LAWRENCE G. WASDEN
ATTORNEY GENERAL

STEVEN L. OLSEN, ISB # 3586
Deputy Attorney General
Chief, Civil Litigation Division

MICHAEL S. GILMORE, ISB #1625
MICHAEL C. ORR, ISB #6720
Deputy Attorneys General
P.O. Box 83720
Boise, Idaho 83720-0010
Telephone: (208) 334-2400
mike.gilmore@ag.idaho.gov
michael.orr@ag.idaho.gov
Attorneys for the Idaho Water Resources Board

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)	**MEMORANDUM IN SUPPORT OF 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:

> 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.

This Memorandum is filed in support of that Motion for Summary Judgment.

INTRODUCTION

The Idaho Code and the State Water Plan prohibit the establishment of water rights that require flows arising above Milner Dam on the Snake River to be dedicated for uses below Milner Dam. This fundamental aspect of Idaho water law and policy is known as the Milner "zero minimum flow" principle and is intended to promote development of the Snake River above the dam. As District Judge John M. Melanson stated prior to ascending to the Idaho Court of Appeals: "In brief terms, the State Water Plan sets a 'zero flow' at Milner Dam to allow for full development of the River above Milner." *Order On Petition For Judicial Review, Clear Springs Foods, Inc. v. Idaho Ground Water Appropriators, Inc.* (Fifth Jud. Dist., Gooding County Dist. Ct.) (Case. No. 2008-444) (Jun. 19, 2009) ("*Clear Springs Order*"), at 40 n.12.[1]

The Milner zero minimum flow principle has deep roots in the long history of reclamation and water resource development in Idaho, and is founded on the principle of subordinating hydropower uses below Milner Dam to uses above Milner Dam that capture winter flows and flood waters—such as reservoir storage and ground water recharge—for irrigation use in the summer months. The Milner zero minimum flow principle reflects the fact that flows spilling past Milner Dam historically have been considered "wasted" or "lost" for irrigation purposes. This principle has been an integral component of the State Water Plan since its inception, was codified as part of the Swan Falls settlement, and has been recommended for inclusion as a general provision in the SRBA's final decree. The Canal Companies helped develop and enforce the Milner zero minimum flow, and consistently supported it for many years—at least until the late

[1] Attached to the *Affidavit of Michael C. Orr in Support of Idaho Water Resource Board's Motion for Summary Judgment*, filed herewith ("Orr Aff."), as Exhibit 1.

1980s, when the opportunity to profit from hydropower production below Milner coincided with the Canal Companies' reversing course.

The controlling question in this proceeding is whether the Director, as part of his duty to ensure that a water right license complies with Idaho law and is consistent with the State Water Plan, Idaho Code §§ 42-219(1), 42-1734B(4), properly conditioned the license for water right no. 01-7011 to prevent a hydropower use located below Milner Dam from interfering with ground water recharge uses of the Snake River above Milner Dam. The answer to this question is clear and unambiguous. The provisions of the Idaho Code and the State Water Plan confirming the Milner zero minimum flow, encouraging ground water recharge development, and providing for subordination of hydropower uses in order to prevent "another Swan Falls" required, as a matter of law, that the license for water right no. 01-7011 be subordinated to all upstream uses other than hydropower, including ground water recharge uses.

FACTS AND PROCEDURAL BACKGROUND

I. THE MILNER DAM AND THE MILNER HYDROPOWER PROJECT.

Milner Dam marks a geographic division in the Snake River basin and has been an important irrigation feature since it was built in 1905. Below Milner, the Snake River rapidly descends into a steep canyon and becomes inaccessible for gravity irrigation development.[2] Above Milner, the river is not deeply entrenched and there are many irrigation diversions. SRBA Milner Aff., Exhibit 4 at 13 (1982 Idaho State Water Plan at

[2] "Almost immediately below Milner Dam, Snake River enters what ultimately becomes a rather deep rock gorge, from which water can not be diverted by gravity for irrigation uses." *Report and Recommendations to the Federal Power Commission by W.G. Swendsen, Commissioner of Reclamation, representing the State of Idaho* (Oct. 28, 1922), at 3. A copy of this document is attached as Exhibit 28 to the *Affidavit of Michael C. Orr*, which was filed on October 19, 2009 in SRBA Subcase Nos. 00-92002GP, 02-00200, 02-00201, 00-00223 and 02-00224 ("SRBA Milner Aff."). The SRBA Milner Aff., including the exhibits thereto, is attached as exhibit 26 to the Orr Aff. filed in this proceeding.

