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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 NAME OF TWIN FALLS CANAL) COMPANY AND NORTH SIDE CANAL) COMPANY) _____)	**REPLY TO THE CANAL COMPANIES' MEMORANDUM IN OPPOSITION TO IDAHO WATER RESOURCE BOARD'S MOTION FOR SUMMARY JUDGMENT**

The Idaho Water Resource Board ("IWRB") has moved for summary judgment affirming the following condition in the license for water right no. 01-7011 issued in the name of the Twin Falls Canal Company and North Side Canal Company (the "Canal Companies") by the Idaho Department of Water Resources ("Department" or "IDWR"):

> 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 than 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 than the priority of water right no. 01-7011.

The Canal Companies filed a memorandum in opposition to the IWRB's summary

judgment motion on March 5, 2010 ("*Canal Companies' Brief*"). This memorandum is filed in reply to the Canal Companies' brief.

INTRODUCTION

The Canal Companies do not dispute that Idaho Code sections 42-219(1) and 42-1734B(4) expressly require the Director to ensure that water right licenses comply with and are consistent with the Milner zero minimum flow provisions of the Idaho Code and the State Water Plan. Rather, they implausibly argue that a hydropower facility located in the Snake River canyon below Milner Dam that discharges into the Snake River below Milner Dam does not constitute a use of water "downstream from Milner dam." Idaho Code § 42-203B(2). Their argument is contrary not only to the plain language of the Idaho Code and the State Water Plan, but flies in the face of the facts and the longstanding and well-documented public policy of the Milner zero minimum flow. The Canal Companies' opposition conclusively demonstrates that they are using the Milner hydropower license to directly attack the core elements of the Milner zero minimum policy: the goal of conserving of winter flows above Milner for agricultural uses, and the subordination of uses below Milner—especially hydropower uses—in service of that goal. The Canal Companies have abandoned their historic support of the Milner policy—at least insofar as it is contrary to the Canal Companies' recently developed hydropower interests—a policy they helped develop and formulate. In this respect, two of the most prominent irrigation entities in the state have taken on the additional role of a hydroelectric power company.

The Canal Companies also mischaracterize the record by attempting to portray three brief letters regarding an interlocutory step in a regulatory matter—their application to the Department for an extension of time for the Milner Permit[1]—as constituting an "agreement" on the final form of the water right license that is binding on the

[1] The "Milner Permit" is the state water appropriation permit for the Milner hydropower project, water right no. 01-7011.

Department, the IWRB, and even the Governor and the Legislature. Even if these letters constituted such a licensing "agreement," which they clearly do not, as a matter of Idaho law such an "agreement" may not be enforced to prevent the Director from complying with the Idaho Code and the State Water Plan in licensing water right no. 01-7011.

The Canal Companies also offer several other arguments in support of their opposition to summary judgment, such as the contention that the lack of a subordination condition in the federal license for the Milner project means that the Department is precluded from subordinating the state water right license. This argument fails to recognize that federal law expressly reserves the state's regulatory authority over the control, appropriation, use and distribution of water for irrigation, municipal purposes and other related uses. The record also belies the contention that the Federal Energy Regulatory Commission ("FERC") intended to preclude subordination in the state water right license, because as FERC was aware the Milner Permit was already subordinated before FERC issued the federal license. The subordination provision would have allowed any non-recharge uses above Milner—such as reservoir storage—to completely deny any winter flows to the Milner hydropower project, and FERC imposed no regulatory terms contrary to this provision. Further, the federal license shows that the FERC intended to protect existing and future uses of water for irrigation purposes, and to be consistent with the state's Milner zero minimum flow policy.

The Canal Companies also resort to re-litigating issues decided adversely to them in the mandamus proceeding, such as the question of whether Idaho Code section 42-219(1) imposed a ministerial duty on the Director to issue a license simply "confirming" the Milner Permit, and whether the Canal Companies have a vested property interest in the Milner Permit. The Canal Companies should not be allowed to collaterally attack the District Court's rulings in this administrative proceeding. Even if any interest in the Milner Permit had vested, the interest would have to be consistent with State law. Hydropower water rights are expressly secondary under the Idaho Constitution, and the

Canal Companies cannot prevent the State from exercising its constitutional and statutory authority to regulate, limit and subordinate hydropower water rights. Contrary to the Canal Companies' dire warnings, this authority carries no broad implications for water rights at large—it concerns only one type of water right, a type that is constitutionally inferior and for which specific subordination legislation has been enacted.

This subordination legislation was intended to prevent "another Swan Falls," which the Canal Companies do not deny, nor do they deny that the incomplete subordination provision of the Milner Permit creates the risk of "another Swan Falls." Just as it is ironic that in this proceeding the Canal Companies have reversed their historic position on the Milner zero minimum flow, it is ironic that they are also opposing application of the statutory tool enacted specifically to prevent another Swan Falls. The irony is heightened by the fact that failure to fully subordinate the Milner hydropower license would put not only the Canal Companies but also their partner, Idaho Power Company, in control of whether agricultural recharge development would be allowed above Milner. Such an outcome would no doubt have come as a surprise to the 1985 Legislature, which enacted the Swan Falls legislation to, among other things, reaffirm the state's authority over such matters.

ARGUMENT

I. THE CANAL COMPANIES' CONTENTION THAT THE MILNER HYDROPOWER PROJECT IS AN "ABOVE MILNER" USE IS CONTRARY TO IDAHO LAW AND THE UNDISPUTED FACTS, AND ATTEMPTS TO UNDERMINE THE MILNER ZERO MINIMUM FLOW POLICY.

The Canal Companies do not dispute that the plain language of Idaho Code sections 42-219(1) and 42-1734B(4) required the Director to ensure that the license for water right no. 01-7011 complies with and is consistent with the Milner zero minimum flow provisions of Idaho Code section 42-203B(2) and the State Water Plan, and that the

license must comply with and be consistent with these provisions.[2] Instead, the Canal Companies argue that Milner hydropower project complies with these provisions because flows are diverted above Milner and therefore the project is an above-Milner use, *Canal Companies' Brief* at 17-18, 19, 26, even though it is undisputed that actual use of water for hydropower generation occurs at the power plant in the Snake River canyon below Milner. The Canal Companies essentially argue that the point of diversion also constitutes the place of use. *See id.* at 18.[3]

A. Under The Plain Language Of The Idaho Code, The Milner Project Is A "Below Milner" Use Because The Place Of Use Is Located Downstream From Milner Dam.

The Canal Companies' argument ignores the legal distinction between point of diversion and place of use, which are entirely separate elements of a water right under Idaho law. *See, e.g.,* Idaho Code § 42-1411(2) (listing the elements of a water right). The point of diversion for a water right does not constitute its place of use under Idaho

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[2] The State Water Plan provides: "The exercise of water rights above Milner Dam has and may reduce the flow at the dam to zero." 1997 Idaho Sess. Laws 71 (amending the 1996 State Water Plan); *see also* 1996 State Water Plan at 17 (same). A copy of this page of the 1996 State Water Plan was included in Exhibit 1 to the *Affidavit of Michael C. Orr* filed on Oct. 19, 2009 in SRBA Subcase Nos. 00-92002GP, 02-00200, 02-00201, 02-00223 and 02-00224 ("SRBA Milner Aff."). The SRBA Milner Aff., including the exhibits attached thereto, is attached as Exhibit 26 to the *Affidavit of Michael C. Orr In Support of Idaho Water Resource Board's Motion For Summary Judgment*, filed in this proceeding on February 11, 2010 ("Orr Aff."). Idaho Code section 42-203B(2) 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).

[3] The Canal Companies refer to the point of diversion for purposes of establishing place of use:

> If a water right which diverts above the Milner dam is not an above Milner use entitled to the use of waters arising above the dam, then it is unclear where the Intervenors would draw such a line. At what point on the Snake River does a point of diversion above Milner dam, become a below Milner diversion?

Canal Companies' Brief at 18 (emphases added).

law. The Canal Companies not only ignore this legal principle but also disregard physical reality: it is undisputed that the power plant where water is used to generate hydroelectricity is located downstream from Milner Dam. The contention that the Milner project's point of diversion also constitutes its place of use is contrary to Idaho law and the undisputed facts.[4]

This argument is also contrary to the plain language of Idaho Code section 42-203B(2), which speaks in terms of "use," not "diversion," in describing location with respect to Milner Dam. The statute expressly bars consideration of flows arising above Milner Dam for purposes of the determination or administration of rights to "the use of the waters of the Snake river or its tributaries downstream from Milner dam." Idaho Code § 42-203B(2) (emphasis added). The controlling inquiry under the statute is whether the place of use is located below Milner Dam. Thus, the Canal Companies' argument that the point of diversion is controlling for purposes of determining whether the water right for the Milner hydropower project complies with Idaho Code section 42-203B(2) founders on the plain and unambiguous language of the statute.

The Canal Companies' interpretation would allow the statute to be circumvented and rendered essentially meaningless: under their interpretation, a water right can include a legal entitlement to require flows arising above Milner Dam to be dedicated to a use below Milner, so long as the water passes Milner in constructed conveyance works rather than in the river channel. Such an interpretation turns the statute on its head, because it authorizes, rather than prevents, the consideration of waters arising upstream

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[4] The Canal Companies' argument that water right no. 01-7011 complies with Idaho Code § 42-203B(2) because it is a Basin 01 water right must be rejected for similar reasons. While the point of diversion is located in Basin 01 (upstream of Milner Dam), it is undisputed that the place of use is located in Basin 02 (downstream of Milner Dam).

from Milner Dam in "the determination and administration" of water rights to the use of flows downstream from Milner Dam. Idaho Code § 42-203B(2). Taken to its extreme, for example, this argument would allow a pipeline running from Milner Reservoir to the Snake River at Brownlee Reservoir, where it would dump back into the river, to be considered a use above Milner. This result would circumvent the plain language of the statute, as the Director concluded:

> The subordination condition in the Milner Permit would effectively bridge the statutory divide the Legislature expressly created in Idaho Code § 42-203B(2), and undermine the Legislature's unambiguous directive that the Snake River upstream from Milner Dam and the Snake River downstream from Milner Dam be administered as separate sources and systems.

Final Order at 10 ¶ 14.[5]

B. The Legislative History And Public Policy Of The 1986 Amendment To Idaho Code Section 42-203B(2) Demonstrate That The Water Right For The Milner Project Must Be Fully Subordinated To Prevent A Power Plant Located Below Milner From Interfering With Agricultural Storage Of Winter Flows Above Milner.

