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DEC 08 2015

DEPARTMENT OF
WATER RESOURCES

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Attorneys for Boise Project Board of Control

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF PRELIMINARY	)	
ORDER ISSUING LICENSE NO. 63-09206	)	PETITION FOR RECONSIDERATION
	)	AND MEMORANDUM IN SUPPORT
	)	
	)	
	)	

COMES NOW, the Boise Project Board of Control (Boise Project), by and through its counsel of record, Barker Rosholt & Simpson, LLP, and hereby moves the Director, pursuant to IDAPA 37.01.01.711 and 720, and for the reasons set forth below, to reconsider the Preliminary Order issued on November 24, 2015 licensing water right no. 63-09206.

I. INTRODUCTION AND REQUEST FOR RELIEF

The Boise Project filed an application for the Mora Drop power plant seeking a right for 900 cfs; the Proof Notice requested 700 cfs; and the diversion records demonstrated use of 597 cfs at the hydropower plant in 2014. Nevertheless, the order issuing the license for water right no. 63-09206 provides a diversion rate of only 450 cfs.¹

¹ The License is described in the attachment as a Preliminary Order. IDAPA 04.11.01.730.01 provides that a Preliminary Order is one issued by a person other than the agency head. IDAPA 37.01.01.730.01 refers to preliminary orders issued by someone other than the agency head. Yet the license is issued under the signature line of the Director (with another person's signature attached). Since the documents attached to the license describe it as a preliminary order and prescribe the timelines for motions to reconsider and Exceptions, we treat it as a preliminary order despite the appearance of the Director's name at the bottom of the license.

ORIGINAL

The Mora Drop hydropower project is located on the Mora Canal. It is a non-consumptive, fully subordinated right supplied by water that is diverted from the Boise River under the irrigation rights of the Boise Project and its member Irrigation Districts which is then conveyed through the Mora Canal to the irrigation end users. The license properly conditions the right to using water in the canal at the Mora Drop which is otherwise diverted for irrigation. This request does not seek to overturn that condition. However, the limitation on the flow rate in the order issuing the license is not supported by the facts and is not necessary to properly administer the right. Such a limit would harm the Boise Project member districts' water users. It would benefit no one. Therefore, the Boise Project requests that the license be issued for 597 cfs rather than 450 cfs.

II. STANDARD OF REVIEW

The action of an agency will be upheld unless it is shown that the order was issued “(a) in violation of constitutional or statutory provisions; (b) in excess of statutory authority of the agency; (c) [was] made upon unlawful procedure; (d) [is] not supported by substantial evidence on the record as a whole; or (e) [is] arbitrary, capricious, or an abuse discretion.” *Laughy v. DOT*, 149 Idaho 867, 896-870, 243 P.3d 1055, 1057-1058 (2010). A party challenging the agency action must also demonstrate “prejudice to a substantial right” of that party in order to prevail. *Id.* An agency’s decision is arbitrary and capricious when the agency relied on facts that the legislature or Congress did not intend for the agency to consider, if it entirely failed to consider an important aspect of the problem or offers an explanation that runs counter to the evidence before the agency. *See e.g. Northern Plains Resource Council, Inc. v. Surface Transportation Board*, 668 F.3d 1067, 1074-75 (9th Cir 2012).

III. FACTUAL BACKGROUND

The Boise Project Board of Control initially applied for a water right to develop the Mora Drop hydroelectric project with a diversion rate of 900 cfs, based on the projected flows through the power plant at the location. *See* Exhibit 1 attached hereto, approved application for water right no. 63-9206. The Mora Drop project is located at a place on the Mora Canal where the flow divides either into the head of the Waldvogel Canal or it continues down a chute historically known as the Mora Drop. The water in the canal is there based solely on the water available under the existing irrigation rights. Under this right the Boise Project has no ability to divert water from the Boise River exclusively for use in the power plant. Thus, water is only available during the irrigation season when there is demand for the water by the irrigation users.

FERC granted an Exemption to build a 1.9 MW hydroelectric plant at this location, the Mora Drop Project, #3403, in 1980. The Department granted a permit in 1979. *See* Ex. 1. The Department graciously provided extensions of time to submit proof of beneficial use. The last of these extensions was granted in 2005 and required submittal of the Proof of Beneficial Use notice by 2010. Meanwhile the Mora Drop hydroelectric plant was finally built and came on line in the fall of 2006, towards the end of the irrigation season.

Sensitive to the additional time that the Department had granted, the Boise Project Board of Control submitted its Proof of Beneficial Use form on January 9, 2007, stating that the diversion rate of the project as completed was 700 cfs. *See* Exhibit 2 attached hereto, Proof of Beneficial Use form for water right no. 63-9206. This flow rate was based on what the Boise Project understood the capacity of the canal system at that location to be.

From 2007 to 2015 nothing happened at the Department with this Permit or the Proof notice and the Boise Project regularly generated with all the water available at the drop and well

within the amount authorized under the permit. Then, on August 13, 2015 the Department requested the opportunity to attend a scheduled FERC inspection of the Mora Drop Project to also inspect the property for “confirmation of Beneficial Use.” *See* Ex. 3, Edl email to Barker. The Department did attend the inspection on August 24, 2015, and requested of the Boise Project and the hydro project operator a significant amount of additional information relative to the project and its generation. This request was followed by an email request for information dated September 11, 2015. *See* Ex. 5, Edl email to Barker.

On September 30, 2015, the Boise Project responded with a letter providing the requested information. *See* Exhibit 4, Barker Sept. 30, 2015 letter and Exhibits E and F thereto. Exhibit E to the responsive letter included various flows at the Mora Drop Hydropower project, identified on the chart as “Mora 2.” *Id.* Exhibit E provided calculated flows for the highest generation days during the years 2007 through 2014, as generation is a result of flow and head and the head remains relatively constant at the Drop. Higher generation suggests higher flow. The September and October 2006 records represented less than full capacity of the canal and the power plant because the irrigation season was winding down and during this period the project was generating “in the pre-operational phase” or, rather, not at full capacity. *Id.*

In the September 11, 2015, email from Ms. Edl she requested development data from the time the project came on-line and the end of the development period in January 2007, implying that only that data during the period when the project was operational prior to submission of the Proof of Beneficial Use submission would be considered in licensing water right no. 63-9206. *See* Ex. 5, Edl Sept. 11, 2015 email. The Boise Project attached the information requested by the Department representing the measured flow at the Mora 2 gauge for the months of September and October, 2006, the first year of operation of the plant prior to submission of the Proof of

Beneficial Use report in 2007. *Id.*, Ex F. However the Boise Project made it clear that it wished the Department to consider the entire period of record prior to the Department's decision to conduct its beneficial use exam.

Exhibit E demonstrates that the Mora Drop hydropower project put 597 cfs to beneficial use on July 7, 2014, before the Department conducted its beneficial use exam. *See* Exhibit 4, Att. E. Exhibit F indicated that the highest flow put to use by the Mora Drop Hydropower project in the year 2006 was 450 cfs on September 1, 2006, the first month the project was operational. *Id.* On November 25, 2015, the Director issued the preliminary water right license for the Mora Drop Hydropower project for a diversion rate of only 450 cfs, despite the fact that the plant put to use 597 cfs on July 7, 2014. The license does not explain the basis for this flow rate decision.

IV. ARGUMENT

The use of water for production of hydropower at the Mora project is both in-canal and non-consumptive. It varies from year to year depending on the amount of water being conveyed through the Mora canal for the primary purpose of irrigation. Restricting the ability to divert water to produce power at the project in high water years serves no benefit and is prejudicial to the Boise Project's substantial right to produce power with the water when it is available. The revenues from the Mora Drop Hydropower project are used to pay for the cost of building the power plant and to offset assessment costs to patrons of the Boise Project's participating member Irrigation Districts. Preventing the Mora Drop Hydropower project from maximizing the use of water in high water years to produce power prejudices the patrons of the member irrigation district's patrons by increasing the assessment costs to those patrons.

It appears that the Department took into consideration the flows that were used by the Mora Drop Hydropower project only prior to the time that Proof of Beneficial Use was

submitted. If so this approach is not supported by Idaho law. I.C. § 42-217 (Proof of application to beneficial use) requires that after the Department has received written proof of beneficial use, pursuant to I.C. § 42-221, “the department shall examine or cause to be examined....2. The capacities of the ditches or canals or other means by which such water is conducted to such place of use, and the quantity of water which has been beneficially applied for irrigation or other purposes.” Nothing in this section states that the investigation is limited to only that time period before the Proof of Beneficial Use is sent to the Department. Rather, the Department shall make an examination and confirm “the quantity of water which has been beneficially applied for irrigation or other uses.” *Id.* The statutory language is clear and unambiguous. The Department is to determine how much water “has been” put to use when it conducts its examination. Here, the Department did not conduct any examination of the Mora Drop hydropower project until August 24, 2015. *See* Ex. 3. This delay in examination from January 2007 to August 2015 was not caused by anything that the Boise Project did. As of the date of examination, the amount demonstrated to have been beneficially used at the Mora Drop hydropower project was 597 cfs. *See* Ex. 4, Att. E.

The Boise Project’s September 30, 2015, letter also indicated that the use of water in September and October 2006 was “pre-operational” or not a full capacity use of the facility. *Id.* The Department’s Beneficial Use Field Examination rules state that “[t]he rate of diversion measurement shall be conducted as close as reasonably possible to the source of supply and shall be measured with the project works fully in place operating at a normal capacity.” IDAPA 37.03.02.040.02. In other words, the Department is to examine the actual flow at normal capacity at the time of the beneficial use examination. The short two months of operation of the project prior to the submission of the Proof of Beneficial Use do not represent the Mora Drop project

“operating at a normal capacity.” The normal capacity of the Mora Drop hydropower project greatly exceeds the recommended diversion rate in the preliminary license. *See* Ex. 4, Att. E (July 2007-535 cfs; July 2010-570 cfs; July 2011-526 cfs; July 2012-559 cfs.) Limiting the Mora Drop project’s diversion rate to a period of time when the irrigation demand was in decline and when the power plant was in a pre-operational stage works a substantial injustice to the Boise Project’s member Irrigation District by preventing them from taking advantage of the capacity of the hydropower generation at the Mora Drop Hydropower project, and is not supported by Idaho law or the Department’s rules governing beneficial use field examinations.

The Boise Project recognizes that Beneficial Use Examination rule 37.03.02.035.o states “[t]he amount (rate and/or volume) of water shall be limited by the smaller of the permitted amount, the amount upon which the license examination fee is paid, the capacity of the diversion works or the amount beneficially used prior to submitting proof of beneficial use, including any statutory limitation of the duty of water.” However, the Boise Project believes that this rule is in conflict with I.C. § 42-217 and IDAPA 37.03.02.040.02. It is further in conflict with the analysis and reasoning of Hearing Officer Schroeder in his recommended order for license no. 01-7011, adopted in full by the Director, as discussed below. Further, because the Mora Drop hydropower project can in no way interfere with the water rights of other users, and bypassing water that could be used for the generation of hydropower serves no purpose, the Boise Project requests that the Director exercise the discretion afforded him by IDAPA 37.03.02.001.02 to grant the diversion rate that the Boise Project has demonstrated the Mora Drop project has historically beneficially used.

Limiting this in-canal, non-consumptive hydropower project’s diversion rate to a rate far less than it can beneficially use serves no valid purpose for administration of water rights and

should be rejected for the same reason that volumetric limits have been rejected on these same rights. Limiting the use to 450 cfs would protect no water rights, junior or senior. This right cannot divert from the Boise River unless water is already being diverted for irrigation uses. License, 63-09206, Condition 1. That condition fully protects any other water users. The License's proposed limitation on the flow rate would require the Boise Project to spill water at the Mora Drop if the flows exceed 450 cfs. This benefits no one, harms the Boise Project, and is of questionable operational feasibility. The plant is designed to take all the flows available at the Mora Drop that are not going down the Waldvogel Canal.

The Department has previously taken up the issue of volumetric limits on hydropower water rights and has agreed not to attach volumetric limits to water right no. 63-9206, as well as the licenses for its other similar projects the Arena Drop hydropower project and Fargo Drop #1 hydropower project. As explained by the Boise Project for these lowhead projects:

Idaho Code § 42-217 provides no authorization for a volume limitation on this water right. Idaho Code § 42-1411(2) provides that the director in recommending a right in the adjudication may set 'an annual volume of diversion of water for use or storage in acre feet per year as necessary for proper administration of the water right.' (Emphasis added.)

See Ex. 8. Here, as with the volumetric limitation, there is no need to further limit the flow rate at the Mora Drop because the power plant cannot call for any water to be diverted from the river. It can only use what has already been diverted into the canal for irrigation purposes. *See also* Ex. 7. Judge Wood's December 29, 1999, Order on Challenge "Facility Volume" Issue and "Additional Evidence Issue," attached hereto, pp. 8-9. A limitation on the rate of diversion below the demonstrated beneficial use rate, and that is questionably enforceable due to the design and operation of the project, does not facilitate better or more efficient administration of the right.

In other circumstances involving non-consumptive hydroelectric plants that use water for hydropower, the Department has found that no legitimate purpose is furthered by limiting the ability to produce power with water that is available and that would otherwise be required to be bypassed by the inclusion of a volumetric limit on the right. *See Exs. 6 and 7, In the Matter of Licensing Water Right Permit No. 01-7011, Hearing Officer's Recommended Order*, July 30, 2010, and *Amended Final Order for Water Right No. 01-7011*, October 18, 2010. While that right dealt with a volumetric limit that was substantially less than the licensed diversion rate, the reasoning is equally applicable here.

The demonstrated diversion used by the Mora Drop Hydropower project prior to licensing has been 597 cfs, but without explanation or justification, the preliminary license for the project limits the diversion rate to 450 cfs. Where, as in this case, the right is non-consumptive, injures no other rights, and can only be exercised in conjunction with the irrigation deliveries available in the Mora Canal, there is no rational justification for limiting the right to less than the demonstrated historic use of the project. The attempt to do so is arbitrary and capricious and prejudices a substantial right of the Boise Project's member irrigation district patrons.

The highest diversion rate utilized by the Mora Drop Hydropower project in the nine years between completion of the project and the subsequent licensing examination was 597 cfs. Limiting the diversion rate to 450 cfs would unnecessarily, and to the prejudice of the Project's patrons, require them to forego non-consumptive use of water in the canal to produce power. As the Hearing Officer stated in his recommended order for water right no. 01-7011, "[i]nclusion of the volume limitation creates the anomaly of a restriction on the use of the water under the hydropower right even when water is available and can be applied to a beneficial use consistent

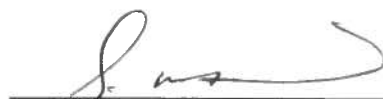
with licensed diversion rate and without harm to other water rights.” *See* Ex. 6, p. 7. The same analysis would apply to the decision to limit the diversion rate to 147 cfs below the demonstrated use of water diverted by the project prior to beneficial use examination. This Director “adopt[ed] and incorporate[ed] into the [final order for water right no. 01-7011] the Hearing Officer’s determinations and reasoning regarding the volumetric limitation ordered in the Final Order,” and further “authoriz[ed] diversion of the diversion rate during the entire period of use set, if the water is available.” *See* Ex. 6, p. 21 ¶ 67. Because limiting the diversion rate to less than the demonstrated beneficial use of the project doesn’t facilitate, but rather complicates, administration of the right the Boise Project requests that here the Director apply the same logic that it adopted in rejecting the volume limitation for license no. 01-7011.

V. CONCLUSION

For the foregoing reasons, the Boise Project hereby requests that the Director issue a Final Order licensing the Mora Hydropower project water right no. 63-9206 for 597 cfs, in conformance with the undisputed evidence submitted by the Boise Project Board of Control that the Mora Drop Hydropower project diverted and put to beneficial use that amount of water on July 7, 2014, prior to the Department’s beneficial use examination.