5).[3] Several irrigation entities, including the Canal Companies make significant diversions at the dam. 45 FERC ¶ 61423, 1988 WL 246992 at **35 (*Twin Falls Canal Company, North Side Canal Company, Ltd. – Project No. 2899-003 – Order Issuing License (Major Project)*) (Dec. 15, 1988). As a result of this pattern of development, the reliable natural summer flow of the river at Milner was fully appropriated shortly after 1900. SRBA Milner Aff., Exhibit 34 at 5 ("State of Idaho Response To Federal Energy Regulatory Commission Request For Additional Information" at 2) (*In the Matter of Petition for Declaratory Order by Idaho Power* Company) (FERC Docket no. EL85-38-000) (Jan. 30, 1987).

While diversions at and above Milner Dam often result in a dry riverbed immediately below Milner in the summer, inflows into the canyon—especially the numerous springs—regenerate the river downstream from Milner. *See Clear Springs Order* at 40 n.12 ("The source for the Snake River below Milner relies on flows and gains from spring discharges from the ESPA."). Historically, hydropower production has been the principal use of the spring-fed river flows in the canyon below Milner. SRBA Milner Aff., Exhibit 29 at 14 ("Report of Board of Engineers to Consider Projects in Snake River Valley Which May Affect the Proposed American Falls Reservoir" at 5) (April 10, 1920) ("Board of Engineers Report") ("The waters flowing in the stream below Milner Dam are not susceptible of diversion to any considerable amount, and therefore become of primary use in connection with the production of power."). In short, the Snake River basin is divided at Milner Dam in terms of geography, hydrology and water resource development—with predominant irrigation use above Milner Dam and hydropower use of flows below Milner Dam.

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[3] The SRBA Milner Aff., including its exhibits, is attached as exhibit 26 to the Orr Aff.

The Canal Companies obtained a permit to appropriate water for hydropower production at Milner Dam in 1977. *Final Order* at 1; Orr Aff., Exhibit 2 at 3 (*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) ("*Mandamus Petition*"). The permit was pending in 1988 when the Federal Energy Regulatory Commission ("FERC") determined there was a "high risk" Milner Dam would fail in the event of an earthquake. 45 FERC ¶ 61423, 1988 WL 246992 at **1. The Canal Companies intended to use sales of electricity generated by the proposed Milner hydropower project to help offset the costs of the necessary repairs to the dam. *Id.*; Orr Aff., Exhibit 3 ("History of Milner Dam," *available at* http://www.tfcanal.com/milner.htm). The Canal Companies and Idaho Power Company entered into an agreement to carry out the "reconstruction, rehabilitation and improvement" of Milner Dam. *Mandamus Petition*, Attachment C at 3 ("Agreement Regarding The Ownership, Construction, Operation And Maintenance Of The Milner Hydroelectric Project"). "Idaho Power would loan the canal companies funds to refurbish the dam. Repayment would come in the form of royalties from the hydro project." Orr Aff., Exhibit 3 ("History of Milner Dam").

The Milner hydropower project uses the irrigation works of the Twin Falls Canal Company to divert and convey water to a power plant next to the river, approximately 1.6 miles downstream from Milner Dam. Flows diverted at Milner Dam are carried in the main Twin Falls canal, which roughly parallels the river above and south of the canyon, to a "forebay" adjoining the canal. At the forebay, a portion of the canal flow is diverted into two penstocks (pipes) that send the water over the canyon rim and down to the power

plant, which is next to the Snake River. 45 FERC ¶ 61423, 1988 WL 246992 at **1, **21; *Mandamus Petition*, Attachment F at 5 ("Water Rights Examiner's Report Narrative"); Orr Aff., Exhibit 4 (*Before The Federal Energy Regulatory Commission - Application For Initial License: Project 2899-002* at Exhibit E, Figure E-2) (Twin Falls Canal Company, North Side Canal Company) (July 1984) (*"Artist's Conception of the Milner Project"*); Orr Aff., Exhibit 3 ("History of Milner Dam"); *id.*, Exhibit 5 (drawings of the Milner hydropower project from the Department's files); *id.*, Exhibit 6 (Google Earth® printouts of the Milner hydropower project). The project also includes an "auxiliary" power plant at the downstream toe of Milner Dam that uses the 200 c.f.s. "target flows"[4] established by the FERC license. 53 FERC ¶ 62203, 1990 WL 319240 at **1; Orr Aff., Exhibit 3 ("History of Milner Dam"); *Mandamus Petition,* Attachment F at 5 ("Water Rights Examiner's Report Narrative").

