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DEPARTMENT OF
WATER RESOURCES

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

IN THE MATTER OF LICENSING WATER)
RIGHT PERMIT NO. 01-7011 IN THE) **IDAHO WATER RESOURCE**
NAME OF TWIN FALLS CANAL COMPANY) **BOARD'S SECOND SUPPLEMENTAL**
AND NORTH SIDE CANAL COMPANY) **ANSWERS TO FIRST SET OF**
) **DISCOVERY REQUESTS FROM THE**
) **CANAL COMPANIES**

INTRODUCTION

The Idaho Water Resource Board, pursuant to Rules 26 and 34 of the Idaho Rules of Civil Procedure, hereby supplements its objections and answers to the first set of discovery requests from the Twin Falls Canal Company and the North Side Canal Company, dated November 18, 2009, as follows.

REQUESTS FOR PRODUCTION OF DOCUMENTS

REQUEST FOR PRODUCTION NO. 1: Please produce all documents, agendas, minutes, notes, reports, attachments, documents prepared by or submitted to the Idaho Water Resource Board, documents prepared by or submitted to the Idaho Department of Water

Resources, contained in the files or archives, in paper or electronic format, of the Idaho Water Resource Board for the years 1977 through 2002, which in any way relate to the development of a hydropower project and application for water right at the Milner Dam.

SUPPLEMENTAL RESPONSE TO REQUEST FOR PRODUCTION NO. 1:

Objection. IWRB's actions or inactions, analyses or lack of analyses, etc., with regard to the development of a hydropower project and application for water right at the Milner Dam are not at issue in this administrative proceeding. The only thing that is at issue in IWRB's Intervention is a pure question of law regarding hydroelectric power production and upstream aquifer recharge.

Further, because IWRB's past actions, analyses, etc., are not at issue in this administrative proceeding, it has not devoted the time necessary to review its files from 1977 through 2002 to determine what documents, agendas, minutes, notes, reports, attachments, prepared by or submitted to IWRB, documents prepared by or submitted to IDWR, contained in the files or archives, in paper or electronic format, of IWRB for the years 1977 through 2002, may in any way relate to the development of a hydropower project and application for water right at the Milner Dam. These documents would be irrelevant and would not be reasonably calculated to lead to relevant evidence, so it would be unduly burdensome to require IWRB to devote time or effort to research a quarter-century of files to try to locate them. Without waiving these objections, the IWRB produces the documents attached hereto in response to this request for production.

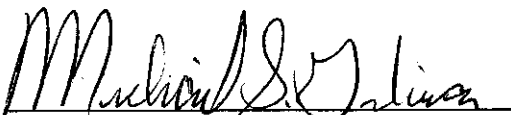
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Respectfully submitted this 8th day of March, 2009.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: 
Michael S. Gilmore
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of March, 2009, I caused to be served a true and correct copy of the foregoing by the following method to:

✓ Hon. Gerald Schroeder, Hearing Officer
c/o Idaho Department of Water Resources
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Boise, Idaho 83720-0098
fcjschroeder@gmail.com

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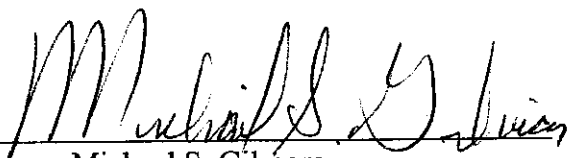
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JUN 20 1989

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June 19, 1989

Idaho Water Resource Board
c/o Idaho Department of Water Resources
1301 N. Orchard
Statehouse Mail
Boise ID 83720

RE: Water District 01 -- 1989 Water Bank Rules

Dear Board Members:

While joining you in Sandpoint to discuss Water District 01 Water Bank Rules and my May 9, 1989, letter and this letter sounds good to me, my sometimes reverse priorities will not allow me to so schedule into Sandpoint.

On May 9, I wrote to you on the above subject you have now scheduled on your agenda for consideration. Since that time, the Water District has again changed their rules. Rule 3.6 was amended at their June 8, 1989, meeting to read as follows:

3.6 Storage space assigned to the Water Bank that is evacuated to supply water for non-consumptive uses below Milner shall be the last space to fill, in the reservoir from which the space was originally assigned, in the ensuing year. Any water bank supplier may limit the use of his space to "agricultural uses only" by so indicating at the time his space is assigned to the bank. Water sold from space assigned and restricted to agricultural uses shall bear the payment priorities set forth in Rule 6 except that anyone assigning space for agricultural purposes shall share proportionally in the proceeds from only water sold for irrigation.

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The change obviously tempers the severity of the rule of March 1, 1989, which I herewith quote for your convenience:

- 3.6 Space assigned to the Water Bank that is evacuated to supply water for non-consumptive uses below Milner shall be the last space to fill in the ensuing year.

Allowing a lessor to designate "agricultural uses only" takes away the punitive nature of penalizing a lessor that could not be protected under the March 1989 version of the rule as interpreted by the Committee. The June 1989 rule also only subordinates "refill" for such lessors who lease for such non-consumptive purposes, to the reservoir from which the water is leased, thus increasing the potential for leasing, over and above the March 1989 rule.