Dated this 8th day of December, 2015.

BARKER ROSHOLT & SIMPSON LLP



Shelley M. Davis

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of December, 2015, I caused to be served a true and correct copy of the foregoing **PETITION FOR RECONSIDERATION AND MEMORANDUM IN SUPPORT** by the method indicated below, and addressed to each of the following:

Original to:

Idaho Department of Water Resources
Water Management Division
322 E. Front Street
P.O. Box 83720
Boise, Idaho 83720-0098

☒ Hand Delivery
☐ U.S. Mail, postage prepaid
☐ Facsimile
☐ Overnight Mail
☒ Email

Copies to:

Rex Barrie
Watermaster
Water District 63
P.O. Box 767
Star, ID 83669

☐ Hand Delivery
☒ U.S. Mail, postage prepaid
☐ Facsimile
☐ Overnight Mail
☒ Email



Shelley M. Davis

EXHIBIT 1

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
APPLICATION FOR PERMIT

APPROVED

To appropriate the public waters of the State of Idaho

1. Name of applicant BOISE PROJECT BOARD OF CONTROL Phone 344-1141

Post office address 214 Broadway Avenue, Boise, Idaho 83702

2. Source of water supply Boise River which is a tributary of Snake River

3. Location of point of diversion is NW $\frac{1}{4}$ of SW $\frac{1}{4}$ of Section 3 Township 2N

Range 3E B.M. ADA County, additional points of diversion if any: _____

4. Water will be used for the following purposes:

Amount 900cfs for power purposes from 3/15 to 11/15 (both dates inclusive)
(cfs or acre-feet per annum)

Amount _____ for _____ purposes from _____ to _____ (both dates inclusive)
(cfs or acre-feet per annum)

Amount _____ for _____ purposes from _____ to _____ (both dates inclusive)
(cfs or acre-feet per annum)

Amount _____ for _____ purposes from _____ to _____ (both dates inclusive)
(cfs or acre-feet per annum)

5. Total quantity to be appropriated:

a. 900 cfs cubic feet per second and/or b. _____ acre-feet per annum.

6. Proposed diverting works:

a. Description of ditches, flumes, pumps, headgates, etc. controlled canal flow to penstock
to hydro-turbines

b. Height of storage dam _____ feet, active reservoir capacity _____ acre-feet; total reservoir
capacity _____ acre-feet, materials used in storage dam: _____

Period of year when water will be diverted to storage _____ to _____ inclusive.
(Month/Day) (Month/Day)

c. Proposed well diameter is _____ inches; proposed depth of well is _____ feet.

7. Time required for the completion of the works and application of the water to the proposed beneficial
use is 4 years. (minimum 1 year — maximum 5 years).

8. Description of proposed uses:

a. If water is not for irrigation:

(1) Give the place of use of water: SW $\frac{1}{4}$ of SW $\frac{1}{4}$ of Section 33 Township 2N.

Range 1W B.M.

(2) Amount of power to be generated: 1900 kw horsepower under 36 feet of head.

(3) List number of each kind of livestock to be watered _____

(4) Name of municipality to be served _____, or number of families to be
supplied with domestic water _____.

(5) If water is to be used for other purposes describe: _____

b. If water is for irrigation, indicate acreage in each subdivision in the tabulation below:

TWP	RANGE	SEC.	NE¼				NW¼				SW¼				SE¼				TOTALS
			NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	

Total number of acres to be irrigated _____

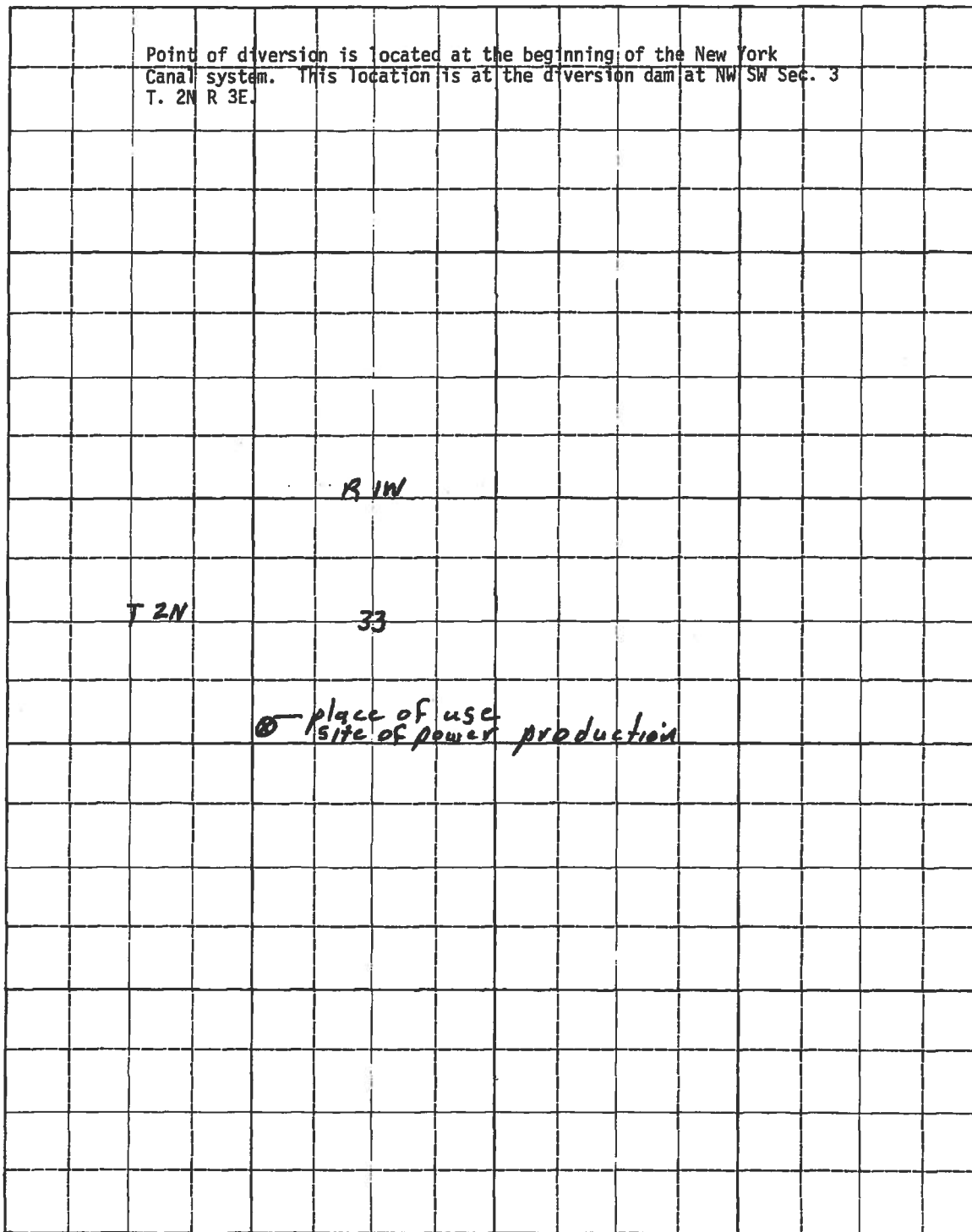
c. Describe any other water rights used for the same purposes as described above. The water in the Mora Drop has been appropriated for irrigation purposes for lands lying within the Boise Project.

9. a. Who owns the property at the point of diversion U.S. Bureau of Reclamation

b. Who owns the land to be irrigated or place of use U.S. Bureau of Reclamation

c. If the property is owned by a person other than the applicant, describe the arrangement enabling the applicant to make this filing The site is a part of the works of the Arrowrock Division of the Boise Project which have been transferred to the Board of Control for operation purposes pursuant to contract between the United States Department of the Interior and Boise-Kuna Irrigation District, the Nampa Meridian Irrigation District, the New York Irrigation District, Wilder Irrigation District and the Big Bend Irrigation Districts. The contract contemplates development of power at locations such as the Mora Drop and promises for distribution of power revenues among the contracting parties so it is presumed that adequate arrangements for use of Federal land to the extent not already made, may be achieved.

11. Map of proposed project: show clearly the proposed point of diversion, place of use, section number, township and range number.



Scale: 2 inches equal 1 mile.

BE IT KNOWN that the undersigned hereby makes application for permit to appropriate the public waters of the State of Idaho as herein set forth.

Boise Project Board of Control

(Applicant)

Royce Van Curen

Project Manager

Proposed Priority J.J. 1-5-79 1/5/79 4:45 PM
Received by AH Date 12-29-78 Time 12:00
Preliminary check by JJ Fee \$ 1505.00
Receipted by KW Date 1/28/79 # 12538
Publication prepared by KK Date 1-18-79
Published in Statesman
Publication dates 1/25 + 2/1
Publication approved KK Date OK
Protests filed by: _____

Copies of protests forwarded by _____
Hearing held by _____ Date _____
Recommended for approval denial by DBS J.J. MCJ

ACTION OF THE DIRECTOR, DEPARTMENT OF WATER RESOURCES

This is to certify that I have examined Application for Permit to appropriate the public waters of the State of Idaho No. 63-9206, and said application is hereby APPROVED.

1. Approval of said application is subject to the following limitations and conditions:
 - a. SUBJECT TO ALL PRIOR WATER RIGHTS.
 - b. Proof of construction of works and application of water to beneficial use shall be submitted on or before March 1, 19 83.
 - c. The rate of diversion, if water is to be used for irrigation under this permit, when combined with all other water rights for the same land shall not exceed 0.02 cubic feet per second for each acre of land.
 - d. Other: (1) A measuring device of a type approved by this Department shall be permanently installed and maintained as part of the diverting works.
(2) The issuance of this permit in no way grants any right-of-way or easement across the land of another. (3) Use of water under this permit is subject to control by the watermaster of State Water District No. 63, Boise River. (4) This permit is subject to the provisions of Sections 42-205 through 42-210, Idaho Code, restricting the sale, transfer, assignment, or mortgage of this permit. Failure to comply with these provisions is cause for immediate cancellation of this permit. (5) That this permit is a new use of existing water rights.

Witness my hand this 5th day of March, 1979.

A. Glen Saylor
Chief, Operations Bureau

EXHIBIT 2

Form No. 217
05/03

RECEIVED

JAN 09 2007

WATER RESOURCES
WESTERN REGION

RECEIVED

JAN 11 2007

DEPARTMENT OF
WATER RESOURCES
FOR OFFICIAL USE ONLY
Amt. of Fee \$ 600
Receipt No. W034996
Receipt By: SB
Date Received: 1-9-07

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
PROOF OF BENEFICIAL USE

The Idaho Department of Water Resources considers this form a statement that the permit holder(s) has/have completed all development that will occur under this permit and that water has been applied according to the provisions of the permit for the beneficial use(s) described below. This form must be accompanied by a license examination fee, when necessary, or be accompanied by a completed field examination report prepared by a certified water right examiner.

1. Permit No. 63-9206 Telephone No. 208-344-1141
2. Name of Permit Holder(s): Boise Project Board of Control
3. Mailing Address: 2465 Overland Road
City Boise State Idaho Zip 83705-3155
4. Source of Water: Boise River If Groundwater (well) Date drilled: / / /
(mo./yr.)
Well Driller: _____ Drilling Permit Number: _____
5. Use(s) (as authorized by the water right permit):
Domestic (No. of households): _____ Stockwater (No./type of stock) _____
Irrigation (No. of acres): _____ Other: Power
6. Total rate of diversion and/or volume for which proof is submitted:
a. 700 cfs OR _____ acre-feet.
7. Measuring Device Requirement: (refer to the approval conditions on your permit and respond accordingly) (This question is not optional. Please check either yes or no. Proofs returned not checked accordingly will be considered incomplete)
Measuring Device: Is a measuring device required: Yes X or No _____
Has the measuring device been installed? Yes X or No _____
8. Fee Enclosed: \$ 600.00 (See Fee Schedule on back of the instructions for filing proof of beneficial use)
9. Person to contact to accompany the Department representative during field examination on the water system.
Name: Paul Deveau Telephone Number: 344-1141
Address: Boise Project Board of Control, 2465 Overland Rd., Boise, ID, 83705-3155
10. The information given on this form is my true statement of the extent to which the above numbered permit has been developed and water has been diverted. I agree to relinquish any undeveloped portion of the permit to the State of Idaho.

Signature of permit holder: Paul Deveau Manager BPBC Date: 3 Jan 2007
(include your title, if on behalf of company or organization)

EXHIBIT 3

Albert Barker

From: Edl, Michele <Michele.Edl@idwr.idaho.gov>
Sent: Thursday, August 13, 2015 1:48 PM
To: tpage@boiseproject.org
Cc: Albert Barker
Subject: Mora Drop FERC inspection

Mr. Page,

Several months ago FERC scheduled an inspection for the Mora Drop project for this coming Monday, August 17, 2015. On behalf of the water rights section of IDWR, I expressed an interest to Chris White, the FERC inspector, of attending the inspection. I hope to confirm that a Beneficial Use for power generation has been developed under water right permit 63-9206.

I have not heard back from Mr. White, so I don't know if his inspection schedule is unchanged. . I don't wish to make an additional imposition on Boise Project or Riverside personnel if it can be avoided.

Mr. Barker mentioned this upcoming inspection in early June email exchange with me.

Would you be opposed to combining the confirmation of Beneficial Use visit with the FERC inspection visit?

I will be out of the cubicle after 2:00 this afternoon but I will be in from 8:00-6:00 tomorrow. Please respond to this email or call and leave a voice message.

Sincerely,

Michele Edl
Water Rights Section
Idaho Department of Water Resources
322 E Front St
Boise, ID 83720
(208) 287-4946
michele.edl@idwr.idaho.gov

EXHIBIT 4

ALBERT P. BARKER
JOHN A. ROSHOLT
JOHN K. SIMPSON
TRAVIS L. THOMPSON
SHELLEY M. DAVIS
PAUL L. ARRINGTON
SCOTT A. MAGNUSON



1010 W. Jefferson, Suite 102
Post Office Box 2139
Boise, ID 83701-2139
(208) 336-0700 telephone
(208) 344-6034 facsimile
brs@idahowaters.com

195 River Vista Place, Suite 204
Twin Falls, ID 83301-3029
(208) 733-0700 telephone
(208) 735-2444 facsimile
jar@idahowaters.com

Albert P. Barker
apb@idahowaters.com

September 30, 2015

VIA EMAIL AND U.S. MAIL

Michele Edl
Idaho Department of Water Resources
322 East Front Street
P.O. Box 83720
Boise, ID 83720-0098

Re: Permit 63-9206 (Mora Drop Hydroelectric Facility)

Dear Ms. Edl:

The Boise Project Board of Control received your request for additional information related to this hydroelectric facility, dated August 24, 2015 and subsequent email of September 11, 2015. The Mora Drop project achieved commercial operation on September 15, 2006 and proof of beneficial use was submitted January 8, 2007. See FERC letter dated April 24, 2007 acknowledging commercial operation date of September 15, 2006, Ex. A (attached). The Department had not responded to the proof until you took it up this summer.

First, you requested contemporaneous engineering drawings of the Mora Drop project. On September 23, 2015, Dennis Daugherty forwarded you by email a set of final engineering drawings. If that is not what you need, please let me know. In addition, attached hereto as Ex. B are the turbine and generator performance/efficiency tables for this project.

FERC's inspections have verified that the nameplate rating on the power plant should reflect 1900 kW. See attached letter from FERC, June 5, 2008, Ex. C. As with the other projects, we do not believe the generation capacity should be included as an element of the water right.

You have asked for daily generation data and flow data for the period 1979 through January 9, 2007. Since the power plant did not come online until September, 2006, there is no data back to 1979. On March 17, 2005, the Department granted a request for extension of time to submit proof of beneficial use until March 1, 2010. Since this is an on-canal hydro facility that only generates during the irrigation season, there are no flows in the canal and no generation

during the winter months. I am including the generation records from September 1, 2006, when the plant began generating in the pre-operational phase, through this past year when the beneficial use examination was performed. Ex. D. These reports show daily and hourly generation for the days when the plant was in operation during that period of time.