While the FERC license originally named only the Canal Companies as licensees, Idaho Power Company was added as a co-licensee a few months after the license issued. 47 FERC ¶ 62124, 1989 WL 261359 (May 2, 1989). The Canal Companies subsequently transferred their interest in the license to Milner Dam, Inc. 58 FERC ¶ 62113, 1992 WL 19802 (Feb. 10, 1992).[5] Idaho Power Company operates the Milner hydropower project pursuant to an agreement with the Canal Companies. *Mandamus Petition*, Attachment C.

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[4] The FERC license requires the Canal Companies and Idaho Power to provide "target flows" of 200 c.f.s. at Milner Dam by leasing water from the Upper Snake River Water Bank. 45 FERC ¶ 61423, 1988 WL 246992 at **2 - **3, **27. The target flows are not mandatory "minimum flows" because they are subject to upstream irrigation uses, and are required only when water in excess of irrigation needs is available for lease from the Water Bank. *Id.* at **19.

[5] The corporate officers of Milner Dam, Inc. (John Honik and Phil Blick) are also officers or directors of Twin Falls Canal Company. Orr Aff., Exhibit 7 (2009 annual reports of Twin Falls Canal Company and Milner Dam, Inc.).

II. INITIAL ADMINISTRATIVE PROCEEDINGS.

The Department of Water Resources ("Department") issued the Canal Companies a permit to appropriate 12,000 c.f.s. from the Snake River for hydropower use at the Milner project on June 29, 1977 (the "Milner Permit"). *Final Order* at 1; *Mandamus Petition* at 3 & Attachments B, C. The permit did not contain a subordination condition, and proof of beneficial use was due on June 1, 1982. *Id.* From 1982 to 1992, the Canal Companies filed four applications to extend the due date for proof of beneficial use, all of which were granted. *Final Order* at 2. In response to the second extension application, the Department sent a letter to the Canal Companies stating that as part of approving the extension the Department planned to add a subordination condition to the permit. *Mandamus Petition*, Attachment G. The contemplated subordination condition provided, in part, that water right 01-7011 "shall be junior and subordinate to all other rights for the use of water, other than hydropower, within the state of Idaho." *Id.*

In response, the Canal Companies requested that the subordination condition be changed to (among other things) make an exception for "groundwater recharge." *Id.*, Attachment H. The Director sent a letter to the Canal Companies on November 18, 1987 approving an extension of time to November 1, 1990, granting the requested changes, and reciting the subordination condition to be placed in the permit:

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

Id., Attachment I; *Final Order* at 2. FERC issued a license for the Milner project on December 15, 1988. *Final Order* at 2; 45 FERC ¶ 61,423, 1988 WL 246992. The Canal Companies submitted proof of beneficial use on November 1, 1993, and the field examination recommended the water right be licensed to divert 5,714.7 c.f.s. for hydropower use at the power plant in the canyon downstream of Milner Dam. *Final Order* at 2; *Mandamus Petition*, Attachments E, F.

The Canal Companies verbally requested that the Department issue a license for the Milner Permit in 2006 and 2007. *Final Order* at 3; *Mandamus Petition* at 11. In January, February and April 2007, the Department received written notices from a number of irrigation entities requesting an opportunity to be heard on the form of the subordination condition for the license. *Final Order* at 2-3; *Mandamus Petition* at 11-12. The Director issued a *Notice Of Intent To Issue License* on September 5, 2007 ("*Notice*"), stating that the Department was prepared to issue the license and would accept and consider written comments from interested parties addressing the form of the subordination condition that should be included on the license. *Notice* at 2. The Department received written comments from thirty-nine (39) water distribution entities regarding the form of the subordination condition. *Final Order* at 39.