The Canal Companies' argument fails even if the language of Idaho Code section 42-203B(2) were deemed ambiguous. As discussed below, their interpretation of Idaho Code section 42-203B(2) would frustrate one the statute's principal purposes: preventing uses of water below Milner—and especially hydropower uses—from interfering with the longstanding practice of storing winter flows and flood waters above Milner so that they are available for agricultural uses during the irrigation season. This purpose is confirmed by the legislative history of Idaho Code section 42-230B(2), and its underlying public policy. *See Hayden Lake Fire Protection Dist. v. Alcorn*, 141 Idaho 388, 398-99, 111 P.3d 73, 83-84 (2005) (holding that to determine the legislative intent of an ambiguous

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[5] Issued by the Director in *In The Matter Of Licensing Water Right Permit No. 01-7011 In The Name Of Twin Falls Canal Company And North Side Canal Company*, on October 20, 2008.

statute, "we examine not only the literal words of the statute, but also the reasonableness of proposed constructions, the public policy behind the statute, and its legislative history").

1. The Legislative History Of The 1986 Amendment To Idaho Code Section 42-203B(2) Demonstrates That It Was Intended To Prevent Interference With Agricultural Storage Of Winter Flows Above Milner.

The Milner zero minimum flow provision of Idaho Code section 42-203B(2) was added to the statute in a 1986 amendment intended to dispel potential doubts over a crucial aspect of the 1984 Swan Falls Agreement: its requirement of retaining the Milner zero minimum flow policy in the State Water Plan. *Memorandum In Support of Idaho Water Resource Board's Motion For Summary Judgment* (Feb. 11, 2010) ("*IWRB's Opening Brief*") at 18-25. In pre-ratification meetings explaining the Swan Falls settlement, the State and Idaho Power Company had stated that the purpose of retaining the Milner minimum zero flow policy was to protect existing and future water storage projects above Milner. *Id.* at 18-19.[6] The parties viewed aquifer recharge as storage, *id.*

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[6] In a press release on the Swan Falls settlement, then-Attorney General Jim Jones stated: "The parties have agreed to a zero flow at Milner, which would allow for the filling of present upstream storage facilities, as well as additional new water storage projects." SRBA Milner Aff., Exhibit 10 at 3. The Governor's negotiator, attorney Pat Costello, also explained retention of the Milner zero minimum flow policy in terms of future storage projects: "And on the up-stream storage, I guess it's in here by omission, because by maintaining the zero flow at Milner, it still provides for any future up-stream storage projects that become feasible above Milner." SRBA Milner Aff., Exhibit 12 at 20 (transcript of Idaho Water Resource Board public information meeting on Swan Falls settlement at 66) (Boise) (Nov. 1, 1984) (testimony of Pat Costello) (emphasis added). Idaho Power Company's negotiator, attorney Tom Nelson, also explained the Milner policy in terms of "new storage":

> The water plan target minimum flow at Milner Dam is zero, which is a condition realized in the summer all the time, and this agreement does not contemplate any change in that minimum flow. So short of a statement that before new storage is built we should fully utilize existing storage, what goes on above Milner is not affected by this agreement.

SRBA Milner Aff., Exhibit 11 at 9 (transcript of Idaho Water Resource Board public information meeting on Swan Falls settlement at 27) (Twin Falls) (Oct. 25, 1984) (testimony of Tom Nelson) (emphasis added).

at 19-20,[7] and intended that the Milner zero minimum flow would protect recharge diversions above Milner from interference by uses below Milner—and particularly from hydropower interference. *Id.* at 19-20 & n.18. As even the Canal Companies admit, recharge had been viewed as an agricultural water storage and conservation strategy for many years. *Canal Companies' Brief*" at 26, 35.[8]

The need for clarification of the Milner zero minimum policy arose from the Department's proposal to implement administrative rules that would have authorized Idaho Power Company to force winter flows and flood waters arising above Milner to be sent below Milner for hydropower use. *IWRB's Opening Brief* at 21-24. This administrative interpretation was universally rejected, in large part because it conflicted with the longstanding practice of reserving of winter flows and flood waters above Milner for agricultural storage, and posed a threat to existing and future storage efforts. *Id.* at 22-24.[9]

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[7] This understanding had legal as well as practical underpinnings: the District Court in the Swan Falls litigation had determined that recharge and off-stream storage operations that were intended to provide water for irrigation in the summer constituted agricultural uses protected by the subordination condition in the license for Idaho Power Company's Hells Canyon complex. *IWRB's Opening Brief* at 19.

[8] *See also IWRB'S Opening Brief* at 44-46 (discussing historic views of recharge as a means of conserving winter flows, flood waters and other surplus flows above Milner).

[9] Eldred Lee, secretary of Menan's Great Feeder Canal Company, testified in a meeting on the proposed rules that the water users above Milner felt as if they had been "deceived" when they discovered that under the proposed rules "we find that all of our water rights may be in jeopardy – or some of them, at least – or that new development may be minimized . . . ." SRBA Milner Aff., Exhibit 23 at 7-8 (transcript of IDWR public hearing on proposed rules and regulations for water appropriation at 16-18) (Idaho Falls) (Jan. 14, 1986). A water manager for several upper Snake River canal companies pointed out pointed out in a hearing on the proposed rules that they threatened to interfere with the established practice of reserving flood waters for uses upstream from Milner:

> Now, in the past, when we have been having flood waters, we use those flood waters, we could use all we could take care of in the canal system. . . . And so I'd like to make my formal protest or clarification of what flood waters is in relation to the trust waters. And if it was going to change anything that we have been doing in the past 30 or 40 years, it would be detrimental to our canal systems.

SRBA Milner Aff., Exhibit 23 at 6 (transcript of IDWR public hearing on proposed rules and regulations for water appropriation at 10-12) (Idaho Falls) (Jan. 14, 1986).

The 1986 amendment was specifically intended to address these concerns and reaffirm that winter flows and flood waters arising above Milner would remain available for agricultural storage above Milner. *Id.* at 24-25. Thus, the legislative history of the 1986 Milner zero minimum flow amendment to Idaho Code section 42-203B(2) demonstrates that it was intended to conclusively confirm that winter flows, flood waters and other surplus flows arising above Milner would remain available for existing and future agricultural storage projects above Milner—including recharge. It was also intended to confirm that uses below Milner, and especially hydropower uses at Idaho Power Company facilities, would have no legal right to interfere with or prevent such storage efforts.

The Canal Companies' interpretation of Idaho Code section 42-203B(2) would interfere with agricultural storage of winter flows above Milner by allowing a hydropower use at a power plant located below Milner to trump recharge efforts above Milner. The Canal Companies' interpretation of Idaho Code section 42-203B(2) thus clashes with the statute's objectives as confirmed by the legislative history.

2. The Public Policy Of The 1986 Amendment To Idaho Code Section 42-203B(2) Demonstrates That It Was Intended To Prevent Interference With Agricultural Storage Of Winter Flows Above Milner.

The Milner zero minimum flow policy was first formally articulated in the 1920 Board of Engineers Report, which was prompted in large part by recognition of the fact that because the reliable summer flows of the Snake River above Milner were fully appropriated, optimum development of the resource going forward hinged on providing for storage of winter flows above Milner. *IWRB's Opening Brief* at 27-30. The unavailability of natural flow meant that future agricultural development—and even the

continued security of existing agricultural development in short water years—was dependent upon capturing winter flows, flood waters and other off-season surplus flows and retaining them for agricultural uses in the summer. *Id.* at 28-29. As a matter of physical fact based upon Idaho's topography, storage had to occur above Milner, because gravity irrigation was impracticable in the canyon below Milner and flows passing Milner were irrevocably lost for agricultural purposes. *See, e.g., id.* at 28 n. 43; 31. Thus, conservation and storage of winter flows above Milner in support of agricultural development has been the primary focus of the Milner zero minimum flow policy since its inception.

It was recognized from the outset that uses in the canyon below Milner—which then as now were primarily hydropower uses—could undermine the objective of optimizing agricultural storage efforts above Milner, by establishing rights to storable winter flows arising above Milner and requiring that they be sent past the dam. *Id.* at 32, 35. Accordingly, hydropower uses below Milner had to be made subordinate or secondary to existing and future agricultural storage projects above Milner. *Id.* at 32-33. This principle also has been a core element of the Milner zero minimum flow policy since its inception.

The complementary principles of optimizing agricultural storage and development of winter flows above Milner, and of subordinating hydropower and other uses below Milner to such efforts, were consistently implemented over many years by the State of Idaho, the federal government, irrigation interests and private power companies. *Id.* at 33-47. The Canal Companies actively participated in formulating these principles, and steadfastly supported them for many years. *Id.* at 20, 24-25, 30.

The Canal Companies' current view of Idaho Code section 42-203B(2) is not only contrary to their past support of the Milner zero minimum flow, but also at odds with the public policy of the statute as evidenced by the undisputed historical record.[10] Even if the language of Idaho Code section 42-203B(2) was ambiguous—which it is not—the legislative history and public policy of the statute require rejection of the Canal Companies' argument that it is consistent with Idaho Code section 42-203B(2) to allow their below-Milner hydropower use to establish rights to flows arising above Milner.

C. There Is No Uncertainty As To The Proper "Expression" Or Substantive Legal Effect Of The Milner Zero Minimum Flow Provisions Of The Idaho Code And The State Water Plan.

The Canal Companies alternatively argue that the Milner zero minimum flow principle "has been subject to varying interpretations and constructions for at least half a century in Idaho." *Canal Companies' Brief* at 20. In support of this contention, the Canal Companies cite different revisions of the State Water Plan, resolutions of the Committee of Nine, the proposed partial decrees in the SRBA subcase dealing with the Swan Falls Agreement,[11] and the SRBA proceedings on a general provision memorializing the Milner zero minimum flow principle in the SRBA's final decree.[12] *Id.* at 19-24. The Canal Companies contend that summary judgment is inappropriate because there are too many different "expressions" of the Milner zero minimum flow policy, *id.* at 20, and too much uncertainty as to what the policy actually means.

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[10] The Canal Companies have raised no genuine dispute in this regard and have offered essentially nothing new regarding the history of the Milner divide—to the contrary, they have admitted that they "largely agree with the representations made by the State concerning the historical treatment of the Snake River at Milner divide." *Canal Companies' Memorandum In Opposition To State Of Idaho's Motion For Partial Summary Judgment Re: Milner Zero Minimum Flow* at 2 (In re SRBA, Subcase Nos. 00-92002GP, 02-0200, 02-0201, 02-0223, and 02-0224) (Nov. 5, 2009). Given that the IWRB relies on the same history and documentation in this proceeding, it is ironic that the Canal Companies accuse the IWRB of "ignoring history." *Canal Companies' Brief* at 24.

[11] SRBA Consolidated Subcase No. 00-92023 (92-23).

[12] SRBA Subcase Nos. 02-0200 and 00-92002GP.

This argument fails as a matter of law because the only relevant "expressions" of the Milner zero minimum flow principle for purposes of the IWRB's summary judgment motion are the 1986 amendment to Idaho Code section 42-203B(2), and the Legislature's direct amendment of the 1996 State Water Plan. There is no uncertainty as to what the Legislature said in these provisions:

> The exercise of water rights above Milner Dam has and may reduce the flow at the dam to zero.[13]
>
> 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). These provisions are the controlling "expressions" of the Milner zero minimum flow policy for purposes of the IWRB's summary judgment motion. The Canal Companies' attempt to inject uncertainty by referring to other "expressions" of the Milner zero minimum flow should be rejected.