Flow calculations for the Mora Drop power plant are complicated. Flow is measured at the head end of the Mora Canal, approximately six miles upstream of the Mora Drop power plant. The canal is measured at two rides off the canal between the head end and the drop (Rides 1 and 2). There are no other diversions from the canal between the head end and the Mora Drop location. At the location of the power plant, the Mora Canal drops down from the bench, into the power plant and the Mora Canal continues west from that point. At that same location, the canals split and the Waldvogel Canal continues along the same elevation of the bench to the west. That location of the split in the canals is known as the head of the Waldvogel. The Boise Project measures water at the head of the Waldvogel. The Boise Project does not measure flows in the Mora at the drop. So, the flows set forth in Exhibits E & F attached hereto are calculated flows, not measured flows. There is no place for the water in the Mora Canal to go other than in the Waldvogel or into the drop for the power plant (or the bypass when the power plant is not operational).

Your email asks about a reference to a location where the "wasteway" intersects the "highline canal" from a 1978 engineering report on the project. We are unsure of that source of information. Attached as Ex. G is an excerpt from the original FERC application describing the proposed project location in 1980 as the Waldvogel and the Mora. It is possible that the "highline" in that reference document refers to the Waldvogel Canal and that the drop is the "wasteway," but Boise Project operations treats the drop as part of the Mora Canal itself rather than a "wasteway" for spilling water. If you need additional information to locate the project site on a map or aerial photo, please let me know and we can provide that.

Because the canal flow is measured at the head end of the canal, and at all three locations where water leaves the canal above the hydroelectric plant, the Boise Project requests that the Department not include an additional requirement for a measuring device at the power plant. It will serve no useful purpose, particularly since the watermaster will not be controlling flows within these portions of the Boise Project canal system. As with the Fargo and Arena projects, we also request that no quantity limitation be included as doing so will serve no useful purpose for proper administration of the water right.

Since the Department did not conduct the beneficial use exam until 2015, we request that the Department consider the flows put to use by the power plant during this entire period of time. Ex. E extracts the flow data for the dates when generation at the Mora plant was the highest. Because of the correlation between flow and generation, these dates should reflect the higher end of the flows used by the power plant. Ex. F shows the flows used by the power plant during the months of September and October 2006, when the plant was in operation prior to the proof submission date.

Michele Edl
Idaho Department of Water Resources
September 30, 2015
Page 3

We believe this data should satisfy the Department's request for proof of beneficial use. There is no doubt that this project has used the existing canal water every year to generate electricity. We request the license to be issued on the same terms and conditions of the permit and that the license not include a separate monitoring device or a volume limitation. We think the condition of using only water diverted from the river under the existing rights continued in the Arena and Fargo licenses is an appropriate condition for this license, as well.

Please let me know if you need any additional information.

Very truly yours,

BARKER ROSHOLT & SIMPSON LLP

Albert P. Barker

APB/se
Enclosures

cc: T. Page (via email w/o attachments)
D. Daugherty (via email w/o attachments)

EXHIBIT E

July 11 2007

Mora gauge 4.91 894 cfs
Wald. gauge 3.21 249 cfs
Ride 1 54 cfs
Ride 2 56 cfs
Total Mora 2 535 cfs

June 23 2010

Mora gauge 4.65 804 cfs
Wald gauges 2.86 214 cfs
Ride 1 49 cfs
Ride 2 67 cfs
Total Mora 2 474 cfs

July 19 2011

Mora gauge 5.01 930 cfs
Wald gauge 3.34 263 cfs
Ride 1 69 cfs
Ride 2 72 cfs
Total Mora 2 526 cfs

May 31 2009

Mora gauge 4.70 821 cfs
Wald gauge 2.81 209 cfs
Ride 1 74 cfs
Ride 2 68 cfs
Total Mora 2 470 cfs

June 24 2010

Mora gauge 4.72 828 cfs
Wald gauge 2.94 222 cfs
Ride 1 57 cfs
Ride 2 52 cfs
Total Mora 2 497 cfs

June 1 2009

Mora gauge 4.73 831 cfs
Wald gauge 2.88 216 cfs
Ride 1 78 cfs
Ride 2 69 cfs
Total Mora 2 468 cfs

July 9 2010

Mora gauge 5.21 1004 cfs
Wald gauge 3.46 277 cfs
Ride 1 78 cfs
Ride 2 79 cfs
Total Mora 2 570 cfs

June 22 2012

Mora gauge 5.15 982 cfs

Wald gauge 3.50 281 cfs

Ride 1 73 cfs

Ride 2 79 cfs

Total Mora 2 549 cfs

July 19 2012

Mora gauge 5.15 982 cfs

Wald gauge 3.47 278 cfs

Ride 1 80 cfs

Ride 2 65 cfs

Total Mora 2 559 cfs

July 6 2012

Mora gauge 5.15 982 cfs

Wald gauge 3.50 281 cfs

Ride 1 81 cfs

Ride 2 80 cfs

Total Mora 2 540 cfs

June 11 2014

Mora gauge 5.15 982 cfs

Wald gauge 3.43 273 cfs

Ride 1 67 cfs

Ride 2 80 cfs

Total Mora 2 562 cfs

July 2 2014

Mora gauge 5.15 982 cfs

Wald gauge 3.42 272 cfs

Ride 1 68 cfs

Ride 2 73 cfs

Total Mora 2 569 cfs

July 7 2014

Mora gauge 5.15 982 cfs

Wald gauge 3.46 277 cfs

Ride 1 56 cfs

Ride 2 52 cfs

Total More 2 597 cfs

EXHIBIT F

Water (cfs) at power plant 2006

Sep	CFS	Oct	CFS
1	450	1	309
2	432	2	313
3	427	3	325
4	417	4	331
5	390	5	323
6	354	6	327
7	335	7	317
8	327	8	317
9	306	9	322
10	315	10	330
11	315	11	319
12	307	12	328
13	316	13	316
14	295		
15	297		
16	294		
17	295		
18	279		
19	277		
20	264		
21	259		
22	256		
23	307		
24	308		
25	294		
26	291		
27	329		
28	307		
29	307		
30	307		

EXHIBIT 5

Albert Barker

From: Edl, Michele <Michele.Edl@idwr.idaho.gov>
Sent: Friday, September 11, 2015 5:39 PM
To: Albert Barker; tpage@boiseproject.org; dennis@rsicorp.net; Terry Daugherty
Subject: permit 63-9206

Gentlemen,

First some good news. I understand that the licenses for Arena Drop and Fargo Drop #1 have been signed and are en route to you.

Second, as you know I am writing up the report of my findings for the Mora Drop project. I have already requested data from the development period of this permit (63-9206) and you still have two weeks to provide it. Since my site visit I have learned that this project was commissioned in September 2006, only a few months before the development period ended in January 2007. So I realize that there may not be much data available.

As you will soon see, Mr. Barker and I have successfully argued that no volume is needed for the licensing of these three projects. And that may simplify your response to my earlier data request.

I still have a couple information gaps.

- 1) Unlike the Arena Drop and Fargo Drop #1 projects, I do not have access to contemporary engineering drawings of the Mora Drop project. Would it be possible to provide me with some general plan and elevation drawings?
- 2) I failed to confirm whether or not the alternative and/or supplemental water route using the Mora 2 Wasteway was developed. I can trace water delivery from the Diversion Dam through the main Mora Canal, but I haven't found "where the "Wasteway intersects the Highline Canal". (The quote is from a 1978 engineering proposal for the project. The alternative route was proposed to provide additional water or year-round water). If it hasn't been developed and used, then I don't need to know any more for the license. However, understanding the location of the Mora 2 Wasteway, which 'highline' canal is intersected and what is the source of the water in the Wasteway, would be good information to pass on to IDWR's GIS-mapping personnel.

I would be happy to draft another formal request for this extra information. But I am hoping that responses to 1) and 2) can be provided by the September 25 target date which I have set for the generation and flow data. Don't hesitate to call me with your questions about these licenses.

Sincerely,
Michele Edl
287-4946

EXHIBIT 6

BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF LICENSING WATER	)	FINDINGS OF FACT, CONCLUSIONS
RIGHT PERMIT NO. 01-7011 (in the name of	)	OF LAW AND
Twin Falls Canal Company and North Side Canal	)	RECOMMENDATIONS
Company)	)	
_____	)	

On April 29, 2010, the Hearing Officer issued an Opinion and Order Granting Motions for Summary Judgment and Recommendation in response to motions filed by Intervenor. At issue in that proceeding was the extent to which the Canal Companies' hydropower rights at the Milner hydroelectric plant could be subordinated to ground water recharge rights. Remaining issues concern conditions included in the license limiting the term of years for the hydropower right and a volume limitation on the amount of water that can be utilized in exercising the hydropower right. The Intervenor who participated in the subordination proceeding are not participants on these issues.

The Opinion and Order Granting Motions for Summary Judgment and Recommendation issued April 29, 2010, sets forth the factual and procedural background necessary for resolution of that stage of the proceeding. That background is incorporated in this Opinion and Recommendation and is repeated only as necessary for clarity and ease of understanding. Some of the issues raised by the Canal Companies in these proceedings were previously addressed in the hearing concerning the question of subordination. The prior resolution of issues in the April 29, 2010, Opinion, Order and Recommendation is not preclusive of independent consideration of the issues concerning the volume and term limitations that are included in the Director's Final Order.

Evidence was submitted and witnesses were cross-examined in this proceeding. Resolution of the issues depends primarily on an interpretation of the statutes addressing these issues. There is no dispute concerning the procedural history or what the Canal Companies and the Department did. This Opinion and Recommendation constitutes the Findings of Fact and Conclusions of Law reached in this proceeding.

I

THE TERM LIMITATION

1. Paragraph 7 of the Conclusions of Law in the Final Order sets a term limitation co-extensive with the FERC license for the project:

The Director in exercising authority to limit a permit or license for power purposes to a specific term of years shall designate the number of years through which the term of the license shall extend considering multiple factors, including the term of the approved FERC license for the project. Idaho Code Sec. 42-203B (7). **The Director determines the expiration of the FERC Milner Project License on November 30, 2038 to be the appropriate term for the license of water right no.01-7011.** (emphasis added).

Condition 5 in the Order itself states the following:

The diversion and use of water for hydropower purposes under this water right is subject to review by the Director after the date of expiration of Milner Project License No. 2899 (11/30/2038) issued by the Federal Energy Regulatory Commission. Upon appropriate findings relative to the interest of the public, the Director may cancel all or any part of the use authorized herein and may revise, delete or add conditions under which the right may be exercised.

2. There is some disconnect between Conclusion of Law 7 and the language of the Order itself. The Conclusion of Law provides for expiration of the hydropower right on November 30, 2038. Condition 5 in the Order provides that “[t]he diversion and use of water for hydropower purposes under this water right is subject to review by the Director after the date of expiration of Milner Project License No. 2899 (11/30/2038) issued by the Federal Energy Regulatory Commission.” The implications of this difference are not altogether clear, but some potential issues may be foreseen.

3. If the right expires, the Canal Companies would have to apply for a new right, as well as obtain FERC licensing, if they wished to continue to operate the power facility. It seems this would subordinate the Canal Companies’ right to other hydropower rights granted subsequent to the present right and prior to the expiration date – perhaps this is of no consequence since subsequent hydropower rights would be non-consumptive.

4. Termination of the hydropower right in 2038 would be of consequence if the recommendation to subordinate the hydropower right to subsequent recharge rights is overturned in court proceedings. If that were to occur, the Canal Companies would be protected from subordination of the existing right. Presumably issuance of a new hydropower right could

require subordination that otherwise would not exist if the present recommendation for subordination is overturned.

5. There is the potential of contention over other conditions that might be imposed on a new hydropower right. If the right does not terminate but is only "subject to review" there may be a different standard for conditioning the right than would be the case for a new right.

6. These issues are speculative, just as it is speculative to determine what status the hydropower right will have if the FERC license is not renewed. Nonetheless, this is not a dispute without consequence. Concerning a different hydropower right, a Memorandum to Water Right File 65-12096 dated January 10, 2000, authored by Shelley Keen makes this observation:

Mr. Tucker said that Idaho Power Company is uncomfortable with the temporal provision of the license. As a permanent property right it adds some value to the company's ledger sheet because it could be sold or transferred. For example, if Idaho Power Company does not retain the FERC license to operate at Cascade, it could still potentially retain and sell the water right license. However, if the water right license can be revoked its value is significantly diminished.

Conclusion of Law 7 goes beyond potential revocation. It says the right terminates. This is different from the Condition 5 in the Final Order which provides for review and potential cancellation or revision of conditions.

7. As early as March 22, 1984, the Department stated a policy of including term review conditions in permits issued for power purposes. See Statement of Position of the Idaho Department of Water Resources, attachment 2 to Canal Companies' Post Hearing Briefing. On July 25, 1984, The Water Resource Board adopted a resolution regarding review of hydropower permits, and in August, 1984, a Department newsletter called "Currents" contained an article titled "IDWR Sets Time Limit on Hydro Permits" which included a re-print of a resolution of the Water Resource Board. The resolution expressed the position that "the local public interest requires that all permits and licenses authorizing the diversion and use of waters of the State of Idaho for hydropower purposes be subject to review by the director of the Department of Water Resources." The resolution provided further:

Normally the review should be made at the end of the operating period specified by the Federal Energy Regulatory Commission authorization, or as otherwise provided by the director of the Department of Water Resources. Pursuant to such review, the director,

upon appropriate findings, should renew the water right with its original priority date for the benefit of the project with the same or different conditions, or should declare the right to be terminated in whole or in part. Keen testimony, transcript pages 102-103.

Condition 5 in the Final Order is largely consistent with this Resolution. Conclusion of Law 7 goes beyond the Resolution.

8. The policy of allowing the Director to consider term limits acquired statutory status in Idaho Code Section 42-203B(6) which provides the Director with “the authority to subordinate the rights granted in a permit or license for power purposes to subsequent upstream beneficial uses.” And, **“The director shall also have the authority to limit a permit or license for power purposes to a specific term.”** (emphasis added). Section 203B (7) addresses the considerations in setting a specific term of years which includes the term provided in a FERC license for power purposes. Following the listing of factors that may be considered Subsection 203B (7) sets forth the following provision specific to the setting of a term of years:

The term of years shall be determined at the time of issuance of the permit, or as soon thereafter as practicable if adequate information is not then available. The term of years shall commence upon application of water to beneficial use. The term of years, once established, shall not thereafter be modified except in accordance with due process of law.

9. Two points emerge from Sections 42-203B (6) and 203B (7). First, the setting of a term limitation is not mandatory. The Director has the authority to limit a license or permit to a specific term, but the statute does not mandate that condition. Failure to include a term does not violate a statutory mandate. Second, there are restraints in terms of time on the exercise of the authority according to subsection 7 of 203B: “The term of years shall be determined at the time of issuance of the permit, or as soon thereafter as practicable if adequate information is not then available.” This sets a standard for the exercise of the Director’s discretion.

10. There was no mention of a term limitation by the Department in the FERC proceedings or thereafter through the proof of beneficial use process, nor at any time identified in this proceeding until the inclusion in the Final Order in 2007. By December 15, 1988, when the FERC license was issued the Department had “adequate information” upon which to determined a specific term limit, considering the fact that the term set is co-extensive with the term of the FERC license. Unlike some other discretionary decisions that the Director may make which are

not specifically constrained by time, the setting of a term is constrained by statute to either the time a permit is issued or “as soon thereafter as practicable if adequate information is not then available.” It was practical to make the determination as soon as the FERC license was issued in 1988.