III. THE MANDAMUS ACTION.

In response to the *Notice*, the Canal Companies filed their *Mandamus Petition* in the Fifth Judicial District Court in Jerome County. The Canal Companies alleged that issuance of the *Notice* and consideration of comments submitted in response thereto was an "unlawful process," that the Milner Permit represented "a valid, enforceable and vested water right under Idaho law," and that the Department's failure to issue a license

in conformance with the Milner Permit was "void as an unconstitutional taking of Petitioners' water right." *Final Order* at 3; *Mandamus Petition* at 15-17. The Companies sought a peremptory writ of mandamus and/or order directing the Department to immediately issue a license in conformance with the Milner Permit. *Final Order* at 3; *Mandamus Petition* at 18. The Companies also filed an accompanying application for an alternative writ of mandate ordering the Department to issue a license including "the conditions on the existing water right permit no. 01-7011." Orr Aff., Exhibit 8 at 2 (*Application For Alternative Writ Of Mandate*) (Oct. 10, 2007).

The District Court denied the application for an alternative writ of mandate and identified several legal issues that had to be resolved to determine whether a writ of mandate was appropriate, including the following:

> The legal question of whether the Respondents have the authority, for any reason (changes in law, etc.), to modify or impose a new condition on a permit after beneficial use has been proven but prior to the issuance of a license?
>
> . . . .
>
> The legal question of when a water right vests—when the permit is issued or when a license is issued or at some other time—may not be entirely settled.

Orr Aff., Exhibit 9 at 4 (*Order Denying Petition For Alternative Writ Of Mandate*) (Oct. 10, 2007). The Department moved to dismiss the mandamus action for failure to exhaust administrative remedies and failure to state a claim upon which relief may be granted. Orr Aff., Exhibit 10 at 2 (*Motion To Dismiss*) (Nov. 8, 2007); Orr Aff., Exhibit 11 at 5-7, 9-10 (*Memorandum In Support Of Motion To Dismiss*) (Nov. 8, 2007).[6] The Companies opposed the motion on grounds that the Director had a "clear legal duty" to issue a license that included the same subordination condition as the Milner Permit. Orr Aff.,

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[6] The Department also filed an *Answer* to the *Mandamus Petition*. Orr Aff., Exhibit 12.

Exhibit 13 at 2, 3-4, 11, 13 (*Petitioners' Response To Respondents' Motion To Dismiss*) (Dec. 14, 2007); *see also id.* at 3 (referring to the Department's "ministerial function to issue a license"); Orr Aff., Exhibit 14 at 9 (*Order Granting Motion To Dismiss Petition For Writ Of Mandate* (Jan. 25, 2008) (referring to "the argument that following proof of the beneficial use examination the issuance of a license is simply a ministerial act").

The District Court held that under Idaho Code § 42-219, the Department "has some level of 'discretion' in conjunction with making the compliance determination prior to issuing the license," and thus "the duty of issuing the license is not a simple ministerial act." *Order Granting Motion To Dismiss Petition For Writ Of Mandate* at 10. The District Court quoted with approval a decision of District Judge R. Barry Wood during his tenure as presiding judge of the SRBA: "'[I]t is clear that the legislature intended the issuance of the license to mark the point at which a water right becomes vested.'" *Id.* at 11.[7] The District Court thus held that "following the beneficial use examination the issuance of a license is not a ministerial act," *id.* at 12, and granted the motion to dismiss.

IV. SUBSEQUENT ADMINISTRATIVE PROCEEDINGS.

The Director issued a *Final Order* for the license for water right no. 01-7011 on October 20, 2008. *Final Order* at 15. The *Final Order* discussed provisions of the Idaho Code and the State Water Plan pertaining to water right licensing, the Milner "zero minimum flow," ground water recharge, and hydropower subordination. *See generally Final Order* at 4-11. The Director concluded that a subordination condition that made an

[7] Quoting *Memorandum Decision and Order on Challenge; Order on State of Idaho's Motion to Dismiss Claimant's Notice of Challenge*, In re SRBA, Case No. 39576, Subcase No. 36-08099, at 24-25 (Jan. 11, 2000). The District Court also noted that Judge Wood's decision relied on a number of Idaho Supreme Court cases as supporting the proposition that "a right to use the waters of this state remains inchoate until a license is actually issued by IDWR." Orr Aff., Exhibit 14 at 11 n.1 (*Order Granting Motion to Dismiss Petition for Writ of Mandate*).

exception for ground water recharge would be contrary to Idaho statutes and the State Water Plan, *id.* at 13-14, and therefore ordered that the license for water right no. 01-7011 include the following subordination condition:

> The diversion and use of water for hydropower purposes under this water right shall be subordinate to all subsequent 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 01-7011.