Further, the Canal Companies specifically agreed in the SRBA just a few months ago to support a Milner zero minimum flow general provision that consists of these very provisions.[14] After representing to the SRBA District Court that the provisions of the State Water Plan and Idaho Code section 42-203B(2) correctly express the Milner zero minimum flow policy and are sufficiently definite for purposes of the SRBA's final decree, the Canal Companies may not now argue that the same provisions are too uncertain or inadequate for purposes of this proceeding.

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[13] 1997 Idaho Sess. Laws 71 (amending the 1996 State Water Plan); *see also* SRBA Milner Aff., Exhibit 1 at 11 (1996 State Water Plan at 17).

[14] Orr Aff., Exhibit 28 at 3-4 (*Order Granting Petition To Appear As Amicus Curiae, Order Setting Deadline For Comments and Special Master Report And Recommendation*, SRBA Subcase Nos. 00-92002GP, 02-00200, 002-00201, 02-00223 and 02-00224) (Nov. 20, 2009), at 3-4; Orr Aff., Exhibit 16 at 10-11 (Reporter's Transcript at 33-35-36) (summary judgment hearing) (SRBA Subcase Nos. 00-92002GP, 02-00200, 002-00201, 02-00223 and 02-00224) (Nov. 19, 2009).

The attempt to inject uncertainty over the meaning of the Milner zero minimum flow is also contrary to the Canal Companies' position in 1986 on the Milner amendment to Idaho Code section 42-203B(2). As previously discussed, this amendment was motivated by potential uncertainty over whether hydropower uses and other uses below Milner had the legal right to demand that storable winter flows arising above Milner be sent past the dam. This uncertainty was resolved by the clarifying 1986 amendment, the language of which the Canal Companies specifically supported via a Committee of Nine resolution.[15] The resolution memorialized the Committee's understanding that the parties to the Swan Falls Agreement had agreed "that it was never their intent to force water arising above Milner Dam to be released to fill downstream water rights" and that "the upper Snake has always been managed separately from the lower Snake."[16] Thus, the Canal Companies' argument that the legal meaning and effect of the Milner zero minimum flow is uncertain simply seeks to resurrect a clarification issue the Legislature conclusively laid to rest in 1986—only this time the Canal Companies do not seek to confirm the Milner zero minimum flow, but to undermine it.

D. The Argument That Summary Judgment Is Inappropriate Because The Milner Zero Minimum Flow Provisions Of The Idaho Code Are Subject To Amendment In The Future Is Contrary To Law, The Canal Companies' Prior Positions, And The Undisputed Historical Record.

The Canal Companies also argue that summary judgment is inappropriate because the Legislature may someday amend the Milner zero minimum flow provisions of Idaho

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[15] SRBA Milner Aff., Exhibit 27 at 6 ("Resolution 19") (Committee of Nine and the Water Users of Water District 1) (Mar. 4, 1986) (encouraging the Legislature to enact 986 Senate Bill 1358 into law); *see also* 1986 Idaho Sess. Laws 309 (setting forth amendments to Idaho Code § 42-203B(2) under 1986 Senate Bill 1358).

[16] SRBA Milner Aff., Exhibit 27 at 6. The Canal Companies had also made clear their position on the Milner zero minimum flow in an earlier resolution, which supported the Swan Falls settlement provided it was clear "[t]hat there is, and will continue to be, no obligation to provide surface flows for water rights established below Milner Dam and that the 'zero' flow at Milner Dam be reaffirmed." SRBA Milner Aff., Exhibit 13 at 3 ("Resolution") (Committee of Nine of Water District 1) (Jan. 17, 1985).

Code section 42-203B(2) or the State Water Plan. This contention is inconsistent with the Canal Companies' support of a general provision for the Milner zero minimum flow in the SRBA's final decree: then as now, there was the possibility of a future change in the law or the State Water Plan. The possibility that the law may change in the future is always present in any proceeding, and is no basis for denying summary judgment under existing law. Moreover, the Milner zero minimum flow provision of Idaho Code section 42-203B(2) has been in place unchanged for twenty-four years, and the State Water Plan's current formulation of the Milner zero minimum flow policy has been part of the plan since 1992. These provisions have stood the test of time and the Canal Companies' warning that change is imminent is purely speculative and raises a phantom issue.[17]

In sum, not only are the Canal Companies' arguments with regard to the Milner zero minimum flow provisions of Idaho Code section 42-203B(2) and the State Water Plan unavailing as a matter of law under a plain language analysis, they clash with almost a hundred years of water resource planning, development and practice in the Snake River Basin. The Canal Companies' opposition to the IWRB's summary judgment motion is nothing less than a direct challenge to the very core of the Milner zero minimum flow policy. The Canal Companies openly advocate that a hydropower plant located below Milner should have first call on winter flows arising above Milner, flows that would otherwise be available for agricultural storage and development under recharge water rights and programs. This is precisely the type of situation the Milner zero minimum flow provisions of Idaho Code section 42-203B(2) and the State Water Plan always have been intended to prevent.

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[17] This is hardly a situation in which there is pending legislation to alter an applicable statute or a similar circumstance in which prudence might dictate a "wait-and-see" delay to await a likely change in the law.

II. RECHARGE WAS A BENEFICIAL AGRICULTURAL USE OF WINTER FLOWS PRIOR TO THE 1994 AMENDMENTS TO IDAHO CODE SECTIONS 42-234 AND 42-4201A, AND THE CANAL COMPANIES HAD NO REASONABLE BASIS FOR ASSUMING THAT THE MILNER PERMIT ASSURED THE MILNER PROJECT OF WINTER FLOWS SUPERIOR TO RECHARGE.

The Canal Companies also argue that the license for water right no. 01-7011 should include a recharge subordination exception because recharge was not considered a beneficial use under Idaho law until 1994, and even then was made subordinate to all other uses. *Canal Companies' Brief* at 26, 35-37. In a related argument, the Canal Companies assert that the Milner hydropower project would not have been feasible if it was subordinated to recharge, which is a winter use. *Id.* at 7-8. The first contention is simply wrong and has already been decided adversely to the Canal Companies in the SRBA. The second argument lacks evidentiary support in the record, and is flawed as a matter of law because it was not reasonable for the Canal Companies to assume that the Milner Permit would assure the Milner project of winter flows superior to recharge.

A. Recharge Was A Beneficial Use In Idaho Prior To The 1994 Amendments, And The Canal Companies' Arguments To The Contrary Have Already Been Rejected In The SRBA.

The Canal Companies' argument that recharge was not recognized as a beneficial use in Idaho prior to 1994, *Canal Companies' Brief* at 26, 35-37, is based on the contention that the 1994 amendments to Idaho Code sections 42-234 and 42-4201A recognizing recharge as a beneficial use necessarily imply that recharge was not a beneficial use prior to the enactment of the amendments. The Canal Companies made this argument—unsuccessfully—in support of their motion for summary judgment in SRBA Subcase No. 01-0023B ("*Aberdeen-Springfield Canal Co.*").

In *Aberdeen-Springfield Canal Co.*, the Canal Companies argued that "Idaho did not recognize 'recharge' to be a beneficial use until the Legislature enacted Idaho Code § 42-234 <u>*in 1978*</u>. . . . the *Rexburg* court could not decree some new use of water 'in the

future' such as 'recharge for irrigation' since 'recharge' was not an authorized beneficial use until 1978."[18] The State of Idaho successfully opposed the Canal Companies' summary judgment motion, demonstrating in detail why the Canal Companies were incorrect in asserting that recharge was not a beneficial use prior to 1994. The Special Master stated that the State of Idaho had "correctly identified the core issues" in the proceedings, including "whether recharge for irrigation was recognized as a beneficial use of water in Idaho before enactment of its groundwater recharge statute in 1978."[19] The Special Master denied the Canal Companies' summary judgment motion:

> It takes no stretch of the imagination to conclude that Idaho has historically considered recharge a beneficial and efficient use of water since the use contributes to efficient water use practices, particularly where groundwater sources are shrinking. . . . 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 . . . .[20]

The Hearing Officer should reject the Canal Companies' contention in this proceeding that recharge was not a beneficial use prior to 1994 for the same reasons set forth in the Special Master's summary judgment decision and in the State of Idaho's summary judgment brief in *Aberdeen-Springfield Canal Co.*[21]

In a related argument, the Canal Companies incorrectly assert that the 1994 amendments made recharge subordinate "to all other beneficial uses, including

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[18] *Memorandum In Support Of Objectors' Joint Motion For Summary Judgment,* SRBA Subcase No. 01-0023B (Mar. 27, 2009) at 8 (emphases in original). This memorandum is available from the SRBA website (http://www.srba.state.id.us/) under the links for "IWATRS Reports" and "Summary Sheet," entering the subcase number in the appropriate fields, and scrolling down to the link to the memorandum.

[19] *Order Partially Granting Aberdeen-Springfield's Motion For Summary Judgment And Denying Surface Water Coalition's Motion For Summary Judgment And Motion To Strike Affidavits*, SRBA Subcase No. 01-0023B (Jun. 11, 2009) at 10. This order is also available from the SRBA website. *See supra* note 17.

[20] *Id.*

[21] The IWRB hereby incorporates into this brief by this reference the State of Idaho's recharge argument from its summary judgment memorandum in *Aberdeen-Springfield Canal Co.* *See State of Idaho's Brief In Response To Claimant's Motion For Summary Judgment And Objectors' Motion For Summary Judgment* SRBA Subcase No. 01-0023B (Apr. 16, 2009) at 12-18. This memorandum is also available from the SRBA website. *See supra* note 17.

hydropower," to support their contention that it made sense for the Milner Permit to include a subordination exception for recharge. *Canal Companies' Brief* at 26 (emphasis added). In fact, the 1994 amendments only made recharge secondary to "prior perfected water rights." 1994 Idaho Sess. Laws 852, 1398 (emphasis added). Thus, the 1994 amendments only make recharge water rights subordinate to senior priority water rights: in other words, just like other water rights in Idaho, recharge water rights are subject to the prior appropriation doctrine.

Further, the 1994 amendments did not categorically subordinate recharge to hydropower uses, as the Canal Companies argue. *Canal Companies' Brief* at 26. Rather, the amendments only provided that among the "prior perfected water rights" to which recharge water rights would be secondary were the hydropower water rights "that may otherwise be subordinated" by the Agreement. 1994 Idaho Sess. Laws 852, 1398. The meaning of the amendment was unclear and was extensively litigated in the SRBA proceedings on the interpretation and application of the Swan Falls Agreement.[22] The 1994 amendments were repealed in 2009 to be "consistent with" and "clarify the original intent" of the Swan Falls settlement, as part of the implementation of the "Framework Reaffirming The Swan Falls Settlement."[23] 2009 Idaho Sess. Laws 743.