11. Construction on the project began in 1989, after an extension of time was issued by the Department and the amended permit was issued allowing additional time to submit proof of beneficial use. Had there been notice of a term limit prior to construction the Canal Companies could have made a determination of whether that condition affected the feasibility of the project and could have appealed the issue prior to construction. Whatever might have occurred is speculative, but it is not speculative to say that the Department had “adequate information” to determine a term limit prior to construction and years before licensing.

12. The failure to set a term limit within the constraints of the statute precludes including the term limit in the license. The determination and recommendation is that Conclusion of Law 7 in the Final Order be deleted.

13. Condition 5 in the Final Order is problematic in that it is not a term limit as such. It is a condition that the license may be reviewed “after the date of expiration of Milner Project License No. 2899 (11/30/2038) issued by the Federal Energy Regulatory Commission.” And, “[u]pon appropriate findings relative to the interest of the public, the Director may cancel all or any part of the use authorized herein and may revise, delete or add conditions under which the right may be exercised.” This bears a relationship to the resolution adopted by the Water Resource Board in July, 1984, during the development stage of the Canal Companies’ project that, “[p]ursuant to such review, the director, upon appropriate findings, should renew the water right with its original priority date for the benefit of the project with the same or different conditions, or should declare the right to be terminated in whole or in part.”

14. Subsequent to the Water Resource Board’s resolution the Legislature adopted sections 42-203B (6) and (7) which defined the right of the Director to establish a term limit and the time limits for doing so. To the extent that Condition 5 is interpreted to establish an undefined right to terminate or re-condition the power right “in the public interest” it fails to comply with the statutory process for determining term limits. To the extent that it states the

power of the Director to review the water right for compliance with the license or to limit or cancel it for justifiable cause, e.g. failure to apply the water to a beneficial use, it seems to be no more than a reiteration of authority of the Director regardless of the Condition.

15. Read in conjunction with Conclusion of Law 7 and coordinating the review of the Canal Companies' water right with the termination of the FERC license implies that more is intended by Condition 5 than the customary power of the Director to review compliance by a right holder with the established conditions of a right and the customary bases upon which a right may be forfeited or re-conditioned. As the prior recommendation concerning subordination makes clear, hydropower rights do occupy a special status constitutionally and by their treatment in the Legislature. However, the Legislature has defined the power and the limits upon the Director concerning term limitations on those hydropower rights.

16. To the extent Condition 5 sets forth the continuing authority of the Director to review water rights it is unnecessary. To the extent that it is a term limitation creating additional rights in the Director, it violates I.C. 42-203B (6) and (7). It is recommended that it be deleted.

II

THE VOLUME LIMITATION

1. The Final Order provides for a Diversion Rate of 5,714.70 cfs and an annual Diversion Volume of 2,390,000.0 acre feet. The beneficial use report did not set forth an annual volume, and there was no annual volume limitation in the permit. If the diversion rate in the beneficial use report were used to calculate an annual volume, that amount would be significantly higher than the amount set by the Department. There is no evidence that the Milner hydropower facilities cannot apply 5,714.70 cfs to a beneficial use when the water is available. The evidence is that 5,714.70 cfs can be applied to the beneficial use of generating electrical power.

2. The Department used 1996 as representative year of the actual annual volume put to use although the beneficial use report was completed in 1993. The volume was calculated by the Department using 1996 as a standard in the belief that there was unreliability in the testing gages at the earlier time when the beneficial use examination was completed. There is a question of

fact as to whether 1996 was a representative year. However, that dispute is not material to the recommendation made in this opinion.

3. Inclusion of the volume limitation creates the anomaly of a restriction on the use of water under the hydropower right even when water is available and can be applied to a beneficial use consistent with licensed diversion rate and without harm to other water rights:

Q. Okay. So if, for example, there is a year in which Twin Falls and North Side in the operation of the power plant in the exercise of the water right, generates with a volume of water that meets the 2.39 million acre-feet figure. At that point in time, is that a limitation then on the exercise of the water right?

A. I believe that it is. When the Department puts a volume figure on water right licenses, that's intended to be an annual diversion volume limit.

Q. So then there is no right to generate once that limit is met?

A. Yes

Q. Okay.

A. I believe that's correct.

Q. Must the water then be spilled past the facilities?

A. There is possibly. I mean, Milner is an interesting case in that there is no obligation of the state to deliver water from upstream of Milner to below Milner. So if there are other beneficial uses that could take that water at Milner, they certainly could do that.

But if the water reaches Milner, and there is no other beneficial use, then – and the annual diversion volume on the license has been exceeded by the power generator. Then, yes, under that circumstance I believe water would need to be spilled past the dam.

Shelley Keen testimony, transcript pages 62-63.

4. In 1997 the facilities at Milner utilized 3.6 million acre-feet of water to generate power, and in 1998 the facilities utilized 2.8 million acre feet. Both amounts are significantly higher than the volume amount subsequently established in the license but are within the diversion rate of the beneficial use report and license. There is reality to the anomaly that operating the Milner facility within the diversion rate established may violate the volume limitation even though the water is applied to a beneficial use consistent with the license and without harm to other water rights. See exhibit 12.5.

5. From the time the beneficial use examination was completed on October 29, 1993, until the time of licensing the permit holders were not notified of any issues with respect to the beneficial use examination and there was no notice to the Canal Companies of the intention to include a volume limitation in the license. Under those circumstances, it is the Department's position that during that period of time the Canal Companies' use of volumes in excess of 2.39 million acre-feet to a beneficial use in the operation of the Milner facility was within their rights. Once the license was issued with the 2.39 acre-feet limitation, however, use in excess of that limitation will violate the conditions of the water right even if the diversion rate is not exceeded. The Department's position is that the Canal Companies' remedy is to apply for a second right to make up for the difference between the volume allowed in the license and the amount that can actually be applied to a beneficial use consistent with the diversion rate.

6. In effect the volume limitation amounts to a method of subordinating the hydropower right in the event the subordination provision in the license is set aside and the hydropower right is not subordinated to later recharge rights. Presumably a new application for an additional hydropower right could be subordinated to existing or future recharge rights.

7. The best prognosis is that if the subordination provision in the license is set aside, other conditions set forth in the license that are not included in the permits will also fail. The subordination provision stands on a more solid legal basis than either the term limitation or the volume limitation. In any event, each issue should be determined on its individual merits, not as a method to achieve a secondary result that might otherwise be precluded.

8. Judge Wood addressed the necessity of a volume specification in *In Re SRBA*, Case No. 39576, In the District Court of the Fifth Judicial District of the State of Idaho, In and for the County of Twin Falls, filed December 29, 1999, concerning a volume limitation, stating the issue as follows: "Did the [respective] Special Master err in ruling that facility volume is not necessary for the definition of the right, for clarification of any element of a right, or for administration of the right by the director?" The case involved non-consumptive fish propagation facilities. The Court determined that facility volume was not necessary for the definition of the right, for clarification of any element of a right or for administration by the Director. The logic of that decision is applicable in this case.

9. Idaho Code Section 42-1411(2) (c) provides as follows:

(2) The director shall determine the following elements, to the extent the director deems appropriate and proper, to define and administer the water rights acquired under state law:

(c) the quantity of water used describing the rate of water diversion or, in the case of an instream flow right, the rate of water flow in cubic feet per second or annual volume of diversion of water for use or storage in acre-feet per year as necessary for the proper administration of the water right;

10. Nothing in the statute requires both a diversion rate and an annual volume for a non-consumptive hydropower right that has been subordinated. In fact, to the extent that an annual volume differs from the amount that could be applied under the diversion rate, the administration of the right becomes more complex. Both must be monitored and apparently action taken if the Canal Companies apply the water to a beneficial use as allowed by the diversion rate but reach the volume limitation. Apparently that action would be to stop the use of the water at the Milner facility and allow it to pass on without generating power to the detriment of the Canal Companies and potentially to power users and the public.

11. Beneficial Use Examination Rule 37.03.02.035.01.j (Rule 35.01.j) provides that, "The field examiner does not need to show total volume of water for municipal and fire protection uses on the field report unless the project works provide for storage." The exclusion of a total volume showing for municipal and fire protection uses in the field examiner's report does not compel inclusion of an annual volume in the licenses that are issued for other water rights, particularly non-consumptive uses. The annual volume can be co-extensive with the diversion rate over the course of a year. With the subordination condition in the license, the Canal Companies cannot make a call against other water users. As has been recognized in earlier proceedings, the Canal Companies get what water is available. If there isn't enough water to meet the amount specified in the diversion rate, they cannot compel others to surrender water. On the other hand, if there is an annual volume limitation that is less than can be put to a beneficial use under the diversion rate, the Canal Companies will be required to spill water beyond their facility without generating electricity from that water. That does not maximize the

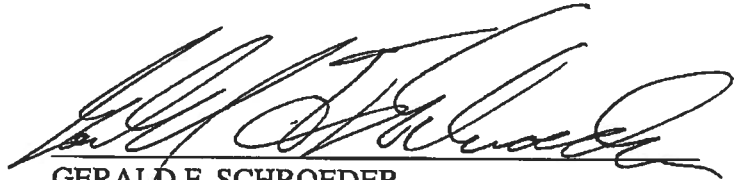
benefits that can be derived from the use of the available water and neither serves the interests of the Canal Companies nor the public.

RECOMMENDATIONS

1. It is recommended that the term limitation specified in the Final Order be deleted from the license.

2. It is recommended that the annual volume limitation in the Final Order be deleted from the license. Alternatively, if consistency of application is deemed significant, the annual volume limitation should be specified to be consistent with the diversion rate set forth in the Final Order.

Dated this 30 day of July, 2010

A handwritten signature in black ink, appearing to read 'Gerald F. Schroeder', is written over a horizontal line.

GERALD F. SCHROEDER
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of July, 2010, the above and foregoing document was served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

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Victoria Wagle
Administrative Assistant to the Director
Idaho Department of Water Resources

EXHIBIT 7

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF LICENSING)	
WATER RIGHT PERMIT NO. 01-7011)	
IN THE NAME OF TWIN FALLS CANAL)	AMENDED FINAL ORDER
COMPANY AND NORTH SIDE CANAL)	
COMPANY)	
_____)	

I. INTRODUCTION

In 2008, the former Director of the Idaho Department of Water Resources issued a license for water right no. 01-7011, a water right for hydropower use at the Milner hydropower project on the Snake River. Three conditions of the license limited elements of the water right: a condition subordinating the water right to all subsequent upstream beneficial depletionary uses other than hydropower, a condition limiting the term of the license, and a condition limiting the volume of water that can be diverted. *Final Order* at 14-15 (Oct. 20, 2008). The holders of the water right, the Twin Falls Canal Company and the North Side Canal Company ("the Canal Companies"), objected to the conditions required by the *Final Order* and requested a hearing.

After conducting a hearing, the Hearing Officer recommended that the subordination condition of the *Final Order* be included in the license for water right no. 01-7011. *Opinion And Order Granting Motions For Summary Judgment And Recommendation* (Apr. 29, 2010) ("*First Recommendation*"). However, the Hearing Officer recommended that the license should not include the term condition or the volumetric limitation of the *Final Order*. *Findings Of Fact, Conclusions Of Law And Recommendation* (Jul. 30, 2010) ("*Second Recommendation*").

The interim director of the Idaho Department of Water Resources ("the Director") reviewed the record and the Hearing Officer's recommendations, and now issues this *Amended Final Order*. For the reasons discussed herein, the Director accepts the Hearing Officer's recommendations as to the subordination condition and the volumetric limitation but not as to the term condition. The Director orders that the license for water right no. 01-7011 shall include the subordination condition and the term condition of the *Final Order*. The Director also orders that the volume limitation in the *Final Order* be amended to authorize full diversion of the licensed flow rate year-round if the flow rate is available.

II. FINDINGS OF FACT

Procedural Background

1. The detailed procedural background of this matter as set forth in the *Final Order*, the *First Recommendation*, and the *Second Recommendation* is incorporated into this order as findings of fact and will not be recited in full here. The other factual findings in the *Final Order*, the *First Recommendation* and the *Second Recommendation* also are incorporated into this order as findings of fact, unless modified herein or inconsistent with the facts as recited herein.

2. The permit for water right no. 01-7011 ("Milner Permit"), as originally issued in 1977, did not include a subordination condition, a term condition or a limitation on the annual volume diverted. *Final Order* at 1 ¶¶ 1-4. However, a subordination condition was added to the permit in 1987 as a condition of the Department's approval of the Canal Companies' second request for an extension of time to provide proof of beneficial use. *First Recommendation* at 14 ¶ 1; *id.* at 16 ¶ 2; *Final Order* at 2 ¶ 6. The subordination condition provided, in relevant part, that the water right was subordinate to "all other rights to the consumptive beneficial use of water, other than hydropower and groundwater recharge, within the Snake River Basin" *Final Order* at 2 ¶ 6 (emphasis added).

3. The Canal Companies submitted proof of beneficial use for the permit in 1993. *Final Order* at 2 ¶ 9. Subsequently, the Canal Companies requested that the Department issue a license for water right no. 01-7011. In 2006, some water user organizations requested an opportunity to comment on the form of the subordination condition for the license. *Final Order* at 2-3 ¶¶ 10-11. On September 5, 2007, the former Director issued a *Notice of Intent To Issue License* ("Notice") stating that the Department was prepared to issue the license and would accept and consider written comments from the Canal Companies and other interested persons or entities on the form of the subordination condition to be included in the license. *Final Order* at 3 ¶ 12.

4. Rather than submitting comments, the Canal Companies filed a mandamus action in the Jerome County District Court seeking an order prohibiting the Director from considering comments submitted pursuant to the *Notice* and compelling the Director to issue a license that conformed to the permit. *Final Order* at 3 ¶¶ 14-15. The Canal Companies also asserted a "takings" claim. *Id.*

5. The District Court dismissed the mandamus action on January 25, 2008. (*Order Granting Motion to Dismiss Petition for Writ of Mandate* (Jan. 25, 2008), *North Side Canal Co., et al v. Tuthill*, (5th Jud. Dist., Jerome Co. Case No. CV 2007-1093) (hereinafter "*Writ Dismissal Order*").

6. The former Director issued the *Final Order* for the licensing of water right 01-7011 on October 20, 2008. In the *Final Order*, the former Director concluded that the form of the subordination condition in the license for water right no. 01-7011 was controlled by provisions of state law and the Idaho State Water Plan. *Final Order* at 7 ¶ 1. The subordination condition required by the *Final Order* did not elevate the senior priority hydropower water right

over later-in-time priority ground water recharge uses, but provided, in relevant part, that water right no. 01-7011 would be subordinate “to all subsequent upstream beneficial depletionary uses, other than hydropower, within the Snake River Basin . . .” *Final Order* at 14-15 (Condition of Approval no. 1). In contrast to the amended Milner Permit, the license for water right no. 01-7011 subordinated the water right to ground water recharge uses.

7. The *Final Order* also required that the license for water right no. 01-7011 include a term condition providing, in relevant part, that the diversion and use of water under the license would be “subject to review by the Director after the date of expiration of Milner Project License No. 2899 (11/30/2038) issued by the Federal Energy Regulatory Commission,” and that upon appropriate findings relative to the interest of the public, “the Director may cancel all or any part of the use authorized herein and may revise, delete or add conditions under which the right may be exercised.” *Final Order* at 15 (Condition of Approval no. 5).

8. The *Final Order* further required that the license for water right no. 01-7011 include a “Diversion Volume” provision limiting the annual diversion volume to 2,390,000 acre-feet. *Final Order* at 14.

9. The Canal Companies objected to the *Final Order*’s subordination condition, term condition, and volumetric limitation. The Canal Companies requested a hearing on their objections and also requested that a Hearing Officer be appointed to preside over the hearing. *Protest and Petition for Hearing* at 1-3 (Nov. 4, 2008).