One result of the June 1989 rule will most likely be that if the reservoirs are full, more water will be available for lease on a non-restricted basis from American Falls, since that reservoir generally refills annually. The rule still will not encourage leasing of water, but will probably not discourage leases for any purpose from lessors who own space in American Falls, or who can carry over enough water to cover the downside of the following year.

As I explained to the Board at your January meeting, my clients Twin Falls Canal Company (TFCC) and North Side Canal Company (NSCC) received a FERC license for the Milner Power Project on December 15, 1988. In essence, it provides for a 200 cfs bypass flow at Milner on a year around basis. Please understand that TFCC and NSCC did not request or support such a requirement in the license. In fact teams of documents and testimony show that TFCC and NSCC totally opposed the assertion of a bypass flow other than the 58 cfs which leaks through the dam as contrary to the State Water Plan and state water law. However, TFCC and NSCC find themselves now in a position where they must comply with the requirement until it can be changed or eliminated.

The imposition of Water District 01's rule is to discourage leases for the bypass flows. While the license does also state that we need not rent water if none is available, the appearance is that TFCC and NSCC dreamed up the rule so as to not have leasable water available and consequently to avoid FERC's requirement, especially in light of Keith Higginson's letter of September 30, 1988, to FERC (a copy of which is

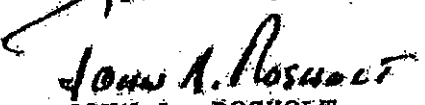
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Exhibit "A" hereto) which may have encouraged the FERC to mandate a flow which was larger than the leak of 58 cfs through the Milner Dam.

In summary, TFCC and NSCC support the change from the March 1989 version to the June 1989 version as an improvement. But as pointed out in the May 9, 1989, letter, a more reasonable rule would be to protect the priority in leasing for irrigation, but to not discourage a lease for any purpose so long as the water is used during the irrigation season of April 15 through October 15 of each year.

If the real purpose of the Water Bank Rule is to spite FERC, it seems to this writer that Idaho only adds fat to the fire. During the Milner licensing process, Idaho Fish & Game, Health and Welfare, and Parks and Recreation all argued for greater bypass flows than were on the table. Their recommendations were also in conflict with the State Water Plan. Perhaps the state needs its house in order so they can comment in a unified voice on a project. Such a voice should include all state agencies, political subdivisions and instrumentalities. Perhaps an M.O.U. can be developed with FERC as to future project licenses so the state doesn't have to depend on a reversal of Rock Creek to avert all out war on the issue of bypass flows, which is a current issue in every pending licensing and relicensing proceeding.