B. It Was Not Reasonable For The Canal Companies To Rely On The Milner Permit As Assuring The Project Of Winter Flows.

The Canal Companies also argue that the Director should not have subordinated

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22 SRBA Consolidated Subcase No. 00-92023.

23 "Framework Reaffirming The Swan Falls Settlement" (Mar. 25, 2009) at 7; *see also id.* at 24-25 (proposed implementing legislation providing for repeal of the 1994 amendments, ultimately enacted under 2009 Senate Bill 1185). The Canal Companies have submitted into the record in this case only a portion of the "Framework Reaffirming The Swan Falls Settlement"—examples of the partial decrees proposed thereunder in "Exhibit 6." Davis Aff. at 5 & Exhibit 32. A complete copy of the entire "Framework Reaffirming The Swan Falls Settlement," including the exhibits thereto, is available for viewing on the Department's website at the following URL: http://www.idwr.idaho.gov/News/Issues/SwanFalls/09documents/20090325_Framework_SwanFallsSettlement.pdf.

the license for water right no. 01-7011 to recharge because the Milner hydropower project depends upon winter flows, and recharge is a winter use that could deprive the project of the winter flows the Canal Companies assumed would be available for the hydropower use at the project. *Id.* at 7-8. The Canal Companies argue that without the recharge subordination exception the project is not feasible. *See id.* at 33 (arguing that failing to "confirm" the Milner Permit subordination condition "substantially jeopardiz[es] the continued existence of the project"). Of course, there is no principal of law that statutes are suspended whenever a permit holder says they must be in order to make a project financially feasible.

It should be noted at the outset that the Canal Companies have offered nothing more than argument in support of their contention that the Milner project would not be feasible without the recharge subordination exception. There is no evidentiary support in the record for this contention, but even if there were, that would not change the law to be applied. It is also suspect, because the Canal Companies made the same claim in their request that IWRB adopt an "official position" against any subordination of the water right whatsoever.[24] Contrary to their "official request," the Milner project has proven feasible under the near complete subordination required by the Milner Permit.

While the subordination condition in the Milner Permit made an exception for recharge, it did not do so for any other existing or future use of winter flows—including the largest and most obvious winter water use in the upper Snake River basin: storage in surface reservoirs. Under the plain terms of the Milner Permit, existing and future surface storage projects were entitled to completely deprive the Milner hydropower project of all winter flows. This was also true of <u>any</u> existing or future winter uses except hydropower and recharge. In short, the Milner hydropower project has always been

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[24] Davis Aff., Exhibit 7 at 2 (Letter from John A. Rosholt, attorney for the Canal Companies, to Reed Hansen, Chairman of the IWRB) (May 3, 1982) (stating that if IWRB sought subordination of the Milner Permit to future irrigation diversions, "it is likely that the Milner Power Project could not be financed.").

subject to winter flow depletions, even to the point of complete de-watering, in favor of agricultural storage and other winter uses. The Canal Companies knew or reasonably should have known this, and may not now claim that it was reasonable for them to assume that the Miler Permit assured a sufficient winter flow supply.

The fact that the Canal Companies expressly seek to reserve winter flows arising above Milner for hydropower use below Milner confirms that the Canal Companies seek to use the Milner hydropower project to undermine the Milner zero minimum flow policy. As previously discussed, the policy is intended to prevent uses below Milner—especially hydropower uses—from establishing rights to storable winter flows, flood waters and other surplus flows arising above Milner, and "storage" includes recharge. Thus, not only was the Canal Companies' reliance on winter flows from above Milner contrary to Idaho law, it was objectively unreasonable because it was at odds with almost a century of water resource planning and development, historic practice and settled expectations—which the Canal Companies helped develop and supported until they branched into hydropower generation.

III. THERE WAS NO LEGALLY COGNIZABLE SUBORDINATION "AGREEMENT" WITH THE DIRECTOR, AND IN ANY EVENT SUCH AN "AGREEMENT" COULD NOT BE ENFORCED TO PREVENT THE DIRECTOR FROM COMPLYING WITH IDAHO LAW IN LICENSING WATER RIGHT NO. 01-7011.

The Canal Companies also argue that a binding subordination "agreement" requires that the subordination condition of the Milner Permit be included in the license. *Canal Companies' Brief* at 2-4, 8-9, 12, 19, 25. They further assert that this "agreement" was negotiated with IWRB's "full knowledge and participation," *id.* at 19, that the IWRB and the Legislature agreed to the subordination condition of the Milner Permit, *id.* at 28, and that the alleged "agreement" is of a special type: a minimum flow/"trust water" subordination agreement under Idaho Code section 42-203B(2). *Id.* at 12.[25] These

[25] Idaho Code section 42-203B(2) authorizes agreements between water right holders and the State of Idaho to define a hydropower water right as unsubordinated to the extent of a minimum flow established by the State. Idaho Code § 42-203B(2). The statute further provides that "any portion" of the hydropower

arguments mischaracterize the record and are contrary to applicable Idaho law.

A. Director Higginson's 1987 Letter Did Not Constitute A Subordination "Agreement."

The "agreement" argument is based on three short letters between the Canal Companies and the Department in 1987 concerning the Canal Companies' second application for an extension of time to show beneficial use under the Milner Permit: (1) a letter from Glen Saxton of IDWR to the Canal Companies' attorney, John Rosholt, informing him that the Department planned to impose a full subordination condition in approving the application; (2) a letter from Mr. Rosholt to Mr. Saxton requesting that the subordination condition make an exception for recharge; and (3) a letter from Director Higginson to Mr. Rosholt granting the recharge exception request and setting forth the subordination condition of the Milner Permit.[26]

The Canal Companies' application for an extension was governed by Idaho Code sections 42-204 and 42-218. The 1987 letters discussed a routine regulatory matter governed by specific provisions of the Idaho Code: they were not "negotiations" or an "agreement." Further, Director Higginson's letter did not state that the parties had reached an "agreement," nor use any other words or phrases indicating as much, and did not make any promises or guarantees regarding the final subordination condition to be eventually inserted in the license (if any). Director Higginson simply granted the Canal Companies' request, in connection with their application for an extension, which was within his authority and discretion under Idaho Code section 42-203B(6).[27]

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water right in excess of the agreed-upon minimum flow is held in trust by the State, for the benefit of the hydropower user and the people of the State, and is subordinate to future water rights acquired pursuant to state law. *Id.* Even in the absence of a minimum flow subordination agreement, Idaho Code section 42-203B authorizes the State to hold in trust and subordinate any portion of a hydropower water right that exceeds a state-established minimum flow. *Id.* § 42-203B(3).

[26] Davis Aff., Exhibits 35, 36, 9.

[27] The Canal Companies are incorrect in asserting that in licensing water right no. 01-7011 the Director took a "second bite at the apple" or reversed the earlier exercise of his discretion under Idaho Code section 42-203B(6). *Canal Companies' Brief* at 2, 19, 27, 37. As explained in the *Final Order*, the *IWRB's Opening Brief* and a subsequent section of this memorandum, the Director's licensing decision was not discretionary because Idaho Code sections 42-219(2), 42-1734B(4) and 42-203B as a matter of law

Ultimately, the Canal Companies' basis for arguing that Director Higginson's 1987 letter constituted an "agreement" is their claim that by 1987 they had a vested property interest in the Milner Permit. In support of this argument, the Canal Companies assert that Director Higginson must have assumed that they had a vested property interest, because he stated that the extension application was sought "in connection with a permit rather than an application for permit." *Canal Companies' Brief* at 34. This interpretation of Director Higginson's letter does not withstand scrutiny, particularly in light of understandings established by the Swan Falls settlement.

As part of the settlement proceedings—specifically, in a Senate Resource and Environment Committee hearing on the Director's authority under then-proposed Idaho Code section 42-203B(6), which expressly authorized the Director to subordinate existing hydropower permits—the question of whether a hydropower permit constitutes a vested property right had been raised, argued and resolved with the understanding that existing hydropower permits did not include vested property rights. John Runft, an attorney for small hydropower users, submitted oral and written testimony to the Senate committee, and sought to have existing hydropower permits grandfathered under Idaho Code section 42-203B(6) to prevent them from being subordinated.[28] In support, Mr. Runft argued that existing hydropower permits constituted property interests.[29] This position was rebutted by Attorney General Jim Jones, who submitted detailed written testimony at the next meeting of the Senate committee addressing Mr. Runft's concerns and arguing that hydropower permits did not represent vested property interests.[30] The changes Mr. Runft requested to Idaho Code section 42-203B(6) were not made, and thus existing

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required the Director to fully subordinate the license for water right no. 01-7011.

[28] Orr Aff., Exhibit 29 at 3 (Minutes of Senate Resources and Environment Committee) (Jan. 25, 1985), at 3-4 (oral testimony of John Runft); 24-25 (written testimony of John Runft at 4-5).

[29] *Id.*

[30] *See* Orr Aff., Exhibit 30 at 1 (Minutes of Senate Resources and Environment Committee) (Jan. 25, 1986) ("Mr. Kole also handed out a written statement addressing concerns raised by John Runft, who testified at the public hearing on behalf of small hydropower interests. (Statement attached)."); *see also id.* at 10, 13 (Attachment to Minutes entitled "Supplemental Testimony of Attorney General Jim Jones Before the Idaho Senate Committee on Resources and Environment," at 1, 4).

hydropower permits remained subject to subordination under the statute—unlike existing hydropower licenses, which were expressly grandfathered. Idaho Code § 42-203B(6).

This legislative history not only demonstrates that Idaho Code section 42-203B(6) was intended to apply to all hydropower permits, but also that the understanding of the Legislature and the parties to the agreement was that hydropower permits did not carry any vested property interests.[31] This is the understanding of the scope and intent of the statute and the "vested interest" question that would have informed Director's Higginson's 1987 letter, and it demonstrates that the letter cannot reasonably be viewed as meaning the Director believed that the Canal Companies had a vested property interest in the Milner Permit.

B. Director Higginson's Letter Does Not Satisfy The Requirements Of A Minimum Flow/"Trust Water" Subordination Agreement Under Idaho Code 42-203B.

The Canal Companies are incorrect in arguing that Director Higginson's 1987 letter constituted a special type of "subordination agreement"—a minimum flow/"trust water" subordination agreement under Idaho Code section 42-203B(2). *Canal Companies Brief* at 12. As discussed above, Director Higginson's letter does not constitute a legally enforceable "agreement" of any kind.

Further, there are special requirements for a section 42-203B(2) subordination agreement that Director Higginson's letter fails to meet. Such agreement must "define" a hydropower water right "as unsubordinated to the extent of a minimum flow established by state action," Idaho Code section 42-203B(2), and must be negotiated by "the Governor or his designee," then ratified by the Legislature. Idaho Code section 42-

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[31] The Canal Companies argue that the case upon which the Attorney General relied in arguing that hydropower permits do not include vested property interests, *Hidden Springs Trout Ranch v. Allred*, 102 Idaho 623, 636 P.2d 745 (1981), does not stand for that proposition. *Canal Companies' Brief* at 41. This contention is irrelevant. The question, for purposes of understanding the intent of Director Higginson's letter, is whether in 1987 the Director would have understood hydropower permits as carrying no vested property interest. The legislative history demonstrates that this would have been the Director's understanding.