10. The former Director designated the matter a contested case and appointed Gerald F. Schroeder as Hearing Officer. *Order Designating Contested Case and Appointing Hearing Officer* at 1 (Nov. 13, 2008). The Hearing Officer granted intervention to the Idaho Water Resource Board, a group of water user organizations collectively known as the “Upper Snake Water Users,” and to a number of ground water districts (“IGWA”).¹ *Order Granting Petitions for Intervention* at 1 (Mar. 27, 2009).

11. The Idaho Water Resource Board, the Upper Snake Water Users, and IGWA moved for summary judgment seeking affirmation of the subordination condition in the *Final Order*. The Hearing Officer granted the summary judgment motions and recommended that the Director proceed in accordance with the *Final Order*. *First Recommendation* at 16-17 (“Conclusions” and “Order and Recommendation”).

12. The Canal Companies then moved for clarification arguing that the *First Recommendation* did not resolve their objections to the term condition and the volumetric limitation. *Order Granting Motion For Clarification And Staying Certain Proceedings In Protest Of License No. 01-7011 And Setting Hearing Schedule* at 1-2 (May 26, 2010). The

¹ The “Upper Snake Water Users” consist of the Mud Lake Water Users, Independent Water Users, Jefferson Canal Company, Montevue Canal Company, Producer’s Canal Company and Fremont-Madison Irrigation District. The ground water districts are Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Clark-Jefferson Ground Water District, Madison Ground Water District, and Aberdeen-Springfield Ground Water District. “IGWA” refers to the Idaho Ground Water Appropriators, Inc.

Hearing Officer granted the motion and set a hearing schedule for those issues. *Id.* Following the hearing and filing of the Canal Companies' post-hearing brief, the Hearing Officer recommended that the term condition of the *Final Order* be deleted from the license for water right no. 01-7011, and that the volumetric limitation of the *Final Order* be either deleted from the license, or changed to be consistent with the diversion rate. *Second Recommendation* at 10 ¶¶ 1-2.

Recharge

13. Recharge² water rights "capture excess water that would otherwise pass beyond the Milner Dam to the Snake River by moving the water onto areas where it will enter the [Eastern Snake Plain] aquifer." *First Recommendation* at 2.

14. Recharge water rights help maintain desirable aquifer levels. *First Recommendation* at 11 ¶ 3. The maintenance of desirable aquifer levels enhances the reliability of the ground water supply for irrigation and municipal uses and aquaculture relying on spring flows. *Id.*

15. By maintaining desirable aquifer levels, recharge water rights create a form of storage to provide water for irrigation and municipal purposes and other possible proprietary uses of the same nature, including enhancing spring flows. *First Recommendation* at 11 ¶ 3. Recharge serves as a method of storing water in the Eastern Snake Plain Aquifer ("ESPA") for use on the Eastern Snake Plain, analogous to holding water in surface reservoirs. *Id.*; *id.* at 16 ¶ 9.

16. Water diverted upstream of Milner Dam for irrigation or recharge purposes sometimes is used on lands that drain to the Snake River downstream from Milner Dam. *First Recommendation* at 4 ¶ 3.

17. If not subordinated to recharge uses, water right no. 01-7011 could require that water be sent past Milner Dam to meet the water right's licensed diversion when such water otherwise could be held in the ESPA by recharge for beneficial use on the Eastern Snake Plain. *First Recommendation* at 16 ¶ 9. If not subordinated to recharge uses, the license for water right no. 01-7011 would interfere with and potentially preclude diversions of water upstream from Milner Dam for recharge of the ESPA much of the time in most years. *Final Order* at 4 ¶ 20; *id.* at 10-11 ¶ 16.

The Milner "Zero Minimum Flow"

18. Milner Dam was constructed in 1905 as a diversion dam and is owned by the Canal Companies, who divert water at the dam for irrigation purposes. Milner dam is located on the Snake River east of Murtaugh, where the geography of the river channel and associated canyon changes dramatically. Above Milner Dam, the Snake River is not deeply entrenched. Consequently, diversion from the river is practical across much of the Eastern Snake Plain.

² For purposes of this order, the terms "recharge," "groundwater recharge," and "aquifer recharge" are used interchangeably.

Below Milner, the Snake River descends into a deep canyon. Diversion of water from the river within the deep canyon below Milner Dam for irrigation is largely impractical. *First Recommendation* at 4 ¶ 2.

19. The reliable natural flow of the Snake River above Milner Dam during the irrigation season was fully appropriated shortly after 1900. Subsequently, there have been significant reclamation projects constructed above Milner Dam to capture non-irrigation season flows and other excess, surplus, flood and high-runoff period waters and hold them in storage for beneficial uses, especially the irrigation of lands above Milner Dam. Some lands geographically below Milner Dam are irrigated by water diverted at Milner Dam, but the water is from sources above Milner Dam. Below Milner Dam, the river is replenished by spring discharges in the canyon and other flows not available for use above the dam. *First Recommendation* at 4 ¶¶ 3-4.

20. As a consequence of the differences in geography and the history of appropriations, the primary use of the water from the Snake River above Milner Dam has been irrigation, while the primary use of the water below Milner Dam has been hydropower production. These differences are the basis of what is frequently termed the “two rivers concept.” See, e.g., *Canal Companies’ Memorandum In Opposition To Idaho Water Resource Board, Upper Snake River Water Users’ And Ground Water Districts’ Motions For Summary Judgment (“Canal Companies’ Summary Judgment Brief”)* at 20 (referring to “the two rivers concept”). While this distinction is not absolute, it has played and continues to play a significant role in defining the development of the State’s water policy, particularly the so-called “zero minimum flow” policy at Milner Dam. *First Recommendation* at 4 ¶ 4.

21. The Milner “zero minimum flow” refers to the long-established policy of conserving, capturing, and storing above Milner Dam, to the maximum practicable extent, all non-irrigation season flows and other excess, surplus, flood, and runoff waters that otherwise would spill past Milner Dam. An important element or corollary of the Milner “zero minimum flow” is that hydropower uses in the canyon below Milner Dam should not be allowed to establish the right to demand that water be sent past Milner Dam. *First Recommendation* at 4 ¶¶ 2-4; see also *Canal Companies’ Summary Judgment Brief* at 22 (quoting Idaho Code § 42-203B(2) and resolution of Water District 1); *Affidavit of Shelley M. Davis In Support Of Canal Companies’ Memorandum In Opposition To Idaho Water Resource Board, Upper Snake River Water Users’ And Ground Water Districts’ Motions For Summary Judgment (“Davis Aff.”)* at Exhibit 32; *Affidavit Of Michael C. Orr In Support Of Idaho Water Resource Board’s Motion For Summary Judgment (“Orr Aff.”)* at Exhibit 16.³

³ Exhibit 32 of the Davis Aff. consists of examples of partial decrees for certain hydropower water rights that the State of Idaho and Idaho Power Company proposed for entry in the SRBA Consolidated Subcase No. 00-92023 pursuant to the March 25, 2009 “Framework Reaffirming The Swan Falls Settlement.” Remarks in the partial decrees provide that for purposes of the determination and administration of the hydropower water rights defined therein, “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.” The history of the Milner “zero minimum flow” policy is discussed on pages 21-48 of Exhibit 16 of the Orr Aff., which is a copy of the *Memorandum In Support Of State Of Idaho’s Motion For Partial Summary Judgment Re: Milner Zero Minimum Flow*, filed in the SRBA on October 16, 2009. In that proceeding, the Canal Companies informed the SRBA District Court that they largely agree with the representations made by the State concerning the historical treatment of the Snake River at Milner divide. There is

III. CONCLUSIONS OF LAW

The Idaho Code Requires The Director To Ensure That The License For Water Right No. 01-7011 Complies With State Law And Is Consistent With The Idaho State Water Plan.

1. Paragraphs nos. 1- 21 above are incorporated into the Director's conclusions of law by this reference and made a part of the Director's conclusions of law.

2. The Canal Companies argued to the District Court and to the Hearing Officer that, by issuing the *Notice*, the Director used an unlawful licensing procedure and "re-opened" the Milner Permit to comment. See, e.g., *Petition For Peremptory Writ Of Mandate* ("Mandamus Petition") at 16, 18; *Canal Companies Response To Motion To Dismiss* at 2-3, 5, 9, 10-13; *Canal Companies' Summary Judgment Brief* at 4-5, 15, 32-33, 45.⁴ The District Court held that "[t]he *Notice* did not reopen a protest period nor did it give those submitting comments party status," *Writ Dismissal Order* at 9; see also *First Recommendation* at 9 ¶ 1 (stating the District Court had determined that the *Notice* did not "reopen" the proceedings). This holding is binding on the parties, the Hearing Officer, and the Director, and the Hearing Officer determined that issuance of the *Notice* "is not a basis to invalidate the subordination condition." *First Recommendation* at 9 (header for part IV). The Hearing Officer also determined that the Director did not consider the comments submitted pursuant to the *Notice*, *id.* at 9-10 ¶ 2, and therefore the question of "[w]hether the Director should have or should not have allowed comments is moot." *First Recommendation* at 10 ¶ 3; see also *Final Order* at 7 ¶ 1 (" . . . they were not considered by the Director."). The Director adopts the Hearing Officer's rational in this order.

3. Idaho Code § 42-219 applies in licensing water right no. 01-7011, and provides that after the Department has received all evidence relating to proof of beneficial use,

it shall be the duty of the department to carefully examine the same, and if the department is satisfied that the law has been fully complied with and that the water is being used at the place claimed and for the purpose for which it was originally intended, the department shall issue to such user or users a license confirming such use.

Idaho Code § 42-219(1).

4. The Canal Companies argued to the District Court and the Hearing Officer that once the Canal Companies submitted proof of beneficial use, Idaho Code § 42-219(1) imposed a ministerial duty on the Director to issue a license for water right no. 01-7011 that "conformed in

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' Memorandum In Opposition To State Of Idaho's Motion For Partial Summary Judgment Re: Milner Zero Minimum Flow, In Re SRBA, Subcase Nos. 00-92002GP, 02-0200, 02-0201, 02-0223 and 02-0224 (Nov. 5, 2009).

⁴ The Canal Companies filed their mandamus petition and "Response to Motion to Dismiss" with the Jerome County District Court in *North Side Canal Co. v. Tuthill*, Case No. CV2007-1093 (5th Jud. Dist.). The *Canal Companies' Summary Judgment Brief* was filed in the administrative proceedings before the Hearing Officer.

all respects” to the Milner Permit. *Canal Companies’ Memorandum In Opposition To Idaho Water Resource Board, Upper Snake Users’ And Ground Water Districts’ Motions For Summary Judgment* at 15 (Mar. 5, 2010) (“*Canal Companies’ Summary Judgment Brief*”). The District Court held that Idaho Code § 42-219 charges the Department with determining, as part of licensing, whether “the law has been fully complied with,” and if it has not, the Department “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.” *Writ Dismissal Order* at 10 (quoting Idaho Code § 42-219) (*italics in Writ Dismissal Order*). The District Court further held:

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. . . . This Court holds that following the beneficial use examination the issuance of the license is not a simple ministerial act. The Department must first make a determination whether the use complies with the law and the terms of the permit.

Id. at 10, 12. The District Court dismissed the Canal Companies’ mandamus petition. *Id.* at 13. The District Court’s holdings on Idaho Code § 42-219 are binding on the parties, the Hearing Officer, and the Director. *First Recommendation* at 8 ¶ 19 (stating the District Court had concluded “that the issuance of a license was not a ministerial act”).

5. The Canal Companies’ contention that the District Court’s holdings were not binding because the questions of the *Notice* and whether Idaho Code § 42-219 required the Director to issue a license conforming to the Milner Permit were not ripe in the District Court proceedings, *Canal Companies’ Summary Judgment Brief* at 16, is incorrect because the District Court’s holdings “were necessary to the ultimate disposition of the case” presented by the Canal Companies’ mandamus petition. *Sun Valley Ranches, Inc. v. Prairie Power Co-op., Inc.*, 124 Idaho 125, 129, 856 P.2d 1292, 1296 (Ct. App. 1993).

6. Idaho Code § 42-1734B applies in licensing water rights and requires the Director to issue water right licenses that are consistent with the “comprehensive state water plan”:

All state agencies shall exercise their duties in a manner consistent with the comprehensive state water plan. These duties include but are not limited to the issuance of . . . licenses . . . ; provided, however, that nothing in this chapter shall be construed to affect the authority of any state agency with respect to activities not prohibited by the comprehensive state water plan.

Idaho Code § 42-1734B(4). The “comprehensive state water plan” referenced in Idaho Code § 42-1734B(4) is the Idaho State Water Plan (“State Water Plan”), which is the constitutionally-authorized plan “for optimum development of water resources in the public interest” that is formulated and implemented by the Idaho Water Resource Board, subject to approval and/or amendment by the Idaho Legislature. Idaho Const. art. XV § 7; *see also* Idaho Code § 42-1734A(1) (similar).

7. The Hearing Officer determined that Idaho law requires the Director, in licensing water right no. 01-7011, “to assure that the terms of the license are consistent with the law and the State Water Plan,” *See First Recommendation* at 14 ¶ 3, and that the Director “must condition the license consistent with State law, including the policies of the State Water Plan.” *Id.* at 16 ¶ 2. The Director agrees with and adopts these determinations in this Order.

The State Law And State Water Plan Policies Applicable To Licensing Water Right No. 01-7011.

8. In order to ensure that the license for water right no. 01-7011 complies with state law and is consistent with the State Water Plan, as required by Idaho Code §§ 42-219(1) and 42-1734B(4), the Director must first identify the provisions of Idaho law and the State Water Plan that are applicable to water right no. 01-7011 and the disputed licensing conditions, and then must determine whether any conditions must be included in the license to ensure that it complies with applicable state law and is consistent with the State Water Plan.

9. Water right no. 01-7011 is a water right for hydropower use at the Milner hydropower project. The Canal Companies object to license conditions addressing the following: (a) Subordination to recharge, (b) a term limit on the license, and (c) a limitation on the volume of water used each year. Various provisions of Idaho law and the State Water Plan define the relationship of a hydropower water right to other water rights and also impose conditions that limit the elements of the hydropower water right.

10. The Idaho Constitution provides that the State “may regulate and limit the use [of water] for power purposes,” *Id.* Const. art. XV § 3. Idaho Code § 42-203B “specifically implement[s] the state’s power to regulate and limit the use of water for power purposes.” Idaho Code § 42-203B(1). Idaho Code § 42-203B includes provisions applicable to the subordination of hydropower water rights, term limits on hydropower water rights, and to the Milner Dam. *See* Idaho Code § 42-203B(2), (6), (7). Idaho Code § 42-234 includes provisions pertaining to recharge. The license the Director issues for water right no. 01-7011 must comply with these provisions of Idaho law. Idaho Code § 42-219(1); *First Recommendation* at 14 ¶ 3; *id.* at 16 ¶ 2

11. The State Water Plan establishes policies pertaining to the Milner “zero minimum flow,” recharge, and hydropower water rights, including the licensing and subordination of hydropower water rights. State Water Plan at 6, 7, 14, 17, 19 (Policies 1F, 1J, 4D, 5B, 5H). The license the Director issues for water right no. 01-7011 must be consistent with these policies of the State Water Plan. Idaho Code § 42-1734B(4); *First Recommendation* at 14 ¶ 3; *id.* at 16 ¶ 2

Water Right No. 01-7011 Must be Subordinate to Recharge in Order to Comply with Applicable State Law and be Consistent with Applicable Policies of the State Water Plan.

The Milner “Zero Minimum Flow”

12. With respect to the Milner Dam and the Milner “zero minimum flow,” Idaho Code § 42-203B provides, in relevant part:

For the purposes of the determination and administration of rights to the use of the waters of the Snake river or its tributaries downstream from Milner dam, 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.

