

DEPARTMENT OF
WATER RESOURCES

COPY

The Recommendation provides, in relevant part:

Regardless of whether the Foster Decree is considered a private adjudication or not, the Judge ordered the State Engineer to determine whether the water flowing at the Minidoka and Milner Dams is storage water or natural flow. The measurement of natural flow was important because he found that senior right holders downstream from Milner Dam are entitled to the **natural flow** measured at Milner Dam "unaffected by the diversions or acts of the parties thereto...or by the release of stored water."

* * *

Judge Walters likely knew he was creating an anomaly in Idaho water law – granting a surface water user a right to return flows which would otherwise be lost when the water left its control. But his solution was necessary because then it would have been "inequitable" for senior water right holders below Milner Dam to claim their 1900 priority against holders of junior storage water rights above Milner Dam – the Minidoka Project.

Recommendation at 7–8.

The following changes should be made to the Recommendation in order to correct what appear to be clerical errors:

Regardless of whether the Foster Decree is considered a private adjudication or not, the Judge ordered the State Engineer to determine whether the water flowing at the Minidoka and Milner Dams is storage water or natural flow. The measurement of natural flow was important because he found that senior right holders downstream from Milner Minidoka Dam were entitled to the **natural flow** measured at Milner Dam "unaffected by the diversions or acts of the parties thereto...or by the release of stored water."

...

Judge Walters likely knew he was creating an anomaly in Idaho water law – granting a surface water user a right to return flows which would otherwise be lost when the water left its control. But his solution was necessary because then it would have been "inequitable" for senior water right holders below Milner Minidoka Dam to claim their 1900 priority against holders of junior storage water rights above Milner Minidoka Dam – the Minidoka Project.

The language as currently written in the Recommendation could be construed as going beyond the issues raised in this subcase group. The Foster Decree decreed water rights to certain

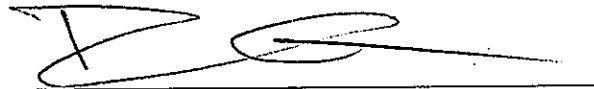
diversions at and above Milner Dam; it did not decree any water rights for use below Milner Dam. In addition, this subcase group similarly involved only diversions at and above Milner Dam. Because the current language erroneously suggests that the trial in the case involved a determination of the rights "downstream from Milner Dam," the Recommendation should be amended accordingly.

The Court should adopt the State's proposed changes so there is no confusion regarding the scope and application of the Court's Recommendation.

RESPECTFULLY SUBMITTED 5th day of April 2010.

LAWRENCE G. WASDEN
Attorney General

CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division

A handwritten signature in black ink, appearing to read 'D. Stanish', written over a horizontal line.

DAVID I. STANISH
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of April 2010, I caused to be served a true and correct copy of the **MOTION TO ALTER OR AMEND SPECIAL MASTER REPORT AND PARTIAL RECOMMENDATION** to the following parties by the indicated methods:

1. Original to:

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253 Third Avenue North
P.O. Box 2707
Twin Falls, Idaho 83303-2707

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POCATELLO, ID 83201

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Represented by:
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WHITE & JANKOWSKI LLP
511 16TH ST STE 500
DENVER, CO 80202

- ☒ U.S. Mail
- ☐ Hand Delivery
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MADISON GROUND WATER
DISTRICT
MAGIC VALLEY GROUND WATER
DIST
NORTH SNAKE GROUND WATER
DIST

Represented by:
RANDALL C BUDGE
201 E CENTER, STE A2
PO BOX 1391
POCATELLO, ID 83204-1391

INDEPENDENT WATER USERS OF
JEFFERSON IRRIGATION DISTRICT
MONTEVIEW CANAL CO
MUD LAKE WATER USERS INC
PRODUCERS IRRIGATION CO

- ☒ U.S. Mail
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- ☐ Overnight Mail

Represented by:
ROBERT L HARRIS
1000 RIVERWALK DR, STE 200
PO BOX 50130
IDAHO FALLS, ID 83405

A & B IRRIGATION DISTRICT
BURLEY IRRIGATION DIST
BURLEY IRRIGATION DISTRICT
FALLS IRRIGATION DISTRICT

- ☒ U.S. Mail
- ☐ Hand Delivery
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Represented by:
ROGER D LING
615 H ST
PO BOX 396
RUPERT, ID 83350-0396

TWIN FALLS CANAL COMPANY
NORTHSIDE CANAL CO LTD

Represented by:
TRAVIS L THOMPSON
113 MAIN AVE W, STE 303
PO BOX 485
TWIN FALLS, ID 83303-0485

- ☒ U.S. Mail
- ☐ Hand Delivery
- ☐ Certified Mail
- ☐ Overnight Mail
- ☐ Facsimile:

CITY OF POCA TELLO

Represented by:
SARAH A KLAHN
WHITE & JANKOWSKI LLP
KIT TREDGE BUILDING
511 16TH ST STE 500
DENVER, CO 80202

- ☒ U.S. Mail
☐ Hand Delivery
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IDAHO POWER COMPANY

Represented by:
JAMES S LOCHHEAD
BROWNSTEIN HYATT ET AL
410 17TH STREET, SUITE 2200
DENVER, CO 80202

- ☒ U.S. Mail
☐ Hand Delivery
☐ Certified Mail
☐ Overnight Mail

IDAHO POWER COMPANY

Represented by:
JOHN K SIMPSON
1010 W JEFFERSON, STE 102
PO BOX 2139
BOISE, ID 83701-2139

- ☒ U.S. Mail
☐ Hand Delivery
☐ Certified Mail
☐ Overnight Mail
☐ Facsimile:

MINIDOKA IRRIGATION DISTRICT

Represented by:
W KENT FLETCHER
1200 OVERLAND AVE
PO BOX 248
BURLEY, ID 83318

- ☒ U.S. Mail
☐ Hand Delivery
☐ Certified Mail
☐ Overnight Mail

UNITED STATES OF AMERICA

Represented by:
US DEPARTMENT OF JUSTICE
ENVIRONMENT & NATL' RESOURCES
550 WEST FORT STREET, MSC 033
BOISE, ID 83724

- ☒ U.S. Mail
☐ Hand Delivery
☐ Certified Mail
☐ Overnight Mail
☒ Email: David.Gehlert@usdoj.gov

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BOISE, ID 83720-0098

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DAVID I. STANISH
Deputy Attorney General