203B(5). Once such an agreement is ratified, the State holds in trust by operation of law "any portion" of the hydropower water right in excess of the minimum flow, for the benefit of the hydropower user and of the people of the State. Idaho Code section 42-203B(2). The hydropower water right held in trust is then subordinated to future water rights acquired pursuant to state law. *Id.*

Director Higginson's 1987 letter did not purport to "define" the water right for the Milner hydropower project, and says nothing whatsoever about state-established minimum flows or how they relate to the subordination of the water right. Moreover, nothing in the record indicates that the Governor negotiated—or was even aware of—the alleged subordination "agreement," nor that the Governor "designated" anyone to negotiate such an agreement. Similarly, nothing in the record or Idaho law suggests that the Legislature "ratified" Director Higginson's letter, or was even aware of it. In any event, Idaho Code sections 42-203B(2) and 42-203B(3) were intended to apply to existing hydropower water rights, while section 42-203B(6) was intended to apply to hydropower water rights that were not yet fully perfected.[32] This is evident from the fact that section 42-203B(6) applies to hydropower water rights "granted in a permit or license." Idaho Code § 42-203B(6). As previously discussed, the legislative understanding of Idaho Code section 42-203B was that hydropower permits did not constitute vested water rights, and therefore neither Director Higginson nor the Legislature would have understood the 1987 letter as an "agreement" for purposes of section 42-203B(2).

Finally, Director Higginson's 1987 letter did not even remotely approach the

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[32] The Swan Falls settlement was intended to establish a comprehensive approach for the hydropower subordination issue, and therefore Idaho Code section 42-203B provided the means for dealing both with existing and future hydropower water rights. The direct subordination authority of section 42-203B(6) applied to existing and future hydropower permits and future hydropower licenses and thus raised no potential takings or compensation issues, but this was not necessarily the case for hydropower water rights under then-existing licenses or decrees. The solution was the "trust" concept, which provided for a consensual subordination under a negotiated approach. Idaho Code § 42-203B(2). If negotiations failed, the State retained authority to unilaterally impose minimum flow/"trust water" subordination on an existing, unsubordinated hydropower water right. Idaho Code § 42-203B(3).

formality and level of detail that would be expected in a section 42-203B(2) agreement. The only such agreement in existence is the Swan Falls Agreement, which is a detailed instrument with approximately nine pages of contractual provisions, formal signature pages including certifications and acknowledgements, and some twenty pages of exhibits.[33] The Legislature formally ratified the Swan Falls Agreement. Idaho Code § 42-203B(5); *see also* 1985 Idaho Sess. Laws 20 (finding that the Swan Falls Agreement "is in the public interest for all purposes"). Clearly, Director Higginson's 1987 letter was not a minimum flow/"trust water" subordination agreement pursuant to Idaho Code section 42-203B(2).[34]

C. Even If Director Higginson's 1987 Letter Did Constitute A Subordination "Agreement," It Cannot Be Enforced To Prevent The Director From Applying And Complying With Idaho Law.

Even assuming, *arguendo*, that Director Higginson's 1987 letter constituted a subordination "agreement"—which it did not—this "agreement" cannot be enforced so as to prevent the Director from performing his statutory duties under the Idaho Code. The Canal Companies do not dispute that Idaho Code sections 42-219(1) and 42-1734B(4) expressly require the Director to ensure that a water right license complies with the Idaho Code and is consistent with the State Water Plan. As previously discussed, water right no. 01-7011 must be fully subordinated to comply with Idaho Code sections 42-203B(2) and 42-203B(6), and to be consistent with the Milner zero minimum flow provisions of the Idaho Code and the State Water Plan. The license also must be fully subordinated to be consistent with the recharge and hydropower subordination provisions of the State

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[33] Davis Aff., Exhibit 14; SRBA Milner Aff., Exhibit 5; *see also* Orr Aff., Exhibit 15 (copy of Swan Falls Agreement attached to *Memorandum Decision And Order On Cross-Motions For Summary Judgment*, SRBA Consolidated Subcase No. 00-92023 (Apr. 18, 2008).

[34] Should this issue be decided adversely to IWRB, the IWRB reserves the right to request that the State of Idaho file with the Department a notice of change of ownership to protect the State's interest as trustee and legal owner of water right no. 01-7011 pursuant to Idaho Code sections 42-203B(2) and 42-203B(3).

Water Plan. *IWRB's Opening Brief* at 48-50.

Further, the Canal Companies do not dispute that the Legislature intended the Director to exercise his subordination authority under Idaho Code section 42-203B(6) so as to prevent "another Swan Falls" situation—that is, a situation in which an unsubordinated hydropower water right is in a position to block or control future upstream development. *Id.* at 50-53. The Canal Companies also have not disputed that retaining the subordination condition of the Milner Permit in the license for water right no. 01-7011 would create "another Swan Falls" situation. *Id.*

These statutory provisions may not be frustrated or circumvented by a subordination "agreement." *See Memorandum Decision And Order On Cross-Motions For Summary Judgment*, In re SRBA, Consolidated Subcase No. 00-92023 (Apr. 18, 2008) at 43-44 ("The parties cannot stipulate around the application of the statute") (referring to Idaho Code § 42-203B).[35] An administrative agency such as the Department may not "contract out" of complying with a statute, nor be "estopped" from complying with a statute by a previous position that may have been inconsistent with statute. Otherwise, it could effectively amend the governing statute by simply taking a position inconsistent with the statute. *See Kelso & Irwin, P.A. v. State Ins. Fund*, 134 Idaho 130, 137-138, 997 P.2d 591, 598-599 (2000). Thus, even if Director Higginson's 1987 letter is viewed as a subordination "agreement," it may not be relied upon or enforced to prevent the Director from fully subordinating the license for water right no. 01-7011. *See Farrell v. Whiteman*, 146 Idaho 604, 609, 200 P.3d 1153, 1158 (2009) ("An illegal contract is one that rests on illegal consideration consisting of any act or forbearance

[35] A copy of this decision is attached to the Orr Aff. as Exhibit 15. It is also available for viewing on the SRBA website under Consolidated Subcase No. 00-92023.

which is contrary to law or public policy. . . . when the consideration for a contract explicitly violates a statute, the contract is illegal and unenforceable.")

D. The Canal Companies' Argument That The IWRB And The Legislature Agreed To The Subordination Condition Of The Milner Permit Has No Support In The Record.

The Canal Companies liberally mischaracterize the record in arguing that the IWRB had "full knowledge and participation" in the subordination "agreement," *Canal Companies' Brief* at 19, and that the IWRB and the Legislature agreed to the subordination condition of the Milner Permit. *Id.* at 28. None of the three 1987 letters were sent to the IWRB, purport to speak for the IWRB, make any requests of the IWRB, mention or refer to the IWRB, or were copied to the IWRB.[36] There is nothing in the record supporting the contention that the IWRB "agreed" to the subordination condition of the Milner Permit. The same goes for the Canal Companies' even less credible assertion that the Legislature did so.

The Canal Companies' sole basis for asserting that the IWRB had knowledge or and participation in the subordination "agreement" is that in 1982 the Canal Companies "officially request[ed]" that the IWRB adopt "an official position" in support of the Milner Project in which the Board would agree not to assert a subordination of the power permit, at least for the term of the original financing.[37] At the request of staff, Deputy Attorney General Phil Rassier prepared a memorandum discussing some of the issues raised by the Canal Companies' request.[38] The IWRB never adopted an "official position" against subordination of the Milner project, and the Canal Companies did not renew or otherwise follow-up on their "official request" to the IWRB. Both the IWRB and the Canal Companies simply dropped the matter.

Nothing in the record demonstrates any connection between the Canal

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[36] *See generally* Davis Aff., Exhibits 9, 35, 36.

[37] David Aff., Exhibit 7 at 3 (Letter from John A. Rosholt, attorney for the Canal Companies, to Reed Hansen, Chairman of the IWRB) (May 3, 1982).

[38] Davis Aff., Exhibit 8 (Memorandum from Phil Rassier to Norm Young and Wayne Haas) (Jul. 6, 1982).

Companies' rather unusual request in 1982 for IWRB to adopt an "official position" against subordination, and the three letters the Canal Companies and the Department exchanged five years later on a routine request for an extension of time. Nothing indicates that the IWRB was even aware of the 1987 letters. The Canal Companies are trying to build bridges that the record simply will not sustain.

IV. THE FEDERAL POWER ACT RESERVES TO THE STATE THE AUTHORITY TO INCLUDE A SUBORDINATION CONDITION IN THE STATE WATER RIGHT LICENSE FOR THE MILNER HYDROPOWER PROJECT, AND FERC DID NOT INTEND THE FEDERAL LICENSE TO PRECLUDE A SUBORDINATION CONDITION IN THE STATE LICENSE.

The Canal Companies also make a preemption argument, contending that the Department is barred from subordinating the license for water right no. 01-7011 because FERC declined to insert a subordination condition in the federal license for the project. *See generally Canal Companies' Brief* at 27-31. This argument misconstrues the governing law and ignores significant portions of the record.

A. *California v. FERC* Confirms That The State May Subordinate The State Water Right License For The Milner Project Pursuant To The State's Reserved Authority Under Section 27 Of The Federal Power Act.

The Canal Companies' preemption argument relies on *California v. FERC*, 495 U.S. 490 (1990), in which the California Water Resources Control Board attempted "to protect the stream's fish" by imposing minimum flow requirement on a hydropower facility that was higher than the minimum flow requirement FERC established in the facility's federal license. 495 U.S. at 493. The dispute hinged "principally on the meaning of § 27" of the Federal Power Act, *id.* at 497, and in particular on "§ 27's reference to 'other uses,' the provision essential to petitioner's argument." *Id.* at 505.

Section 27 of the Federal Power Act provides that the act shall not be interpreted or applied to interfere with certain areas of authority that are reserved to the States:

> Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the

> respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

16 U.S.C. § 821 (emphasis added); *see also* 495 U.S. at 497 (quoting section 27 of the Federal Power Act). California argued that the phrase "other uses" should be construed to include a state's "minimum stream flow requirement" regarding "the generation of hydropower or the protection of fish." 495 U.S. at 497.

The Court observed that in an earlier decision, *First Iowa Hydroelectric Cooperative v. FPC,* 328 U.S. 152 (1946), it had construed the statutory term "other uses" to be limited to uses "'*of the same nature*'" as those expressly identified in section 27—"irrigation" or "municipal" uses—and therefore relating primarily, if not exclusively "'*to proprietary rights.*'" 495 U.S. at 498 (emphasis in original) (quoting *First Iowa*, 328 U.S. at 175-76). The Court thus rejected California's argument, reasoning that a state's minimum flow requirements for power generation or fish protection "neither reflect nor establish 'proprietary rights' or 'rights of the same nature as those relating to the use of water in irrigation or for municipal purposes." 495 U.S. at 498 (quoting *First Iowa*, 328 U.S. at 176.)