Idaho Code § 42-203B(2). The legislative history of this provision demonstrates that it was intended to clarify and codify the Milner “zero minimum flow” policy of the State Water Plan as confirmed pursuant to the Swan Falls settlement. *Statement of Purpose – RS12550* (1986 Senate Bill 1358); *Minutes – Senate Resources and Environment Committee* (Feb. 19, 1986).⁵ The purpose of the Milner “zero minimum flow” is “to allow for full development of the River above Milner.” *Order On Petition For Judicial Review, Clear Springs Foods, Inc. v. Idaho Ground Water Appropriators, Inc.* (Fifth Jud. Dist., Gooding County Dist. Ct.) (Case No. 2008-444) (Jun. 19, 2009), at 40 n.12 (Melanson, J.). Further, as the Hearing Officer found, the Milner “zero minimum flow” policy “is intended to promote the development of agricultural uses” *First Recommendation* at 13 ¶ 2.

13. The State Water Plan describes the Milner “zero minimum flow”: “The exercise of water rights above Milner Dam has and may reduce flow at the dam to zero.” State Water Plan at 17 (Policy 5B). The Legislature added this provision to the State Water Plan by a direct legislative amendment of the plan. 1997 Idaho Sess. Laws 71. The original State Water Plan and all subsequent revisions of the State Water Plan have included the Milner “zero minimum flow” provision or policy. *Final Order* at 5-7 ¶¶ 26-33.

14. In the *Final Order*, the former Director concluded that the subordination condition of the Milner Permit: (a) did not comply with the Milner “zero minimum flow” provision of Idaho Code § 42-203B(2); (b) is inconsistent with the Milner “zero minimum flow” policy of the State Water Plan and Chapter 38 of the 1997 Idaho Session Laws; and therefore

⁵ The history of this statutory provision is set forth in detail on pages 15-21 of Exhibit 16 of the Orr Aff. See *supra* note 3. Reconfirmation of the Milner “zero minimum flow” was one of the elements of the Swan Falls Agreement. See *Swan Falls Agreement* at Exhibit 6 (“The executive branch of the State of Idaho and Idaho Power Company agree to recommend that the following positions be incorporated into policy 32 of the state water plan. . . . The minimum daily flow at the Milner gauging station shall remain at zero c.f.s.”). This aspect of the Swan Falls settlement was again confirmed in last year’s *Framework For Reaffirming The Swan Falls Settlement* between the State of Idaho and Idaho Power Company:

[T]he Swan Falls Settlement reconfirmed that the minimum daily flow at Milner Dam shall remain at zero, and that for the purposes of the determination and administration of rights to the use of the waters of the Snake River or its tributaries downstream from Milner Dam, 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. . . .

[T]he Swan Falls Settlement recognized that the establishment of a zero minimum flow at Milner Dam allowed existing uses above Milner to continue and for some additional development above Milner, and further recognized that the zero minimum flow means that river flows downstream from Milner Dam to Swan Falls Dam at times may consist entirely of ground-water discharge and that therefore the Eastern Snake Plan Aquifer (ESPA) must be managed as an integral part of the Snake River.”

Framework For Reaffirming The Swan Falls Settlement, Exhibit 2 at 1.

could not be included in the license for water right no. 01-7011. *Final Order* at 10, 12-14 ¶¶ 14-15, 20, 22-23.

15. The Canal Companies argued to the Hearing Officer that the subordination condition of the Milner Permit was consistent with the Milner “zero minimum flow” provisions of Idaho Code § 42-203B(2) and the State Water Plan because the flows used for hydropower generation at the Milner power plant are diverted out of the river just above Milner Dam, at the same point of diversion the Twin Falls Canal Company uses to divert irrigation water. *Canal Companies’ Summary Judgment Brief* at 2, 17-18.

16. The Hearing Officer concluded that “[u]se below the Milner Dam for irrigation with water from the Dam is consistent with the zero flow policy. The policy is intended to promote the development of agricultural uses, and the use of water in areas below the Milner Dam for irrigation is consistent with that policy.” *First Recommendation* at 13 ¶ 2.

17. The Hearing Officer also determined that the question of whether the Milner hydropower project is consistent with the Milner “zero minimum flow” provisions of the Idaho Code and the State Water Plan is not limited to consideration of the physical location of the Milner power plant and its diversion facilities.⁶ Rather, the Hearing Officer determined that consistency with the Milner “zero minimum flow” policy depends on whether water passes Milner Dam as a result of “incidental” drainage or, in contrast, pursuant to a legal “right requiring passage of water”: “Any water that reenters the Snake River after being diverted for irrigation is incidental to its use for irrigation and not by a right requiring passage of water from the Snake River beyond the Milner Dam.” *First Recommendation* at 13 ¶ 2. This analysis is consistent with Idaho Code § 42-203B(2), which does not bar the “incidental” passage of flows over or past Milner Dam, but rather only bars the establishment or administration of a water right that can demand flows be sent over or past Milner Dam. *See* Idaho Code § 42-203B(2) (providing that “[f]or the purposes of the determination and administration” of rights to the use of the waters of the Snake River or its tributaries downstream from Milner Dam, “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.” The Hearing Officer concluded: “The use of water for the hydropower project is a non-consumptive use that passes water that might otherwise be captured for agricultural or municipal use. It is this aspect of the hydropower project that is inconsistent with the zero flow policy, not the physical location of the project.” *First Recommendation* at 13 ¶ 3.

18. The Hearing Officer further determined: “Water may pass beyond Milner Dam with no violation of State policy when there is an excess. The zero flow policy comes into play when there are claims for use of the water above the Milner Dam, including recharge rights at issue in this proceeding.” *First Recommendation* at 14 ¶ 3. The Hearing Officer also determined

⁶ As the Hearing Officer observed, “the physical location” of the Milner power plant below Milner Dam, “by itself,” does not violate the Milner “zero minimum flow” policy. *First Recommendation* at 13 (header for Part VII). It should be noted that the Milner hydropower project includes two power plants: the main power plant is adjacent to the Snake River approximately 1.6 miles downstream from Milner Dam, and a smaller “auxiliary” power plant is located at the downstream toe of the dam. The *Final Order*, the parties’ briefing, and the Hearing Officer’s analysis focused almost exclusively on the main power plant.

that it would be inconsistent with the Milner “zero minimum flow” policy to license a hydropower water right so that it could force water “that might otherwise be captured for agricultural or municipal use” to be sent past Milner Dam, where it would not be available “for full development of the Eastern Snake Plain.” *Id.* The Hearing Officer further determined:

If not subordinated to recharge rights, the hydropower right could require that water be delivered to meet its licensed amount and pass beyond Milner to the Snake River when it otherwise could be held in the aquifer by recharge for the beneficial use on the Eastern Snake Plain. Some of that water might by-pass Milner Dam in the aquifer for enhancement of the springs below Milner, but that is not inconsistent with the State Water Plan. In many respects recharge serves as a method of storage for use on the Eastern Snake Plain, analogous to holding water in reservoirs. The hydropower right would be subordinate to such a method of storage if developed further, paralleling the result of subordinating the hydropower right to recharge rights.

First Recommendation at 16 ¶ 9.

19. The Hearing Officer concluded it would be “inconsistent with State law and policy if [the Director] were to license the hydropower right with the subordination condition sought by the Canal Companies,” and that “[t]he Final Order entered on October 20, 2008, is consistent with State law and policy” with respect to the subordination condition. *First Recommendation* at 16 ¶ 3.

20. The Director adopts the reasoning of the Hearing Officer as outlined in parts VI, VII and IX of the *First Recommendation* (pages 11-14).

Recharge

21. The State Water Plan provides: “It is the policy of Idaho that managed recharge be encouraged, pursuant to state law.” State Water Plan at 7 (Policy 1J). The “Comment” to this policy states, in part: “Managed aquifer recharge may enhance spring flows and maintain desirable aquifer levels.” *Id.*

22. The State Water Plan further provides that it is state policy “to seek to maintain spring flows in the American Falls and Thousand Springs reaches of the Snake River which will sustain beneficial uses of surface and ground water supplies in accordance with state law.” State Water Plan at 19 (Policy 5H). The “Comment” to this policy states, in part: “Maintaining these [spring] discharges should be the goal of water managers. Managed recharge of the aquifers and continued efforts to efficiently use ground water are two strategies for maintaining spring discharges in these reaches.” *Id.*; see also *id.* at 6 (“Aquifers, in turn, serve as underground reservoirs, and can stabilize stream discharges during dry periods.”) (Policy 1F, “Comment”).

23. In the *Final Order*, the former Director concluded that including the subordination condition of the Milner Permit in the license for water right no. 01-7011 would be inconsistent with the recharge policies of the State Water Plan. *Final Order* at 10-11 ¶¶ 16-18.

The Canal Companies did not object to or challenge these conclusions in the proceedings before the Hearing Officer. The Hearing Officer also determined that licensing water right no. 01-7011 with the subordination provision of the Milner Permit would be inconsistent with the policies of the State Water Plan favoring recharge rights, *First Recommendation* at 16 ¶ 3. The Director agrees and adopts this determination.

24. Idaho Code § 42-234 discusses the use of water for recharge purposes in the context of the state policy of promoting the optimum use and full realization of the state's water resources:

It is the policy of the state of Idaho to promote and encourage the optimum development and augmentation of the water resources of this state. The legislature deems it essential, therefore, that water projects designed to advance this policy be given maximum support. The legislature finds that the use of water to recharge ground water basins in accordance with Idaho law and the state water plan may enhance the full realization of our water resource potential by furthering water conservation and increasing the water available for beneficial use.

Idaho Code § 42-234(1).

25. Including the Milner Permit's recharge exception in the subordination condition of the license for water right no. 01-7011 would be contrary to the state policy of promoting and encouraging the optimum development and augmentation of the State's water resources as explained by the Legislature in Idaho Code § 42-234(1).

Preventing "Another Swan Falls"

26. Idaho Code § 42-203B "specifically implement[s] the state's power to regulate and limit the use of water for power purposes," Idaho Code § 42-203B(1),⁷ and authorizes the Director "to subordinate the rights granted in a permit or license for power purposes to subsequent upstream beneficial depletionary uses." Idaho Code § 42-203B(6).

27. Idaho Code § 42-203B was enacted in 1985 as part of the legislative implementation of the settlement of the Swan Falls hydropower subordination controversy. 1985 Idaho Sess. Laws 25-26; *see also Miles v. Idaho Power Co.*, 116 Idaho 635, 637, 778 P.2d 757, 759 (1989) ("our legislature enacted legislation to implement the agreement. *See* 1985 Idaho Sess. Laws, ch. 14-17; ch. 18, §§ 1, 3, 4; ch. 162, 204, pp. 20-31, 437, 514."). As the Hearing Officer stated, "[t]he potential of hydropower rights limiting the further development of agriculture, as well as limiting the agricultural water rights acquired subsequent to the Idaho Power rights, became a possibility in the Swan Falls controversy." *First Recommendation* at 12 ¶ 7. The legislative history of Idaho Code § 42-203B establishes that the subordination authority of Idaho Code § 42-203B(6) was intended to be exercised so as to prevent "another Swan Falls." *Final Order* at 9 ¶ 12; *id.* at 11-12 ¶ 19.

⁷ *See* Id. Const. art. XV § 3 (providing that "the state may regulate and limit the use [of water] for power purposes").

28. In the *Final Order*, the former Director determined that if the license included the subordination condition of the Milner Permit, hydropower use under water right no. 01-7011 could preclude recharge uses upstream of Milner Dam, which would be contrary to the legislative objective of preventing “another Swan Falls.” *Final Order* at 12 ¶ 19. The Canal Companies did not challenge these determinations in the proceedings before the Hearing Officer.

29. It is also undisputed that, while the Canal Companies are the owners of the water right for the Miner hydropower project, Idaho Power Company operates the project pursuant to an agreement with the Canal Companies, and also is named as a co-licensee on the project’s Federal Energy Regulatory Commission license. *First Recommendation* at 3 ¶ 3; 45 FERC ¶ 61,423; *Mandamus Petition* at Attachment C (“Agreement Regarding The Ownership, Construction, Operation And Maintenance Of The Milner Hydropower Project By And Between The Twin Falls Canal Company, North Side Canal Company, Limited And Idaho Power Company”).

30. Including the subordination condition of the Milner Permit in the license for water right no. 01-7011 would be contrary to the subordination provisions of the Swan Falls settlement as ratified by the Legislature, Idaho Code § 42-203B(5), which bars Idaho Power Company from requiring that water from above Milner Dam be sent past Milner Dam for purposes of hydropower production below Milner Dam. Idaho Code § 42-203B(2).⁸ Including the subordination provision of the Milner Permit in the license for water right no. 01-7011 would be contrary to the Swan Falls settlement as ratified by the Idaho Legislature.

The Former Director’s 1987 Letter

31. The Canal Companies argued to the District Court and to the Hearing Officer that the 1987 letter from former Director R. Keith Higginson to the Canal Companies constituted an enforceable “subordination agreement” that was binding on the Director and required that the subordination condition of the Milner Permit be included in the license for water right no. 01-7011. *Mandamus Petition* at 3, 15; *Canal Companies’ Response To Motion To Dismiss* at 4, 8, 13; *Canal Companies’ Summary Judgment Brief* at 2, 4, 8-9, 11-12, 25, 31-32, 34, 37.

32. The District Court did not resolve the question of whether the 1987 letter constituted a binding “subordination agreement,” but, in dismissing the Canal Companies’ mandamus petition the District Court, held that such a “subordination agreement” would not have imposed a ministerial duty on the Director to include the Milner Permit’s subordination condition in the license for water right no. 01-7011:

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 and effect of enforceability of the agreement can still be raised with the Director and through judicial review if necessary.

Writ Dismissal Order at 10.

⁸ See *supra* page 9 ¶ 17 & note 5.

33. The Hearing Officer determined that “[t]he letter does not constitute a binding agreement upon the current Director who must condition the license consistent with State law, including the policies of the State Water Plan.” *First Recommendation* at 16 ¶ 2. The Hearing Officer further determined that the 1987 letter did not constitute a final order determining the terms of the license when issued, but rather “was a step in the process of obtaining a license with vested rights. . . . there were additional steps necessary before any rights became vested, including proof of beneficial use and review by the Director before issuance of a license to assure that the terms of the license are consistent with the law and the State Water Plan.” *First Recommendation* at 14 ¶ 3. The Director adopts these determinations of the Hearing Officer.⁹

34. Even if the 1987 letter was found to be a binding contract, such an agreement would be void and unenforceable as contrary to Idaho Code §§ 42-219(1) and 42-1734(B), which require the Director to ensure that the subordination condition in the license for water right no. 01-7011 complies with state law and is consistent with the State Water Plan. *See Barry v. Pacific West Constr. Inc.*, 140 Idaho 827, 832, 103 P.3d 440, 445 (2004) (“Illegal contracts are void . . .”). Further, the argument that the Department should be estopped from applying and complying with Idaho Code §§ 42-219(1) and 42-1734(B) as a result of the 1987 letter is contrary to Idaho law because it implies that the Department’s agents may expand the Department’s powers and effectively amend its governing statutes without legislative action. *Kelso & Irwin, P.A. v. State Ins. Fund*, 134 Idaho 130, 137-138, 997 P.2d 591, 598-599 (2000).

Vested Right

35. The Canal Companies argued to the District Court and to the Hearing Officer that the Canal Companies obtained a vested and compensable right to the use of water as set forth in the Milner Permit upon submission of proof of beneficial use, and therefore the Director was required to issue a license for water right no. 01-7011 that included the subordination condition of the Milner Permit. *Mandamus Petition* at 15, 17; *Canal Companies’ Summary Judgment Brief* at 5, 15, 19, 21, 31, 38-45.