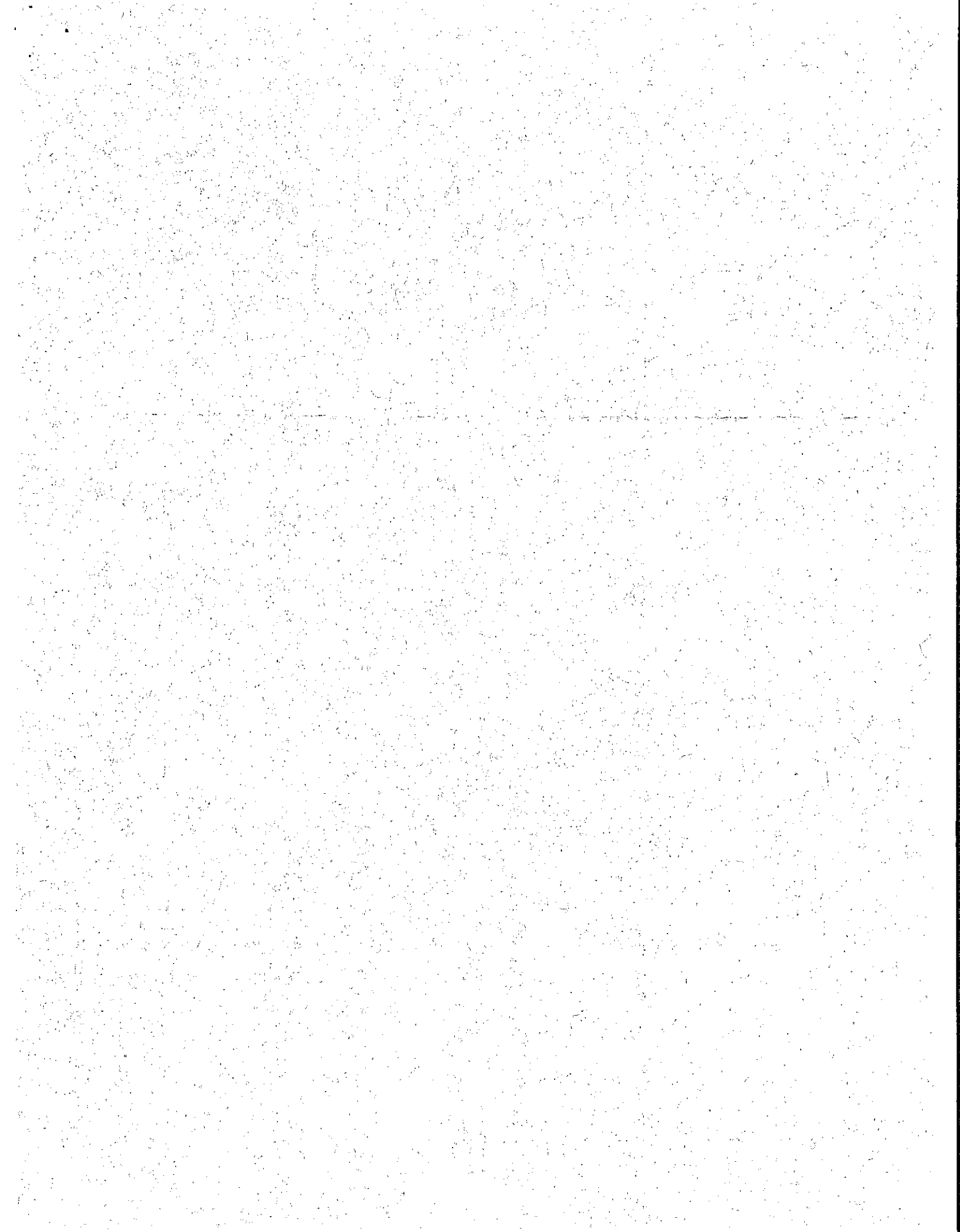
Respectfully submitted,


JOHN A. ROSHOLT
ATTORNEY FOR TFCC & NSCC

JAR:dcb
24911

Enclosure

cc: Keith Higginson
Clive Strong





State of Idaho
DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Statehouse Mail, Boise, Idaho 83720 - (208) 334-7900

CECIL D. ANDRUS
GOVERNOR
R. KEITH HIGGINSON
DIRECTOR

September 30, 1988

Ms. Lois D. Cashell
Acting Secretary
Federal Energy Regulatory Commission
825 North Capitol Street, N.E.
Washington, D.C. 20426

COMMENTS OF THE IDAHO DEPARTMENT OF WATER RESOURCES

Re: In the Matter of the Supplement to the Draft Environmental Impact Statement No. 0048 for the Twin Falls, Milner, Auger Falls, and Star Falls Hydroelectric Projects on the Mainstem of the Snake River, Idaho

Dear Ms. Cashell:

The Idaho Department of Water Resources ("IDWR") has reviewed the new circumstances, information and staff alternatives for the referenced projects and makes the following comments regarding the Milner Hydroelectric Project (FERC No. 2899).

Maintenance of higher minimum flows at the Milner site must be done in accordance with applicable state law. The applicant has proposed minimum by pass flows of 58 cfs during the irrigation season and 150 cfs during the non-irrigation season. In the event the applicant is successful in complying with the substantive areas of state water law, IDWR has determined that there is reasonable possibility that both minimum flows can be accommodated if a supply of water can be leased or purchased.

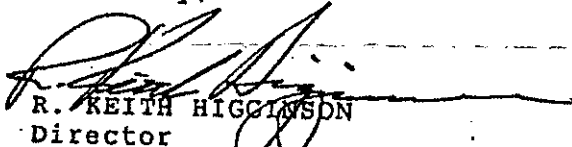
The concept of a "Comprehensive Water Block" ("CWB") may work well in some years on the mainstem of the Snake River, it will be a challenge to structure a long-term agreement with the Water Bank to sell water to meet mitigative flows for hydroelectric projects. Currently, water bank rules provide that irrigation users have the highest priority to receive water in times of shortage, while non-consumptive, non-irrigation users maintain the lowest priority to receive water. While it is true that in most years the water bank has water for sale, this is not always the case. However, there is enough flexibility under the present system that applicants should be able to accomplish their objectives and proceed to a successful completion of the project by timely compliance with the state water laws.

Lois D. Cashell
Page 2
September 30, 1988

Notwithstanding the applicants increased costs in obtaining the water, it appears that structured reliance on the water bank through the comprehensive water block mechanism can be successful in meeting prescribed mitigative flows on the mainstem of the Snake River.

In closing, IDWR wishes to thank the Commission for the opportunity to submit additional testimony concerning the Draft Environmental Impact Statement issued in November, 1987.

Sincerely,


R. KEITH HIGGINSON
Director

RKH:dc
Enc.

cc: Idaho Power Co.
John Rosholt, Esq.
B. & C. Energy, Inc.
J.U.B. Engineers
Twin Falls Canal Co.
U.S. Fish & Wildlife
Bureau of Land Management, Shoshone
Idaho Dept. of Fish & Game, Boise
Environmental Protection Agency, Seattle
Idaho Dept. Health & Welfare, DEQ
Idaho Dept. of Parks & Recreation