The Canal Companies are incorrect in asserting that this case is "similar" to *California v. FERC. Canal Companies' Brief* at 29. This case does not involve a conflict between differing state and federal minimum flow requirements: neither the State of Idaho nor FERC has established a "minimum flow" requirement at the Milner hydropower project. The "target flows" established by the FERC license are subject to upstream irrigation requirements and expressly are not "minimum flows." 45 FERC ¶ 61423, 1988 WL 246992 at **2, **3, **27; *see also IWRB's Opening Brief* at 6 & n. 4.

Further, the Milner zero minimum flow provisions of the Idaho Code and the State Water Plan have precisely the opposite effect of establishing a "minimum flow": they authorize the flow to go down to zero c.f.s., to allow for irrigation and other agricultural uses above Milner. These provisions in no way conflict with the "target flows."

Nor does this case involve fish protection flows, or any "other uses" that are not of "the same nature" as those set forth in section 27 of the Federal Power Act. Rather, the Milner zero minimum flow provisions of Idaho Code section 42-203B(2) and the State Water Plan relate to the diversion, storage and use of water for agricultural and municipal purposes, among others. Thus, unlike the situation in *California v. FERC*, in this case the State of Idaho's authority is unambiguously confirmed by the plain language of section 27 of the Federal Power Act. Section 27 expressly bars the Federal Power Act from being construed "as affecting or intending to affect or in any way to interfere" with state law "relating to the control, appropriation, uses, or distribution of water used in irrigation or for municipal or other uses." 16 U.S.C. § 821 (emphasis added). This case involves "proprietary rights" acquired under State law to use water for "irrigation" and "municipal" purposes—and "other uses" that are "of the same nature." *California v. FERC*, 495 U.S. at 498.

The Milner zero flow provisions of the Idaho Code and the State Water Plan expressly relate to water rights acquired under Idaho law. The State Water Plan provides: "The exercise of water rights above Milner Dam has and may reduce flow at the dam to zero." 1996 State Water Plan at 17 (emphasis added); *see also* 1997 Idaho Sess. Laws 71 (same). Idaho Code section 42-203B(2), expressly governs the determination and administration of water rights acquired under Idaho law:

> 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) (emphasis added). Moreover, it is undisputed that these provisions relate to the storage and use of water for irrigation and municipal purposes, and "other uses" of the same nature, such as commercial, industrial and domestic uses, which are also traditional, long-standing uses under the prior appropriation doctrine as established by Idaho law. These provisions define, in part, state law water rights authorizing the diversion, storage and use of water for such purposes, which unquestionably are "proprietary rights" within the meaning of *First Iowa* and *California v. FERC*. *See County of Amador v. El Dorado County Water Agency*, 91 Cal.Rptr.2d 66, 84 (Cal. Ct. App.) (1999) ("It is difficult to imagine a more proprietary interest than the consumption of water and its removal from stream flow.")

Accordingly, this case falls squarely under the State's expressly reserved authority to regulate the "control, appropriation, use, or distribution of water use in irrigation or for municipal or other uses, or any vested right acquired therein." 18 U.S.C. § 821. Given this plain language and the "'presumption against finding pre-emption of state law in areas traditionally regulated by the States,'" *California v. FERC*, 495 U.S. at 497 (citation omitted), the Supreme Court's decision in *California v. FERC* confirms that federal law reserves to the State of Idaho authority to subordinate the state water right license for the Milner hydropower project.

This conclusion is supported by the implications of the Canal Companies' preemption argument. The Canal Companies' interpretation of *California v. FERC*

reduces to an assertion that the Federal Power Act preempts Idaho law for purposes of regulating the control, appropriation, use and distribution of water for irrigation, municipal purposes, and other related uses. This view means that almost nothing would remain under State control—the Canal Companies' argument would essentially concede complete federal control of Idaho's water resources. Not only is this argument directly contrary to the Federal Power Act and *California v. FERC*, it is astonishing that these irrigation companies, with their prior history of staunch opposition to federal preemption of state water law, now advocate in favor of federal preemption of state law.

B. The Federal License Demonstrates That FERC Did Not Intend To Preclude A Subordination Condition In The State Water Right License For The Milner Hydropower Project.

Given the State's clear authority under the Federal Power Act, the Canal Companies' argument that FERC intended the federal license to preclude a subordination condition in the state water right license must fail: even if FERC intended such a result, the Federal Power Act does not authorize FERC to preempt Idaho law with respect to the Milner zero minimum flow provisions of the Idaho Code and the State Water Plan. In fact, however, the record demonstrates that FERC did not intend to take the unprecedented position advocated by the Canal Companies.

The Milner Permit already included an almost complete subordination condition when FERC issued the federal license: the Milner Permit subordination condition was imposed on November 18, 1987,[39] and the FERC license was issued more than a year later, on December 15, 1988. 45 FERC ¶ 61423. As previously discussed, recharge was the only subordination exception in the Milner Permit, and thus other existing or future winter uses of water upstream from Milner—such as storage in surface reservoirs—could

[39] Davis Aff., Exhibit 9 (Higginson letter to Rosholt).

have completely de-watered the Milner project, leaving it with no flows whatsoever for hydropower use. Yet, the federal license made no mention of the subordination condition in the Milner Permit, even though FERC discussed (and declined) the Department's request for a subordination condition in the federal license. 45 FERC ¶ 61423, 1988 WL 246992 at **18-**19.

This demonstrates that the Canal Companies read too much into the federal license. Plainly, FERC did not overrule or prohibit subordinating the project to existing and future upstream storage for agricultural purposes that had the potential to completely deprive the Milner project of winter flows. For this reason, there is also no basis for thinking that FERC would have objected to subordination to recharge, which also stores winter flows for agricultural purposes. Had FERC intended its subordination discussion in the federal license to also preclude the existing subordination to condition in the Milner Permit, the license would have said so, but it did not.

The reason for this is obvious: a subordination condition in the federal license would interfere with FERC's authority under federal law, while a subordination condition in the state water right license would not. FERC did not include an "open-ended subordination clause" in the federal license, presumably because such a provision would go beyond the scope of the State's reserved authority under section 27 to define and administer proprietary state water rights, and thus would "interfere with the exercise of [FERC's] comprehensive planning responsibilities under Section 10(a)(1)." 45 FERC ¶ 61423, 1988 WL 246992 at **18. A subordination condition in the state water right license presented no such risk, because section 27 limits its effect to the regulation of

matters reserved to the State's authority. The Canal Companies' argument fails to recognize this significance difference.

The Canal Companies also fail to acknowledge that numerous provisions of the federal license demonstrate that FERC did not intend to authorize the Milner hydropower project to interfere with agricultural uses. For instance, FERC intended to protect upstream agricultural storage operations. *See* 45 FERC ¶ 61423, 1988 WL 246992 at **40 (concluding that the "target flows" requirement "would not commit water storage to a non-agricultural use" and "would not violate the intent for which . . . the upstream storage projects were authorized"). In addition, rather than establishing minimum flows, the license provided for the "Comprehensive Water Block" approach, the objective of which was to provide "target flows" at the projects when water was available "in excess of irrigation needs." *Id.* at **2; *see also id.* at **3, **19, **20, **24, **40, **41 ("in excess of irrigation needs," "in excess of irrigation demand," "in excess of irrigation requirements"). The federal also license identified "irrigation" as a water use "to be protected," *id.* at **4, and the license was intended to be consistent with the State Water Plan's Milner zero minimum flow policy. *Id.* at **19.

V. THE CANAL COMPANIES' ARGUMENTS THAT THE DIRECTOR LACKED STATUTORY AUTHORITY TO SUBORDINATE THE LICENSE FOR WATER RIGHT NO. 01-7011 ARE CONTRARY TO IDAHO LAW AND THE DISTRICT COURT'S DISMISSAL OF THE MANDAMUS ACTION.

The Canal Companies argue that the Director employed "unlawful" procedures and exceeded his statutory authority in two ways: (1) by "reopening" the comment period on the Milner Permit; and (2) by failing to issue a license that simply "confirmed" the Milner Permit without any changes. *Canal Companies' Brief* at 31-37. The Canal Companies also assert that the Director improperly exercised his discretion under Idaho Code section 42-203B(6) and took a "second bite at the apple" in licensing water right

no. 01-7011. The first two contentions are attempts to re-litigate issues the District Court decided in dismissing the Canal Companies' mandamus action. Moreover, the "reopening" issue is moot. The argument that the Director abused his discretion and took a "second bite" fails to recognize that as a matter of law the Director was required to fully subordinate the license.

A. The *Notice Of Intent To Issue License* Did Not "Reopen" The Comment Period, And In Any Event The Issue Is Moot.

The Canal Companies argue that by issuing the *Notice Of Intent To Issue License* (Sept. 5, 2007) ("*Notice*"), which stated that the Department would accept and consider written comments addressing the form of the subordination condition for the license for water right no. 01-7011, the Department used an "unlawful procedure" that "reopened" public comment on the Milner Permit. *Canal Companies' Brief* at 31-32. This argument is unavailing because the District Court already held in the proceedings on the Canal Companies' *Mandamus Petition*[40] that the Director did not "reopen" the comment period: "The *Notice* did not reopen a protest period nor did it give those submitting comments party status."[41] The Hearing Officer should reject the Canal Companies' attack on this judicial determination.

Further, and just as important, the District Court observed that even if it were determined that the Director could not appropriately consider the new comments, "there would be no prejudice to the Petitioners as the comments would be excluded from consideration." *Id.* Thus, in licensing water right no. 01-7011, the Director addressed the Canal Companies' concern by excluding the new comments from consideration: "Although the comments submitted are included in the agency record, they were not

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[40] Orr Aff., Exhibit 2 (*Petition For Peremptory Writ Of Mandate, North Side Canal Co. & Twin Falls Canal Co. v. Tuthill*, Case No. CV 2007-1093) (Fifth Jud. Dist., Jerome County Dist. Ct.) (Sept. 28, 2007).

[41] Orr Aff., Exhibit 14 at 9 (*Order Granting Motion To Dismiss Petition For Writ Of Mandate*, Case No. CV 2007-1093) (Fifth Jud. Dist., Jerome County Dist. Ct.) (Jan. 25, 2008).

considered by the Director." *Final Order* at 7 ¶ 1.[42]

The Canal Companies were not prejudiced by the *Notice* and the comments received in response thereto. The Canal Companies no longer have any basis for complaining that the Director engaged in an "unlawful process" by "reopening" the comment period. This issue is moot and the Hearing officer should reject the Canal Companies' continued attempts to litigate it. *See Farrell*, 146 Idaho at 610, 200 P.3d at 1159 (stating that an issue is moot if "a judicial determination will have no practical effect upon the outcome.").