36. The District Court determined that the Canal Companies did not have a vested, compensable interest in the Milner Permit. The District Court quoted an SRBA decision holding that while the assertion that a water right vests upon application to beneficial use rather than upon issuance of a license by the Department “‘may well be a correct statement of the law as to

⁹ The Canal Companies argued that recharge was not a beneficial use prior to 1994, *Canal Companies’ Summary Judgment Brief* at 26, 35, and the Hearing Officer determined that recharge was specifically addressed as a beneficial use in a 1994 under Idaho Code § 42-234(2), and that the Legislature had specifically authorized specific instances of recharge prior to 1994. *First Recommendation* at 15 ¶ 7. The Director does not understand these determinations of the Hearing Officer as constituting a determination that recharge was precluded as a beneficial use under Idaho law prior to 1994, and does not so interpret Idaho Code § 42-234(2). “The fact that Idaho enacted a groundwater recharge statute in 1978 in no way signifies it declined to recognize recharge as a beneficial use before then, especially in light of the Idaho Water Resource Board’s stated objective in 1974 [of following a broader definition of the term ‘beneficial use of water’ to include all water uses, both consumptive and non-consumptive].” *Order Granting Aberdeen-Springfield’s Motion For Summary Judgment And Denying Surface Water Coalition’s Motion For Summary Judgment And Motion To Strike Affidavits*, In re SRBA, Subcases Nos. 01-23B, 01-297, 35-2543 and 35-4246 (Aberdeen-Springfield Canal Co.), at 10 (Jun. 11, 2009).

water rights made under the constitutional method,” that this is not the case under the statutory method of appropriation:

[I]t is clear that the Legislature intended the issuance of the license to mark the point at which a water right becomes vested. . . . 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 water right remains an inchoate right. Because I.C. § 42-219(6) gives IDWR 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.

Writ Dismissal Order at 12 (quoting *Memorandum Decision And Order On Challenge; Order On State Of Idaho's Motion To Dismiss Claimant's Notice Of Challenge* (In re SRBA, Subcase No. 36-08099, River Grove Farms) at 24-25 (Jan. 11, 2000) (emphasis in *River Grove Farms*). The District Court stated that while the quoted SRBA decision had not been appealed, “this Court finds it to be on point and persuasive.” *Writ Dismissal Order* at 12. These holdings were binding on the Hearing Officer and the parties, and are binding on the Director.

37. The Hearing Officer also concluded that the Canal Companies had no vested rights in the Milner Permit: “there were additional steps necessary before any rights became vested, including proof of beneficial use and review by the Director before issuance of a license to assure that the terms of the license are consistent with the law and the State Water Plan.” *First Recommendation* at 14 ¶ 3. The Hearing Officer also determined: “The delay in the permit process and licensing does not preclude the Director from conditioning the license as provided in the October 20, 2008, Final Order. Had the licensing occurred earlier it should have contained the subordination condition presently included in the Director’s Final Order.” *Id.* at 16-17 ¶ 4. These determinations of the Hearing Officer are adopted by the Director.

38. Even if Canal Companies had held a vested, compensable interest in the Milner Permit, as a matter of law, such an interest would not require the Director to issue a license conforming to the Milner Permit because, as the Hearing Officer recognized, “hydropower rights do occupy a special status constitutionally and by their treatment in the Legislature.” *Second Recommendation* at 6 ¶ 15.

39. Hydropower water rights are expressly subject to regulation and limitation by the State under the Idaho Constitution and the Idaho Code. *Id.* Const. art. XV § 3; Idaho Code § 42-203B(6); *see also* State Water Plan at 14 (Policy 4D) (subordination authority: “Hydropower water rights may be limited to a specific term and subordinated to upstream depletionary uses [Idaho Code, 42-203B(6) and (7)].” State Water Plan at 14 (Policy 4D) (brackets in State Water Plan).

40. Idaho Code § 42-203B specifically authorizes the Director to subordinate a hydropower water right at the time of licensing, regardless of whether the water right holder has a vested or compensable interest in the underlying permit. *See* Idaho Code § 42-203B(6)

(authorizing the Director to subordinate “a permit or license for power purposes”) (emphasis added).

41. Regardless of whether the Canal Companies have a vested or compensable interest in the Milner Permit, the Director is authorized by the Idaho Constitution and the Idaho Code to subordinate the license for water right no. 01-7011. The Canal Companies’ remedy, if they believe the imposition of the subordination provision affects a vested right, is to seek compensation through an inverse condemnation action.

The FERC License

42. The Canal Companies argued to the Hearing Officer that the 1988 Federal Energy Regulatory Commission (“FERC”) licensing order for the Milner hydropower project precluded the Director from requiring that the license for water right no. 01-7011 include the subordination condition of the *Final Order*, because FERC denied the Department’s request (in 1985) that the federal license include a broad subordination condition. *Canal Companies’ Summary Judgment Brief* at 27-31. The Hearing Officer determined that FERC’s licensing order “does not prevent the Director from conditioning the license with the subordination provision at issue in this case.” *First Recommendation* at 10 (title to part V). The Hearing Officer further determined that, while FERC’s licensing order was subject to its own interpretation, “nothing in that action precludes the State of Idaho from including the subordination condition included by the Director in issuing the license.” *Id.* at 10 ¶ 1.

43. The Hearing Officer also determined that, while any claim by the Canal Companies that the subordination condition of the *Final Order* interfered with the terms of the FERC license “ultimately would be resolved by FERC and the federal courts” under federal law, it appears that “those standards allow the subordination condition in dispute.” *First Recommendation* at 10 ¶ 1.

44. The Hearing Officer’s analysis and determinations in part V of the *First Recommendation* (pages 10-11 ¶¶ 1-3) are adopted by the Director.¹⁰

45. The Hearing Officer determined: (a) “[t]he Director would act inconsistent with State law and policy if he were to license the hydropower right with the subordination clause sought by the Canal Companies,” *First Recommendation* at 16 ¶ 10; (b) the subordination condition of the *Final Order* is consistent with state law and policy, *id.* at 16 ¶ 3; and the Director should include the subordination condition of the *Final Order* in the license. *Id.* at 17 (Order and Recommendation). The Director adopts this determination.

The Term Condition.

¹⁰ The *First Recommendation* refers to the “FERC’s action in licensing the hydropower right.” *First Recommendation* at 10 ¶ 1 (emphasis added). The Director deems the Hearing Officer’s use of the term “right” in this sentence to be a scrivener’s error, because as a matter of federal and state law FERC issues federal licenses for hydropower projects, not for hydropower water rights. The Director therefore understands and interprets this sentence as referring to ‘FERC’s action in licensing the hydropower project.’

46. The Milner Permit, as issued in 1977 and amended in 1987, did not include a term condition.

47. The *Final Order* required that the license for water right no. 01-7011 include a term condition. The term condition provides, in relevant part, that the diversion and use of water under the license would be “subject to review by the Director after the date of expiration of Milner Project License No. 2899 (11/30/2038) issued by the Federal Energy Regulatory Commission,” and that upon appropriate findings relative to the interest of the public, “the Director may cancel all or any part of the use authorized herein and may revise, delete or add conditions under which the right may be exercised.” *Final Order* at 15 (Condition of Approval no. 5).

48. Idaho Code § 42-203B authorizes the Director to add a term condition at the time of licensing. Idaho Code § 42-203B provides, in relevant part: “The director shall also have the authority to limit a permit or license for power purposes to a specific term.” Idaho Code § 42-203B(6).

49. Subsection (7) of Idaho Code § 42-203B outlines criteria the Department shall consider when determining the length of term conditions for new permits and provides, in part: “The term of years shall be determined at the time of issuance of the permit, or as soon thereafter as practicable if adequate information is not then available.” The Canal Companies argued to the Hearing Officer that the Director violated Idaho Code § 42-203B(7) by including a term condition in the license because there had been several opportunities to add a term condition prior to licensing. *Canal Companies' Summary Judgment Brief* at 9, 12.

50. The Canal Companies also argued the Department's Water Appropriation Rule 50.03 precludes the addition of a term condition at licensing. Water Appropriation Rule 50.03 addresses “Applications and Existing Permits” for hydropower purposes, and provides, in relevant part: “A permit issued for hydropower purposes shall contain a term condition on the hydropower use in accordance with Section 42-203B(6), Idaho Code.” IDAPA 37.03.08.050.03. The Canal Companies argued that because this rule addresses only permits, it precluded the Director from including a term condition in the license for water right no. 01-7011. *Canal Companies' Summary Judgment Brief* at 13.

51. The Hearing Officer determined that Idaho Code § 42-203B(7) puts “restraints in terms of time on the exercise of the authority” of the Director to impose a term condition on a hydropower water right, and “sets a standard for the exercise of the Director's discretion.” *Second Recommendation* at 4 ¶9. The Hearing Officer further determined: It was practical to make the determination [as to a term condition] as soon as the FERC license was issued in 1988,” and that “[h]ad there been notice of the term limit prior to construction the Canal Companies could have made a determination of whether that condition affected the feasibility of the project and could have appealed the issue prior to construction.” *Id.* at 5 ¶ 11. The Hearing Officer concluded: “the Department had ‘adequate information’ to determine a term limit prior to construction and years before licensing,” and the failure to set a term limit within the constraints of the statute precludes including the term limit in the license. The Hearing Officer recommended that Conclusion of Law 7 in the *Final Order* be deleted.” *Id.* at 5 ¶¶ 11-12.

52. Under the Hearing Officer's interpretation of subsection (7), the Director has "adequate information" to determine a term condition for a hydropower water right, and therefore it is "practicable" to set the term, when the FERC license issues. Further, the Hearing Officer's interpretation of subsection (7) requires the Director to determine a term condition "prior to construction" of a hydropower project, so that the water right holder has an opportunity to appeal the condition before building the project.

53. The Hearing Officer's interpretation of subsection (7) of Idaho Code § 42-203B eliminates consideration of part of the statutory language. Subsection (6) expressly authorizes the Director to include a term condition in either "a permit or license" for power purposes. Idaho Code § 42-203B(6) (emphasis added). The first sentence of Subsection (7) explains how "a permit or license" may be conditioned by the Director. Idaho Code § 42-203B(7) (emphasis added). If the Department were required to set the term condition when the FERC license issues and before construction begins, as suggested by the Hearing Officer, the Department would effectively be barred from ever setting the term condition at licensing. This is because the FERC license is always issued before the hydropower water right license is issued and construction always begins before the hydropower water right license is issued.¹¹ If the Department were required to set the term condition when the FERC license issues and prior to construction, the term "or license" is effectively deleted from the statute. As a result, the Hearing Officer's interpretation of the statute creates a conflict or ambiguity in the statutory language.

54. It is appropriate to consult the legislative history of Idaho Code § 42-203B to determine the intent of the statute for purposes of resolving the conflict or ambiguity arising under the Hearing Officer's interpretation of the statute. *Hausladen v. Knoche*, 149 Idaho 449, 452, 235 P.3d 399, 402 (2010).

55. As originally enacted under 1985 Senate Bill 1008, I.C. § 42-203B contained only six subsections, and the Director's authority to subordinate and/or impose term conditions on hydropower permits or licenses was in subsection (6). 1985 Idaho Sess. Laws 25-26. The provision that ultimately became subsection (7) was not part of the original bill but was added later in the same legislative session, under 1985 House Bill 186. 1985 Idaho Sess. Laws 537-39.

56. In the committee hearings on Senate Bill 1008 (which did not contain subsection (7)), Senator William Ringert pointed out that, because the statute authorized the Director to subordinate "a permit or license" for hydropower use, the Director would have the authority to subordinate the license for a hydropower water right even though the permit was not

¹¹ Under Idaho law a water right holder cannot obtain a license without first proving beneficial use. Idaho Code §§ 42-217, 42-219(1). Under federal law, however, beneficial use at a private hydropower project cannot be shown until after the FERC license issues and the project has been constructed, because federal law prohibits construction of such a project before FERC has issued a license. 16 U.S.C. § 817. Further, in the case of a major hydropower project, such as the one at issue in this matter, construction may take a significant amount of time, and thus it may not be possible to show beneficial use until several years after the FERC license issues. Thus, interpreting subsection (7) as requiring the Director to determine a term condition after the FERC license issues and before construction begins (so that the water right holder has an opportunity to appeal the condition), as the Hearing Officer did in this case, *Second Recommendation* at 4-5, effectively bars the Director from including a term condition at the time of licensing.

subordinated.¹² The proponents of the legislation explained the statute had been so drafted intentionally, to give the State the authority to revisit then-existing unsubordinated permits for hydropower uses at the time of licensing, and add subordination conditions at that time.¹³ Further, while an attorney representing small hydropower interests observed that the statute “grandfathered” existing hydropower licenses and requested that the statute be amended to also “grandfather” existing permits, the State opposed such an amendment.¹⁴

57. This legislative history demonstrates that the provision in subsection (6) authorizing the Director to add a subordination condition to “a permit or license” for hydropower use was intended to allow the Director to revisit, at licensing, unsubordinated permits for hydropower uses that were existing when Idaho Code § 42-203B was enacted, and add subordination conditions to the licenses.

58. Because subsection (6) similarly authorizes the Director to add a term condition to either “a permit or license” for hydropower use, it follows that this authority also allows the Director to revisit at licensing hydropower permits that were existing when the time of licensing any hydropower permits that were existing when Idaho Code § 42-203B was enacted, and add term limit conditions to the licenses.

59. The Milner Permit was an existing hydropower permit when Idaho Code § 42-203B was enacted in 1985. Subsection (6) authorizes the Director to add a term condition to the license for water right no. 01-7011.

60. The legislative history of subsection (7) further demonstrates that the foregoing conclusion is not contrary to the intent of subsection (7). Subsection (7) was added to the statute after the small hydropower interests had expressed concerns that if the Director were to set a term condition when a permit was first issued, the condition might inadvertently restrict the length of time necessary for an adequate return on investment.¹⁵ To address this concern, the small hydropower interests, the State, and Idaho Power Company jointly proposed adding subsection (7) to Idaho Code § 42-203B via House Bill 186.¹⁶ The bill expressly recognized the Director had authority to add term limit conditions to “permits or licenses” for hydropower purposes,¹⁷ and the proposed amendments were intended “to make sure the director does not inadvertently set too short a period of time in the permit or license, thus preventing the financing of small hydropower projects.”¹⁸ In supporting the amendments, the attorney for the small

¹² Transcript of Senate Resources and Environment Committee Meeting (Feb. 1, 1985), at pp. 33-34.

¹³ *Id.*

¹⁴ Attachment to Senate Resources and Environment Committee Minutes (Jan. 21, 1985), titled “*Revised and Supplemented Testimony By John L. Runft Before the Idaho Senate Committee on Resources and Environment January, 21, 1985*,” p. 5; Attachment to Senate Resources and Environment Committee Minutes (Jan. 25, 1985) titled “*Supplemental Testimony of Attorney General Jim Jones before the Idaho Senate Committee of Resources and Environment*,” pp. 1, 3.

¹⁵ *Revised and Supplemented Testimony by John L. Runft* at 3-4.

¹⁶ Because the Swan Falls Agreement was contingent upon the enactment of Idaho Code § 42-203B as proposed under the Agreement, subsection (7) could not be added directly to Senate Bill 1008 but rather had to be added under a separate bill, House Bill 186.

¹⁷ Idaho H. 186, 1985 Leg., 48th Sess. 1.

¹⁸ ANALYSIS OF HOUSE BILL 186 I: *Attachment to Minutes of H. Comm. On Res. & Conservation*, 1985 Leg., 48th Sess., 1 (Mar. 6, 1985).

hydropower interests explained the amendments were intended to address a "procedural problem" related to when the term of years would begin to run, and also recognized the Director would have authority to "limit such a permit or license to a specific term of years."¹⁹

61. This legislative history establishes that subsection (7) was not intended to prevent the Director from adding a term condition at licensing, but rather was intended "[t]o provide factors the Director of the Department of Water Resources is to consider in limiting permits or licenses for power purposes to a specific term,"²⁰ and to allow the term length to either be set or adjusted at the time of licensing based upon when the water was first put to beneficial use. The Hearing Officer's reading of subsection (7) requiring that the term condition be established at the time the FERC license issues and before construction begins results in the very situation that the small hydropower users were trying to prevent in getting subsection (7) added to Idaho Code § 42-203B. Setting the length of the term at the time the FERC license issues and prior to construction could significantly restrict the water user's ability to derive an adequate return on investment.