Final Order at 14-15. The Companies filed a *Protest And Petition For Hearing* regarding the *Final Order* on November 4, 2008 ("*Protest*"), and requested appointment of an Independent Hearing Officer. *Protest* at 3.[8] The Director designated the matter a contested case under the Department's administrative rules and chapter 52, title 67 of the Idaho Code, and appointed Gerald F. Schroeder as hearing officer. *Order Designating Contested Case And Appointing Hearing Officer* (Nov. 12, 2008). The IWRB and a number of water user entities petitioned to intervene. *Idaho Water Resource Board's Petition To Intervene* (Jan. 29, 2009); *Petition To Intervene* (Ground Water Districts) (Dec. 2, 2008); *Petition To Intervene* (Upper Snake Water Users) (Dec. 4, 2008). The Hearing Officer granted the petitions and ordered that the IWRB's participation is limited to the issue of the subordination condition the Director ordered to be included in the license for water right no. 01-7011. *Order Granting Petitions For Intervention* (Mar. 27, 2009); *Order Granting Idaho Water Resource Board's Motion To Amend Petition To Intervene* (Oct. 26, 2009).

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[8] The *Final Order* stated that any person aggrieved by the Director's decision was entitled to a hearing if a written petition was filed within fifteen (15) days. *Id.* at 15; *see also* Idaho Code § 42-1701A(3) (same).

ARGUMENT

I. SUMMARY JUDGMENT STANDARDS.

IWRB asks the Hearing Officer to apply the same standard for summary judgment used in an Idaho District Court. A motion for summary judgment should be granted "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). When an action will be tried before the court without a jury, the court is not constrained to draw inferences in favor of the non-moving party, and is free to arrive at the most probable inferences to be drawn from the uncontroverted evidentiary facts, despite the possibility of conflicting inferences. *Vreeken v. Lockwood Engineering, B.V.*, 148 Idaho 89, 101, 218 P.3d 1150, 1162 (2009).

II. THE DIRECTOR IS STATUTORILY REQUIRED TO ISSUE WATER RIGHT LICENSES THAT COMPLY WITH THE IDAHO CODE AND THAT ARE CONSISTENT WITH THE STATE WATER PLAN.

The Idaho Code requires the Director in licensing a water right to ensure the license "fully" complies with Idaho law:

> **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, <u>and if the department is satisfied that the law has been fully complied with</u> 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) (emphasis added). The Idaho Code also requires the Director to issue water right licenses that are consistent with the State Water Plan: "All state agencies shall exercise their duties in a manner consistent with the comprehensive state

water plan. These duties include . . . licensing . . . ." Idaho Code § 42-1734B(4); *Final Order* at 6, 8; *see also* Idaho Code § 42-1736B(1) (providing that future filings, permits and decrees on the unappropriated waters of the State "shall be determined with respect to the effect such filings, permits and decrees will have on the minimum daily flows" established by the IWRB).

These statutory provisions require the Director to identify, consider and apply relevant provisions of the Idaho Code and the State Water Plan in licensing a water right, and to issue a license that complies and is consistent with them. Moreover, pursuant to the State's constitutional authority to "regulate and limit" hydropower water rights, Idaho Const. art. XV § 3, the Director is authorized to subordinate licenses for hydropower water rights to ensure that they comply with Idaho law and are consistent with the State Water Plan. *See* Idaho Code § 42-203B(6) (authorizing the Director "to subordinate the rights granted in a permit or license for power purposes to subsequent upstream beneficial depletionary uses."). The Director may not ignore these statutory provisions, nor may they be circumvented by stipulation or agreement with the Department or its officer, as the Canal Companies assert. *See* Orr Aff., Exhibit 15 at 43-44 (*Memorandum Decision And Order On Cross Motions For Summary Judgment*, In re SRBA, Consolidated Subcase No. 00-920230 (Apr. 18, 2008) ("The parties cannot stipulate around the application of the statute") (referring to Idaho Code § 42-203B).[9]