B. Idaho Code Section 42-203B(6) Expressly Authorized The Director To Subordinate The Milner License, And The District Court Determined That He Was Not Required To Simply "Confirm" The Milner Permit With No Changes.

The Canal Companies' second argument that the Director engaged in an "unlawful" procedure and exceeded his statutory authority is based on their contention that once an applicant has shown beneficial use under a water right permit, Idaho Code section 42-219(1) requires the Director to simply issue a license that "confirms" the permit without any changes. *See Canal Companies' Brief* at 32 (arguing that after beneficial use in accordance with the terms of the permit has been shown, "[c]hanging the conditions at this point in time exceeds the Director's authority."). This argument fails for the two reasons discussed below.

1. <u>The Director Subordinated The License Pursuant To His Express Subordination Authority In Idaho Code Section 42-203B(6).</u>

This argument ignores Idaho Code section 42-203B(6). Section 42-203B(6) <u>expressly</u> authorizes the Director to subordinate a hydropower license: "<u>The director shall have the authority to subordinate the rights granted in a</u> . . . <u>license for power</u>

[42] This was not simply a cosmetic or superficial statement, as the *Final Order* demonstrates that the Director did not consider the new comments. The *Final Order* contains no substantive discussion of the comments or the interests of the submitting parties, and the Director based his decision regarding the form of the subordination condition for the license on the Idaho Code and the State Water Plan. *Final Order* at 7-14.

purposes to subsequent upstream beneficial depletionary uses." Idaho Code § 42-203B(6) (emphasis added). The Canal Companies are simply wrong in asserting that the Director had no statutory authority to require the license to include the subordination condition of the *Final Order*.

2. The District Court Determined In The Mandamus Action That Idaho Code Section 42-219(1) Does Not Limit The Director To Simply "Confirming" The Subordination Condition Of The Milner Permit Without Any Changes.

The Canal Companies ignore the express subordination authority in Idaho Code section 42-203B(6) and instead argue that Idaho Code section 42-219(1) left the Director with no option or discretion during licensing to do anything other than simply "confirm" the Milner Permit, without any changes to the subordination condition. This argument attempts to re-litigate the mandamus proceedings, wherein the District Court determined that Idaho Code section 42-219(1) did not require the Director to issue a license that simply "confirmed" the subordination condition of the Milner Permit. Idaho Code section 42-219(1), which provides, in relevant part:

> **Issuance of license – Priority. –**
> Upon receipt by the department of water resources of all the evidence in relation to such final proof, 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). The Canal Companies focus almost exclusively on the phrase, "shall issue to such user or users a license confirming such use," *Canal Companies' Brief* at 31, arguing that it means once beneficial use has been shown, the Director has a "duty" to "confirm" the permit by issuing a license that has the same conditions as the permit, with no changes. *Id.* at 31-32; *see also id.* at 36-37. In short, the Canal Companies argue that in licensing a permit for which beneficial use has been shown, the Director has no discretion to impose conditions that depart from the conditions in the permit.

This is precisely the same argument that the District Court rejected in the proceedings on the Canal Companies' *Mandamus Petition.* In those proceedings, the Canal Companies also predicated their argument on Idaho Code section 42-219(1) and its passage, "shall issue to such user or users a license confirming such use."[43] The Canal Companies argued that this provision imposed a "clear legal duty" on the Department to issue a license that simply confirmed the conditions of the Milner Permit, with no changes.[44]

The District Court rejected the Canal Companies' narrow reading of Idaho Code section 42-219(1), which would have meant that "following the proof of beneficial use examination the issuance of a license is simply a ministerial act."[45] The District Court held that the issuing a license with the same conditions as the Milner Permit was not a "simple ministerial act," because the statute vests IDWR with "discretion" in making the "compliance determination" required prior to issuing a license:

> Idaho Code § 42-219(1) requires an intermediate step prior to the issuance of the license. After all evidence is filed in relation to proof of beneficial use, IDWR is then charged with "carefully examining the same, *and if the department is satisfied that the law has been fully complied with* . . . the department shall issue . . . a license confirming such use." I.C. § 42-219(1) (emphasis added). The statute then provides that if IDWR finds that the applicant has not complied with the law or the conditions of the permit "it *may* issue a license for the portion of the use which is in accordance with the permit or *may* refuse issuance of the license and void the permit. I.C. § 42-219(8) (emphasis added). Because IDWR has some level of "discretion" in conjunction with making the compliance determination prior to issuing the license the duty of issuing the license is not a simple ministerial act.[46]

The District Court held that prior to issuing a license, Idaho Code section 42-219 provides that "[t]he Director must first make a determination <u>whether the use complies</u>

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[43] Orr Aff., Exhibit 13 at 12 (*Petitioners' Response To Respondents' Motion To Dismiss*, Case No. CV 2007-1093) (Fifth Jud. Dist., Jerome County Dist. Ct.) (Dec. 14, 2007).

[44] *Id.* at 2, 3-4, 13.

[45] Orr Aff., Exhibit 14 at 10 (*Order Granting Motion To Dismiss Petition For Writ Of Mandate* at 10).

[46] *Id.*

with the law . . . ."[47] The statute further provides that if the Director determines that the use does not comply with the law, he may "refuse issuance of the license and void the permit," Idaho Code § 42-219(8), as the District Court also observed.[48] Thus, the plain statutory language and the District Court's decision demonstrate that Idaho Code section 42-219(1) does not require the Director to simply "confirm" the subordination condition of the Milner Permit.

3. The Director's Decision Was Not An Abuse Of Discretion Or A "Second Bite At The Apple" Because Idaho Law Required The Director To Fully Subordinate The License For Water Right No. 01-7011.

The Canal Companies nonetheless assert that the Director "acted outside of the law" because "he took a second bite at the apple" in ordering a subordination condition different from that in the Milner Permit. *Canal Companies' Brief* at 37. The Canal Companies assert that in 1987 the Director already exercised his discretionary authority under Idaho Code section 42-203B(6) in approving the subordination condition of the Milner Permit, and should not now be allowed to again exercise this same discretion to modify the subordination condition. *Id.* at 2, 19, 26, 27, 37. This argument ignores the statutory differences between the proceedings in 1987 and those in 2008, and the fact that the Director's 2008 decision was not discretionary but was required by law.

The "proceedings" in 1987 involved only an exchange of three brief letters. They discussed the Canal Companies' application for an extension of time to prove beneficial use under the Milner Permit pursuant to Idaho Code sections 42-204 and 42-218. Such proceedings do not involve a review of licensing conditions, they simply focus on the question of permission to go forward and attempt to perfect a water right. The fact that the Director acquiesced to a recharge subordination exception during extension proceedings did not amount to a final licensing determination. Such an interpretation would collapse a licensing compliance determination under Idaho Code section 42-219(1)

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47 *Id.* at 12 (emphasis added).

48 *Id.*

into the extension statutes, and render section 42-219(1) superfluous or meaningless in this respect.

The events in 2008, in contrast, were formal licensing proceedings governed by Idaho Code section 42-219(1) and Idaho Code section 42-1734B(4). As previously discussed, these statutes as matter of law required the Director to ensure that the license (1) complied with applicable provisions of State law, and (2) was consistent with applicable provisions of the State Water Plan—including, among others, the Milner zero minimum flow provisions of State law and the State Water Plan. Thus, as explained *supra* and in the IWRB's opening summary judgment brief, these statutory provisions required the Director to fully subordinate the license for water right no. 01-7011. In subordinating the license in 2008, the Director was not exercising statutory discretion but rather was complying with statutory mandates. As the Director stated in the *Final Order:*

> [T]his question is controlled by affirmative enactments of the Idaho Legislature and the policies of the Idaho State Water Plan as ratified by the Idaho Legislature. In short, while the Director has discretion with respect to exercising his authority under Idaho Code § 42-203B(6), the Director does not have discretion to ignore clear statutory language and provisions of the State Water Plan, or to approve subordination limitations that are directly contrary to them.

Final Order at 14 ¶ 23. The Canal Companies' arguments that Director had improperly exercised his discretion and/or impermissibly took a "second bite at the apple" are incorrect and should be disregarded.

VI. THE CANAL COMPANIES DID NOT HAVE A VESTED PROPERTY RIGHT IN THE MILNER PERMIT, AND EVEN IF THEY DID, THEY MAY NOT PREVENT THE DIRECTOR FROM EXERCISING HIS CONSTITUTIONAL AND STATUTORY AUTHORITY TO SUBORDINATE A HYDROPOWER WATER RIGHT.

The Canal Companies' final argument is that the Director was required to include in the license the subordination condition of the Milner Permit because the Canal Companies had a vested, compensable property interest in the Milner Permit. *Canal*

Companies' Brief at 38-46. This argument is another attempt to re-litigate an issue the District Court decided adversely to the Canal Companies in dismissing their *Mandamus Petition.* Further, even assuming, *arguendo*, that the Canal Companies did have a compensable property interest in the Milner Permit (which they did not), the Director still had express statutory authority to fully subordinate the license, pursuant to a statute specifically enacted to implement the State's constitutional authority to "regulate and limit" hydropower water rights. If the Canal Companies had a compensable interest then they may seek compensation in District Court, but they may not prevent the Director from ignoring clear constitutional and statutory authority requiring him to fully subordinate the water right for the Milner hydropower project.

A. The District Court Determined In The Mandamus Action That The Canal Companies Do Not Have A Vested Property Right In The Milner Permit.

One of the principal arguments the Canal Companies made in the mandamus proceedings in the District Court was that ordering the Department to license water right no. 01-7011 with the subordination condition of the Milner Permit was appropriate because they had a vested, compensable property interest in the Milner Permit. The Canal Companies specifically alleged in their *Mandamus Petition* that a new or changed subordination condition would constitute "an unconstitutional and prohibited taking of Petitioners' property without just compensation."[49] The Canal Companies also alleged a "takings" claim,[50] and sought an order stating that they were "entitled to just compensation in an amount to be determined at trial."[51]

The District Court recognized that the question of whether the Canal Companies

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[49] Orr Aff., Exhibit 2 at 15 (*Petition For Peremptory Writ Of Mandate,* Case No. CV 2007-1093) (Fifth Jud. Dist., Jerome County Dist. Ct.) (Sept. 27, 2007).

[50] *Id.* at 17.