62. The legislative history of Idaho Code § 42-203B resolves the potential conflict or ambiguity that arises under the Hearing Officer's interpretation of subsection (7), and supports inclusion of a term condition in the license for water right no. 01-7011. The Director therefore declines to accept the Hearing Officer's determinations, conclusions, and recommendations with regard to the term condition.

63. The Hearing Officer did not address the Canal Companies' argument that the Water Appropriation Rule 50.3 barred the Director from adding a term condition to the license for water right no. 01-7011 because the rule provides for a term condition to be inserted in the permit for a hydropower water right, but not in the license. Water Appropriation Rule 50.3 by its terms applies only to permits for hydropower water rights. The rule does not purport to define the Director's authority to add a term condition to a license. Even if Water Appropriation Rule 50.3 were interpreted as meaning that the Director lacks authority to add a term condition to the license for a hydropower water right, such an interpretation would be contrary to Idaho Code § 42-203B(6), which expressly authorizes the Director to add a term condition to the license for a hydropower water right. *See Idaho County Nursing Home v. Idaho Dep't. of Health & Welfare*, 120 Idaho 933, 937, 821 P.2d 988, 992 (1991) ("When a conflict exists between a statute and a regulation, the regulation must be set aside to the extent of the conflict.")

64. The Canal Companies argued that the Director may not add a term condition to the license for water right no. 01-7011 because Idaho Power Company or the Canal Companies have a vested or compensable property interest in the Milner Permit, *see, e.g., Post-Hearing Briefing In Support Of Canal Companies' Protest Of Term Limit And Volumetric Limitation On Water Right License No. 01-7011* at 9 (arguing that adding a term condition to the license "affected a substantial property right of Idaho Power Company").²¹ The argument alleging a

¹⁹ Statement By John L. Runft: Attached to Minutes of H. Comm. On Res. & Conservation, 1985 Leg., 48th Sess. 3 (Feb. 15, 1985).

²⁰ 1985 Idaho Sess. Laws 537 (1985 H.B. 186) (1985 Leg., 48th Sess. 1).

²¹ This is the first time that the Canal Companies have asserted in this matter that Idaho Power Company has a property interest in water right no. 01-7011. While Idaho Power Company operates the Milner hydropower

vested or compensable property interest is incorrect for the same reasons these arguments are unpersuasive with respect to the subordination condition, as previously discussed: (a) the Idaho Constitution and Idaho Code § 42-203B specifically authorize the Director to regulate and limit hydropower water rights even if the Canal Companies (or Idaho Power Company) had a vested or compensable interest in the Milner Permit; and (b) the Canal Companies (and Idaho Power Company) did not have any vested or compensable interest in the Milner Permit.

65. The Director concludes that including a term condition in the license for water right no. 01-7011 is consistent with applicable provisions of state law and the State Water Plan. The Director therefore declines to accept the Hearing Officer's recommendation that the license for water right no. 01-7011 should not include a term condition.

66. The Director agrees, however, with the Hearing Officer's determination that the term condition of the *Final Order* is potentially inconsistent with Conclusion of Law No. 7 of the *Final Order*, because the term condition provides for review and potential cancellation or revision of the water right license upon expiration of the FERC license, while Conclusion of Law No. 7 states that the water right license will terminate upon expiration of the FERC license. *Second Recommendation* at 3 ¶ 6. The Director therefore rejects Conclusion of Law No. 7 of the *Final Order* to the extent it is inconsistent with term condition as approved herein.

The Volumetric Limitation.

67. The Director adopts and incorporates into this order the Hearing Officer's determinations and reasoning regarding the volumetric limitation ordered in the *Final Order*. The Director accepts the Hearing Officer's recommendation that the license for water right no. 01-7011 should include a volumetric limitation authorizing diversion of the diversion rate during the entire period of use set, if the water is available. *See the Final Order. Second Recommendation* at 10 ¶ 2.

ORDER

IT IS HEREBY ORDERED that water right no. 01-7011 authorizing the diversion of water from the Snake River for power purposes be licensed as follows:

Source:	Snake River
Beneficial Use:	Power
Period of Use:	01/01 to 12/31
Diversion Rate:	5,714.70 cfs
Diversion Volume:	4,140,000 acre-feet
Points of Diversion:	NW1/4SW1/4 Sec. 28, Twp. 10S, Rge. 21E, B.M. L8 (NE1/4SE1/4) Sec. 29, Twp. 10S, Rge. 21E, B.M.
Place of Use:	NE1/4SE1/4 Sec. 29, Twp. 10S, Rge. 21E, B.M. L8 (SW1/4NE1/4) Sec. 30, Twp. 10S, Rge. 21E, B.M.

facility pursuant to an agreement with the Canal Companies, and is a co-licensee on the facility's FERC license (with Milner Dam, Inc.), Idaho Power Company is not named on the Milner Permit, is not a party to this proceeding, and has not claimed any interest in water right no. 01-7011.

Conditions of Approval:

1. The diversion and use of water for hydropower purposes under this water right shall be subordinate to all subsequent upstream beneficial depletionary uses, other than hydropower, within the Snake River Basin of the state of Idaho that are initiated later in time that the priority of this water right and shall not give rise to any right or claim against any junior-priority rights for the depletionary or consumptive beneficial use of water, other than hydropower, within the Snake River Basin of the state of Idaho initiated later in time that the priority date of water right no. 01-7011.
2. A measuring device of a type approved by the Department shall be permanently installed and maintained as part of the diverting works.
3. Use of water under this right shall be non-consumptive.
4. This right does not constitute Idaho Public Utilities Commission or Federal Energy Regulatory Commission approval that may be required.
5. The diversion and use of water for hydropower purposes under this water right is subject to review by the Director after the date of expiration of Milner Project License No. 2899 (11/30/2038) issued by the Federal Energy Regulatory Commission. Upon appropriate findings relative to the interest of the public, the Director may cancel all or any part of the use authorized herein and may revise, delete or add conditions under which the right may be exercised.

IT IS FURTHER ORDERED that this is a final order of the agency. The right holder may petition for reconsideration of this final order within fourteen (14) days of the service date of this order. The agency will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law pursuant to Idaho Code § 67-5246.

DATED this 18th day of October, 2010.



GARY SPACKMAN
Interim Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of October, 2010, the above and foregoing document was served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

JOHN ROSHOLT
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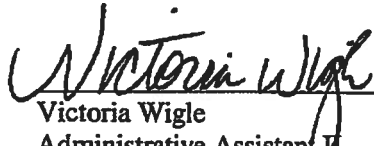
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Victoria Wigle
Administrative Assistant II
Idaho Department of Water Resources

EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(Required by Rule of Procedure 740.02)

The accompanying order is a "Final Order" issued by the department pursuant to section 67-5246 or 67-5247, Idaho Code.

Section 67-5246 provides as follows:

- (1) If the presiding officer is the agency head, the presiding officer shall issue a final order.
- (2) If the presiding officer issued a recommended order, the agency head shall issue a final order following review of that recommended order.
- (3) If the presiding officer issued a preliminary order, that order becomes a final order unless it is reviewed as required in section 67-5245, Idaho Code. If the preliminary order is reviewed, the agency head shall issue a final order.
- (4) Unless otherwise provided by statute or rule, any party may file a petition for reconsideration of any order issued by the agency head within fourteen (14) days of the service date of that order. The agency head shall issue a written order disposing of the petition. The petition is deemed denied if the agency head does not dispose of it within twenty-one (21) days after the filing of the petition.
- (5) Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:
 - (a) The petition for reconsideration is disposed of; or
 - (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.
- (6) A party may not be required to comply with a final order unless the party has been served with or has actual knowledge of the order. If the order is mailed to the last known address of a party, the service is deemed to be sufficient.
- (7) A non-party shall not be required to comply with a final order unless the agency has made the order available for public inspection or the nonparty has actual knowledge of the order.

(8) The provisions of this section do not preclude an agency from taking immediate action to protect the public interest in accordance with the provisions of section 67-5247, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4) Idaho Code.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days: a) of the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

EXHIBIT 8

ALBERT P. BARKER
JOHN A. ROSHOLT
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Albert P. Barker
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July 31, 2015

VIA EMAIL AND U.S. MAIL

Michele Edl
Idaho Department of Water Resources
322 East Front Street
P.O. Box 83720
Boise, ID 83720-0098

Re: Permit 63-33329 (Arena Drop Hydroelectric Facility)

Dear Ms. Edl:

The Boise Project Board of Control has received a Notice of Intent to void the Permit for this hydroelectric facility, dated July 14, 2015. As noted in my email of July 13, 2015, we believe it is regrettable that the Department has chosen to take this precipitous action. We have been gathering the data requested during your site visits and it has taken some time to pull the information together. The project has had to obtain historic flow data on relevant dates from its records, obtain generation, bypass flow, and wicket gate opening data from Riverside and efficiency curves from the turbine manufacturer. The project went online in the fall of 2010 and proof of beneficial use was submitted in May of 2013. No action has been taken for over two years by the Department on the proof. Yet, the permittee is expected to jump within a matter of weeks in response to this demand for additional information or lose the permit entirely. This is not a very fair way to treat permittees in general. The Boise Project objects to the issuance of the Notice of Intent by the Department.

We know that power was actually being generated by the facility during your on-site visit and was confirmed by the FERC inspection as well. As the proof states, Arena was generating at full capacity as noted in the beneficial use field report on that day. See also Idaho Power's acknowledgment that the facility was operational and generating electricity in 2010. Exhibit A. You have asked to see generation records to confirm actual generation levels. Attached as Exhibit B are daily generation reports for the Arena Drop Hydroelectric Facility for the years 2011 through 2015. These reports show daily and indeed hourly generation for the days when the plant was in operation during that period of time. While the generation records confirm that

generation occurred on each of the days referenced, the amount of kWhs generated is not an element of the permit or water right and should not be considered as an element of the license.

You also asked for efficiency curves for the Arena turbine because you had no proof of the turbine's capacity. Attached as Exhibit C are the turbine efficiency curves for the Arena Drop Hydroelectric Facility provided by the turbine manufacturer, CHEC.

Riverside, the operator, and the Boise Project have determined what they believe is a better and more accurate way to calculate the maximum flow put to beneficial use by this facility rather than attempting to back-calculate flows from generation data and efficiency curves. The Project measures the flow at the head of the canal drop. Attached as Exhibit D is a chart measuring the flows at the head of the canal drop for the highest generation days over the period of operation 2011-2014. Exhibit E is a chart showing the bypass flows measured by Riverside on the bypass channel as a percentage of the bypass channel openings. Riverside reviewed that data and determined the six maximum flow days (which occurred in April and May of 2014), when the highest volume of water was measured by the Boise Project at the head of the canal drop when there were no bypass flows around the turbines. Riverside also determined that the wicket gates were set at 100% opening on each of those days. These dates thus represent the maximum turbine flow. See Exhibit F. Those maximum flows ranged from 96 to 104 cfs.

You have asked for annual volume data so that you can recommend a volume limitation on the license. Your email requests do not describe how a volume limitation is necessary to administer this water right. The Boise Project Board of Control objects to inserting any volume limitation in the license for this hydroelectric facility. First of all, no such limits were set forth in the permit. The Department stated that it has a general policy of not adding conditions to a license that were not in the permit. Second, this facility is a non-consumptive, subordinated hydropower plant. It does not have the ability to call for any water to be diverted out of the river and relies entirely on the water already being diverted into the same canals for irrigation purposes. Only when water is diverted into the canals under the irrigation right is the water available for use in this hydroelectric facility. It operates as a run-of-the-river facility.

Idaho Code § 42-217 provides no authorization for a volume limitation on this water right. Idaho Code § 42-1411(2) provides that the director in recommending a right in an adjudication may set "an annual volume of diversion of water for use or storage in acre feet per year as necessary for proper administration of the water right." (Emphasis added.) You cited to IDAPA Rule 37.03.02.035.j as providing that a volume limit is not necessary for an on-stream non-consumptive hydropower right, but state that this provision does not apply to this hydropower right even though it is also non-consumptive, subordinated, and cannot call for any water that would not otherwise flow past the plant.

The SRBA Court in the Facility Volume case, *In Re SRBA Case No. 3957 in the District Court of Fifth Judicial District of the State of Idaho in and for the County of Twin Falls* (December 29, 1999), held that an attempt to place a facility volume limitation on a non-consumptive fish processing permit would not be permitted because a volume limitation was not

necessary for the definition of the right or administration of the right. In a subsequent case involving a hydroelectric facility, *In the Matter of Licensing Water Right Permit No. 01-7011, in the Name of Twin Falls Canal Company and North Side Canal Company* (July 30, 2010), the hearing officer rejected an attempt to require a volume limit on a hydroelectric facility at Milner Dam. The hearing officer, retired Supreme Court Justice Gerald Schroeder, held "Nothing in the statute requires both a diversion rate and an annual volume rate for a non-consumptive hydropower right that has been subordinated." *Findings of Fact, Conclusions of Law, and Recommendations*, p. 9. The Hearing Officer went on to conclude that an annual volume which differs from the total maximum diversion rate makes administrative of the right more complex and would result in wasting of water that otherwise could have been used to generate power to the detriment of the holder of the water right and to power users in the public as a whole. *Id.*

The same rationale applies here. There is no reason for a volume limitation on the Arena Hydropower right. Placing an annual volume limitation could require the districts and the Board of Control to spill or bypass water that could otherwise be put to use generating electricity for the benefit of the district landowners and the electrical consuming public as a whole just because an arbitrary volume limit had been reached. No other water user would benefit from or be protected by a volume limit. As Justice Schroeder has found in the *Milner* case, there is simply no basis for proper administration of a non-consumptive hydropower right like this one by inserting a volume limitation in the license.

As a practical matter, determining the total volume use for actual generation cannot be done with any precision. The measurements at the head of the canal drop are taken periodically, daily or twice daily, and are not taken on a continuous basis. Flows in the canal vary from day to day and even within the day, depending on irrigation demand and other canal operational issues. Canals start and stop operation from year to year on different dates depending on total water available under the irrigation rights. This hydropower right has no influence on the water diverted from the Boise River as this hydropower right is completely dependent upon the water available for irrigation. Because these hydropower facilities are not located on the main canal it is not possible to simply calculate the amount of water that is turned into the head of the New York Canal on an annual basis because that amount of water does not reach to the locations of these hydroelectric facilities.

Moreover, there is no storage associated with this facility. The Arena Drop Hydroelectric Facility does not back up water and store it for later generation. It simply uses the flow as it goes through the canal.

For these reasons, the Boise Project Board of Control objects to any volume limitation imposed on the right through the license. Idaho Code § 42-217 and Idaho Code § 42-1411(2) do not authorize such a volume limitation because it is not necessary for the administration of right and would make the right far more complicated to administer at all. In addition, this hydroelectric facility is a run-of-the-river type of facility, has no storage, and is entirely non-consumptive and so falls within the spirit and the letter of IDAPA 37.03.02.035.j.v.

Michele Edl
Idaho Department of Water Resources
July 31, 2015
Page 4

We believe this data satisfies the Department's legitimate request for proof of beneficial use. There is no doubt that this project has used the existing canal water every year to generate electricity. We request the license to be issued on the same terms and conditions of the permit. We acknowledge that this data demonstrates the need for a second permit and license for additional flows over 80 cfs and will work with the Department to see that it has the proper paperwork for that second right.

Very truly yours,

BARKER ROSHOLT & SIMPSON LLP

A handwritten signature in black ink, appearing to read 'Albert P. Barker', written over the printed name.

Albert P. Barker

APB/se
Enclosures

cc: T. Page (via email w/attachments)
D. Daugherty (via email w/o attachments)
S. Keen (via email w/o attachments)