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[9] The IWRB disputes the Canal Companies' assertion that they had an enforceable "agreement" with the Department regarding the form of the subordination condition for water right 01-7011. *See Petition* at 2 ¶ 4 (referring to "the parties' agreement"). Even assuming, *arguendo*, that this assertion is true—which it is not—the IWRB does not address this assertion in this memorandum because as a matter of law such an "agreement" could not excuse or prevent the Director from applying Idaho Code §§ 42-219(1) and 42-1734B(4) in licensing water right 01-7011. An administrative agency like the Department cannot "contract out" of complying with a statute or be "estopped" from complying with a statute by a previous position that may have been inconsistent with statute. Otherwise, it could effectively amend the statute that governs it simply by taking a position inconsistent with the statute. See *Kelso & Irwin, P.A. v.*

As the Director recognized, the licensing of water right no. 01-7011 raises questions relating to the Milner "zero minimum flow" principle, ground water recharge and hydropower subordination—all of which are specifically addressed in various provisions of the Idaho Code and the State Water Plan. *See generally Final Order* at 5-14. As a matter of law, the Director was required to consider and apply such provisions in licensing water right no. 01-7011—and to subordinate the license to ensure it complied with the Idaho Code and was consistent with the State Water Plan.

III. THE LICENSE FOR WATER RIGHT 01-7011 HAD TO BE FULLY SUBORDINATED TO COMPLY WITH THE MILNER ZERO MINIMUM FLOW PROVISIONS OF THE IDAHO CODE.

A. Plain Statutory Language Bars The Director From Issuing A License For A Use Below Milner That Includes An Entitlement To Flows Above Milner.

The Idaho Legislature has explained the meaning of the Milner zero minimum flow in unambiguous terms. In chapter 38 of the 1997 Idaho Session Laws, the Legislature directly amended the current version of the State Water Plan to provide: "The exercise of water rights above Milner Dam has and may reduce the flow at the dam to zero." 1997 Idaho Sess. Laws 71 (underlining in original); *see also* SRBA Milner Aff., Exhibit 1 (1996 State Water Plan at 17). The purpose of the Milner zero minimum flow is to promote uses above Milner Dam, as District Judge John M. Melanson recently explained, while still serving as the SRBA Presiding Judge: "In brief terms, the State Water Plan sets a 'zero flow' at Milner Dam to allow for full development of the River above Milner." Orr Aff., Exhibit 1 (*Clear Springs Order* at 40 n.12).[10] Thus, as a matter

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State Ins. Fund, 134 Idaho 130, 137-138, 997 P.2d 591, 598-599 (2000). The IWRB reserves the right to submit evidence and/or argument on any questions of the existence and effect of any alleged "agreement" between the Canal Companies and the Department.

[10] Judge Melanson made this statement after being fully briefed on the question of the meaning and effect of Milner zero minimum flow, which the State of Idaho and Idaho Power Company addressed in

of law, water users upstream from Milner may exercise their water rights to reduce the flow of the Snake River at Milner Dam to zero c.f.s. The Legislature has been equally clear that water rights using water downstream from Milner Dam may not impair or interfere with the full development of the river for uses above Milner Dam:

> 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). This language unambiguously provides that uses of water downstream from Milner Dam have no legal entitlement to call for water upstream from Milner Dam, and may not interfere with uses above Milner Dam.

Taken together, section 42-203B(2) and chapter 38 of the 1997 Idaho Session Laws leave no doubt that as a matter of law the entire flow of the Snake River may be developed for uses above Milner Dam, and that water rights using water downstream from Milner Dam have no legal standing to prevent or interfere with such development. In order to comply with these statutes, a water right license for a use below Milner Dam may not include a legal right to call for water from above Milner Dam.