[51] *Id.* at 18.

had a vested property interest in the Milner Permit was a pivotal issue. In denying the Canal Companies' application for an alternative writ of mandate, the District Court stated that in order to determine whether a writ of mandate was appropriate, the court would have to resolve "[t]he legal question of when a water right vests—when the permit is issued or when a license is issued or at some other time," because the issue "may not be entirely settled."[52]

In opposing the Department's motion to dismiss, the Canal Companies argued they were not seeking judicial review of the Director's licensing decision, but rather seeking to compel the Director to issue a license confirming the subordination condition to which they claimed to be entitled under the Milner Permit.[53] The Canal Companies also alleged that the Director and the Department were causing "injury" to their vested interest in the Milner Permit.[54]

In evaluating this argument, the District Court relied on the SRBA's District Court's decision in SRBA Subcase No. 36-08099 (*River Grove Farms*), which also dealt with the question of the Department's authority under Idaho Code section 42-203B(6) to subordinate a hydropower water right at licensing. *Id.* at 10-11. The District Court observed that precisely the same "vested interest" claim the Canal Companies were asserting had also been raised and rejected by the SRBA District Court in *River Grove Farms*:

> One of the many arguments raised was that the water right vested at the time the water was applied to beneficial use and not upon the issuance of

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[52] Orr Aff., Exhibit 9 at 4 (*Order Denying Petition For Alternative Writ Of Mandate*, Case No. CV 2007-1093) (Fifth Jud. Dist., Jerome County Dist. Ct.) (Oct. 10, 2007).

[53] *See* Orr Aff., Exhibit 13 at 7 (*Petitioners' Response To Respondents' Motion To Dismiss* at 7) ("Petitioners are entitled to issuance of a Writ of Mandate pursuant to Idaho Code § 7-302 in order to ***compel Respondents to perform their duties under Idaho Code § 42-219 to issue a license to Petitioners . . .***") (emphasis in original).

[54] *Id.* at 7, 8, 14.

> the license. Therefore I.C. § 42-203B(6) could not be retroactively applied to diminish that scope of the vested hydropower right. In essence the license is more of a formality. The Hon. R. Barry Wood, then presiding judge of the SRBA, disagreed. Judge Wood held that the water right vested at the time the license was issued. . . . Judge Wood ruled: " . . . . [I]t is clear that the legislature intended to mark the point at which a water right becomes vested."[55]

The District Court quoted Judge Wood's thorough analysis at length and concluded: "Although the decision was never appealed from, this Court finds it to be on point and persuasive."[56] Thus, the District Court rejected the Canal Companies' contention that they had a vested, compensable property interest in the Milner Permit.[57]

The Canal Companies attempt to avoid this ruling by asserting that the question of whether the Canal Companies had a vested property interest in the Milner Permit was not "ripe" in the mandamus proceedings. *Canal Companies' Brief* at 16. The record belies this contention. The Canal Companies argued that the exhaustion requirement was irrelevant <u>because</u> they had a "vested interest" in the Milner Permit. The District Court had to—and did—decide this question in order to determine whether the exhaustion requirement warranted dismissal of the writ action. The District Court never stated or implied that the legal question of whether the Canal Companies had a "vested interest" in the Milner Permit was not yet ripe, and indeed no further development was necessary for the claim to be justiciable: the Canal Companies had years earlier submitted the proof of beneficial use upon which their "vested interest" argument relied.

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[55] Orr Aff., Exhibit 14 at 11 (*Order Granting Motion To Dismiss Petition For Writ Of Mandamus* at 11).

[56] *Id.* at 12.

[57] The Canal Companies contend that the relevant analysis in *River Grove Farms* was "mere dicta." *Canal Companies' Brief* at 42 n.115. This is incorrect, but would be irrelevant in any event. The *River Grove Farms* analysis was "necessary for, and integral to" the District Court's dismissal of the Canal Companies' *Mandamus Petition*, and therefore was not dicta for purposes of this case. *California v. FERC*, 495 U.S. at 501.

The Canal Companies also attempt to avoid the District Court's decision by pointing to the SRBA's District Court's decision in *Riley v. Rowan* (SRBA Subcase No. 94-00012) (Aug. 28, 1997),[58] and to the judicial review order regarding the Department's licensing of an Idaho Power Company water right at the Brownlee facility, *Idaho Power Co. v. IDWR, In the Matter of Licensing Water Right No. 03-7018 In the Name Of Idaho Power Company.*[59] *Canal Companies' Brief* at 42-44. This argument is unavailing because it simply demonstrates, as the District Court observed in this case, that the decisions of the Idaho Supreme Court do not appear to have squarely settled the specific question of precisely when a water right vests under the statutory permitting and licensing system. In the absence of controlling appellate guidance on this point, it is perhaps not surprising that various district courts have come to different conclusions. The Idaho Supreme Court may resolve the issue or provide guidance in deciding the Department's appeal of the Brownlee license case.

In any event, the fact remains that for purposes of <u>this</u> case and <u>this</u> water right, the District Court has determined that the Canal Companies did not have a vested interest in the Milner Permit. The Hearing Officer should adhere to this judicial determination for purposes of this proceeding, rather than relying on decisions based on different water rights and different facts.

B. Because Hydropower Water Rights Are Constitutionally Subject To Regulation And Limitation By The State And May Be Subordinated To Other Uses, The Canal Companies' Only Remedy For Any Alleged Injury Is To Seek Compensation Through An Inverse Condemnation Action.

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[58] Davis Aff., Exhibit 38. *Riley* was appealed, but the Idaho Supreme Court "decline[d] to address" the claim that the IDWR "breached its statutory duty to issue a license." *Riley v. Rowan*, 131 Idaho 831, 834, 965 P.2d 191, 194 (1998).

[59] Third Jud. Dist., Washington County Dist. Ct., Case No. CV-2009-1883 (Jan. 13, 2010). Davis Aff., Exhibit 39.

The Canal Companies' argument that they had a vested interest in the Milner Permit is also legally flawed because it assumes that such an interest bars the Director from imposing a new subordination condition on the water right. This assumption is contrary to the plain language of section 3 of Article XV of the Idaho Constitution, and Idaho Code section 42-230B(6).

Under the Idaho Constitution, hydropower is inherently secondary to all other uses of water. Section 3 of Article XV of the Idaho Constitution expressly authorizes the State to "regulate and limit" the "right to divert and appropriate" for hydropower uses. Idaho Const. Art XV § 3. This authority was added to the Idaho Constitution in a 1928 amendment after it became apparent that unsubordinated hydropower water rights posed a significant risk to the future development of the State's water resources.[60] Significantly, the "regulate and limit" authority applies without limitation to all rights for hydropower uses—it is not limited to inchoate or unperfected rights, and is not limited to undeveloped permits.

Idaho Code section 42-203B expressly implements the State's constitutional authority to regulate and limit hydropower water rights. Idaho Code § 42-203B(1). Like the constitutional provision, section 42-203B(6) is not limited to inchoate or unperfected rights, or undeveloped permits. Rather, the subordination authority of Section 42-203B(6) extends to all "permits and licenses" for hydropower use, with a single exception: licenses that were in existence when the statute first went into effect, on July 1, 1985. Idaho Code § 42-203B(6).

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[60] *See* Orr Aff., Exhibit 15 at 5 (*Memorandum Decision And Order On Cross-Motions For Summary Judgment* (SRBA Consolidated Subcase 00-92023) (Apr. 18, 2008) (stating that the "regulate and limit" authority was added to the Idaho Constitution "after the development of hydropower projects on the Snake River and its tributaries began in earnest").

It is undisputed that the Canal Companies did not obtain a water right license for the Milner hydropower project until after 1985. Thus, the statute that expressly implements the State's constitutional authority to regulate and limit hydropower water rights specifically authorized the Director to subordinate the license for water right no. 01-7011, regardless of whether the Canal Companies had a vested property interest in the Milner Permit. While the Canal Companies may seek compensation for any alleged deprivation of their claimed property interest through an inverse condemnation proceeding, they have no right to prevent the Director from exercising his hydropower subordination authority under Idaho Code section 42-203B(6) and section 3 of Article XV of the Idaho Constitution. Unlike other water rights, hydropower water rights are constitutionally and statutorily subject to regulation and limitation by the State pursuant to Article XV, section 3.

This is also why the Hearing Officer should disregard the Canal Companies' exaggerated attempts to characterize an affirmation of the Director's licensing decision in this case as presenting a grave threat to all water rights. *See, e.g., Canal Companies' Brief* at 32 ("Water right permit holders rely heavily upon the terms of the permit in order to make the necessary cost and benefit analysis, and to determine the feasibility of any given project"); *id.* at 38 ("the Department would have unfettered and inequitable powers to refuse to perform its statutory duties, with drastic and unconscionable results"); *id.* at 40 ("this type of discretionary unpredictable exercise of power by the Department would create a chilling effect on water resource development").

Hydropower water rights are a special case because they are constitutionally and statutorily subordinated to water rights for other uses. The Canal Companies' shrill

warnings that the Director's licensing decision in this hydropower case presents a threat to all permit holders, all types of water rights, and water resource development in general, should be discounted as the overreaching hyperbole that it is. The Director's licensing decision, and the constitutional and statutory subordination authority on which it rests, have no application outside of the hydropower arena.

The Canal Companies' warnings of unfettered and unpredictable exercises of administrative subordination authority are also baseless within the hydropower arena. Hydropower users and developers have long been on notice of hydropower's secondary status in Idaho, and of the State's authority to subordinate hydropower permits and licenses. The "regulate and limit" authority was added to the Idaho Constitution in 1928, and Idaho Code section 42-203B(6) has been in effect for almost a quarter-century. In addition, as discussed previously and in the IWRB's opening summary judgment brief, Idaho Code section 42-203B(6) was explicitly intended to prevent hydropower water rights from blocking or precluding other uses and developments of the State's water resources. Moreover, as the District Court pointed out in the mandamus proceedings, the SRBA District Court determined ten years ago that the statute expressly authorized the Department to include a subordination condition in the license for a developed hydropower water right.[61] Hydropower permit holders or developers cannot reasonably claim insufficient notice of the possibility that a subordination condition might be included at licensing, or that doing so exceeds the Department's statutory or constitutional authority.

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[61] Orr Aff., Exhibit 14 at 10-11 (*Order Granting Motion To Dismiss Petition For Writ Of Mandate* at 10-11) (discussing SRBA Subcase No. 36-08099) (*River Grove Farms*). The *River Grove Farms* decision was entered on January 11, 2000, is available under the "Presiding Judge Documents" link on the SRBA website: http://www.srba.state.id.us/.

This is especially true of the Canal Companies with respect to the Milner hydropower project. Having helped formulate the Milner zero minimum flow policy almost a century ago, having helped implement and enforce it against hydropower uses below Milner Dam for so many years, and having played an important role in the enactment of Idaho Code section 42-203B, the Canal Companies are in no position to claim surprise or injury when the statute is invoked to subordinate their below-Milner hydropower use in favor of agricultural aquifer recharge uses above Milner.

CONCLUSION

For the reasons set forth herein and in the *IWRB's Opening Brief*, the IWRB respectfully requests that the Hearing Officer grant the IWRB's motion for summary judgment.

Respectfully submitted this 19th day of March, 2010.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of March 2010, I caused a true and correct copy of the foregoing **REPLY TO CANAL COMPANIES' MEMORANDUM IN RESPONSE TO IDAHO WATER RESOURCE BOARD'S MOTION FOR SUMMARY JUDGMENT** to be filed with the Department of Water Resources and served on the following parties by the indicated methods:

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