carried.

Next it was moved and seconded that those nominated to serve on the Committee of Nine should be elected by unanimous vote. The motion passed by acclamation.

Next on the agenda, Max Van Den Berg introduced Assistant Regional Director John Keyes. John announced that Dale Duval has been selected to replace Broadbent as the Commissioner of Reclamation. John next discussed the status of the Jackson Dam replacement. He indicated that everything is on schedule and if that continues, Jackson will be ready to start filling in 1988. John indicated that the BOR has appointed two people to review the reserved water rights claim of the Shoshone-Bannock Indians. John said the Bureau of will support rebuilding Ieton Dam if they have adequate local support. They would also support building Lynn Crandall if there is adequate local support.

The time was then turned over to Earl Corliss who reported on the water supply outlook for 1986 and reservoir operation. Ron Golus then reported on the upper Snake storage evaluation study being conducted by the BOR. The meeting was adjourned for lunch at 11:30 a.m.

The meeting was reconvened at 1:00 p.m. Chairman Robert Reichert presented the report of the Committee of Nine. Bob spoke about the benefits that water users have received from the water bank and the 2.44 million dollars in direct return to spaceholders since the bank was established in 1978. Bob emphasized the importance of having water user participation in the negotiations of federal and Indian reserved water rights.

John Rosholt then reported that the Indians had recently filed the irrigation portion of their reserved water right claim. John said the Indians were claiming water for 198,000 acres. He explained that the review of this claim was going to require hiring technical experts and that meant the water users were going to have to put up some significant sums of money to get the necessary expertise.

Dave Shaw, of the IDWR, said that the necessary legislation to provide for general adjudication has been worked out and has been introduced in the House. Dave reported that the rules and regs for processing water rights have been prepared and will be ready for distribution shortly after the legislature decides on how far upstream trust water must be considered.

Next on the agenda was the report of the watermaster. Ron Carlson warned that the settlement of the reserved water rights issue could embroil water users in protracted litigation that could sap their resources for many years. He cautioned that if this happens water users could support half of the lawyers in the state to protect their individual interests unless they can stick together and agree upon common representation. Ron said that he sees the unity provided through the Committee of Nine and their representation of collective interest of water users during the negotiations process as an invaluable water user asset.

Ron then read the resolution changes for 1986. All resolutions passed by acclamation. All special resolutions passed. These resolutions included: support of the changes for the adjudication statutes, opposition to the requirement of an economic impact statement before state agencies could adopt rules and regulations, endorsement of the Committee of Nine to act on behalf of the water users of Water District 1 in the Indian negotiations, opposition to the establishment of a Federal Wild and Scenic River designation for the Henrys Fork, support for legislation limiting "trust water" to waters arising below Milner, and a resolution supporting the Committee of Nine's allocation of \$75,000 to be used for acquiring technical experts.

Dale Rockwood moved that Ron Carlson be elected watermaster for the coming year. The motion was seconded and passed by acclamation.

Finally plaques for their services were presented to Bob Reichert and Reed Murdock.

The meeting was adjourned at 2:00 p.m.

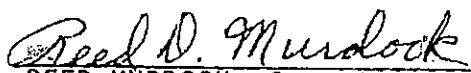

REED MURDOCK, Secretary

Exhibit C

RESOLUTION 19

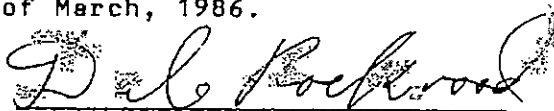
WHEREAS, it has been agreed by all parties involved in the Swan Falls negotiations that it was never their intent to force water arising above Milner Dam to be released to fill downstream water rights; and

WHEREAS, the upper Snake has always been managed separately from the lower Snake; and,

WHEREAS, the trust water provisions of the Swan Falls settlement would adversely affect both natural flow and storage supplies of existing users and could actually reduce the amount of water available for hydropower generation below Milner Dam during the summer months.

NOW, THEREFORE, BE IT RESOLVED by the Committee of Nine and the water users of Water District 1 meeting in regular annual session the 4th day of March, 1986, that the Idaho State Legislature be encouraged to enact into law Senate Bill 1358.

Dated this 4th day of March, 1986.


CHAIRMAN, Committee of Nine

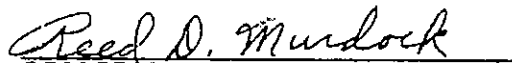

SECRETARY, Committee of Nine

Exhibit D

RESOLUTION 22

MILNER ENVIRONMENTAL
IMPACT STATEMENT

WHEREAS, the Federal Energy Regulatory Commission (FERC) recently issued a Draft Environmental Impact Statement for the Milner Power Project which suggest winter instream flows and kayaker flows as a precondition of the power license to build the project; and,

WHEREAS, a zero flow below Milner has been established in the State Water Plan and by state law; and,

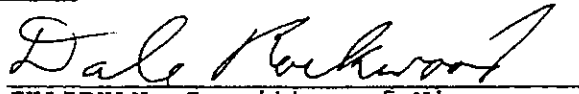
WHEREAS, FERC has no authority to either issue water rights or set instream flows in the State of Idaho; and,

WHEREAS, the existing water rights structure have dictated the flow at Milner for the past fifty years; and,

WHEREAS, the recommendations in the Draft Environmental Impact Statement cannot be met by the applicants, the Twin Falls and North Side Canal companies under state law;

NOW, THEREFORE, BE IT RESOLVED by the water users of Water District 1, meeting this First day of March, 1988, that the Federal Energy Regulatory Commissioner be directed to disregard the recommendations of the Draft Environmental Impact Statement in issuing the license to construct the proposed Milner Project.

Adopted this 1st day of March, 1988.


CHAIRMAN, Committee of Nine

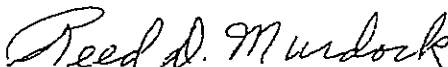

SECRETARY, Committee of Nine

Exhibit E

BE IT RESOLVED that the following Rental Pool Procedures be approved by the Idaho Water Resource Board as follows:

See the Rental Pool Section.

21. WATER DISTRICT 1 POLICY POSITION

WHEREAS, there are currently many issues that potentially can change water distribution patterns and water supplies in Idaho; and

WHEREAS, water users are now being asked to fund experts and attorneys in preparation for negotiations and/or litigation; and

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 Snake River irrigators, and establish the following as the guiding principles in any and all negotiations and litigation:

- A. Administration of water rights that have been or will be adjudicated in the SRBA must recognize traditional distribution and water management.
- 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 can be no call for deliveries below Milner by downstream interests.
- C. Releases past Milner must be consistent with state law and limited to annual arrangements approved by the Committee of Nine and IWRB.
- D. Any changes in upstream water rights that would allow water to be transferred below Milner shall be by Committee of Nine agreement only or will be vigorously opposed.

NOW, THEREFORE, BE IT RESOLVED by the water users of Water District 1, that the Committee of Nine is authorized to allocate sufficient funds to protect and defend these principles in negotiations with the federal government and Indian tribes and in challenging and defending claims in the Snake River Basin Adjudication or other necessary litigation.

22. ADMINISTRATION

WHEREAS, Idaho is a priority doctrine state where historically water has been developed and used in the various areas of the state; and

WHEREAS, the state has established administrative units in the form of water districts to distribute available water supplies; and