The license for water right no. 01-7011 could have included a legal entitlement to call for water above Milner Dam to support hydropower use below Milner Dam if the

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summary judgment proceedings on the Swan Falls settlement in SRBA Consolidated Subcase 00-92023. Also in that subcase, the State and Idaho Power jointly moved for entry of partial decrees that recite the relevant language of Idaho Code § 42-203B(2), and provide that the hydropower water rights that are the subject of the Swan Falls Agreement may not be enforced or administered against any diversions or uses of water above Milner Dam. SRBA Milner Aff., Exhibit 9 (*State Of Idaho's And Idaho Power Company's Joint Motion For Entry Of Partial Decrees Re: Water Rights In Basin 02 And Basin 37*) (SRBA Consolidated Subcase 00-92023) (June 25, 2009). Special Master Dolan has also recommended that the Milner zero minimum flow provisions of Idaho Code § 42-203B(2) and the 1997 Idaho Session Laws be included as a general provision in the SRBA's final decree. Orr Aff., Exhibit 28 at 4-5 (*Order Granting Petition To Appear As Amicus Curiae, Order Setting Deadline For Comments and Special Master Report And Recommendation*) (SRBA Subcase Nos. 00-92002GP, 02-0200, 02-0201, 02-0223, and 02-0224) (Nov. 20, 2009). The Canal Companies did not object to this recommendation.

subordination condition did not apply for the benefit of ground water recharge uses. As the Director explained in his Finding of Fact 14, such a qualified subordination condition would have authorized the Canal Companies to demand that flows arising above Milner be delivered to a hydropower facility below Milner:

> If licensed with the subordination condition of the Milner Permit, water right no. 01-7011 would authorize the Canal Companies to demand that flows arising upstream from Milner Dam be delivered directly to the Snake River downstream from Milner Dam, albeit through diversion and conveyance works rather than by spilling the upstream flows over Milner Dam itself. The effect would be the same, however: the subordination condition in the Milner Permit would authorize water rights administration that would deliver flows of the Snake River arising upstream from Milner Dam directly to the Snake River downstream from Milner Dam.

Final Order at 10. This result would have directly conflicted with the Legislature's express directive that "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" for 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." Idaho Code § 42-203B(2). As the Director correctly determined later in Finding 14:

> 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. Thus, licensing water right no. 01-7011 with the qualified or incomplete subordination condition of the Milner Permit would not have complied with Idaho Code section 42-203B(2). As a matter of law, the Director therefore was required to include a subordination condition in the license that subordinated the hydropower use below Milner to ground water recharge uses above Milner. *See* Idaho Code § 42-219(1)

(providing for issuance of a license after the Director is satisfied "that the law has been fully complied with").

B. The Legislative History Confirms That The Intent Of The 1986 Amendment To Idaho Code § 42-203B(2) Was To Prevent Uses Below Milner From Interfering With Uses Above Milner.

The plain language of Idaho Code section 42-203B(2) unambiguously required the Director to include a full subordination condition in the license for water right no. 01-7011. Even if the statutory language had been ambiguous, however, the result would be the same because the legislative history of section 42-203B(2) demonstrates that it was intended to clarify and confirm that uses downstream of Milner Dam may not establish any legal entitlement to flows upstream of Milner Dam. *See Hayden Lake Fire Prot. Dist. v. Alcorn*, 141 Idaho 388, 398-99, 111 P.3d 73, 83-84 (2005) (stating that when a statute is ambiguous, legislative intent is determined by examining "'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.'").

The Legislature added the Milner zero minimum flow provision of Idaho Code section 42-203B(2) to the statute in 1986. 1986 Idaho Sess. Laws 309. This amendment was specifically intended to clarify that the Milner zero minimum flow policy of the State Water Plan means that water rights—and especially hydropower water rights—using water downstream from Milner may not interfere with the full use and development of flows above Milner. The need for such clarification became apparent during the implementation of the Swan Falls settlement.

The Swan Falls Agreement of 1984 was contingent upon, among other things, reaffirmation of the Milner zero minimum flow in the State Water Plan, and required that

"[t]he minimum daily flow at the Milner gauging station shall remain at zero c.f.s."[11] It was widely understood that retention of the Milner zero minimum flow meant that surplus flows upstream from Milner such as winter flows and flood waters would remain available for storage and use above Milner. In a press release on the settlement, then Attorney General Jim Jones (who signed the Agreement) stated, among other things, that "[t]he 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."[12] Idaho Power's attorney Tom Nelson (who negotiated the Agreement on behalf of Idaho Power) explained in the IWRB's public information meeting[13] on the day the Agreement was signed:

> 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.[14]

The Governor's Swan Falls negotiator, attorney Pat Costello, also pointed out in one of the IWRB's public information meetings that the zero minimum flow provision allowed for future storage projects upstream of Milner Dam: "And on the up-stream

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[11] SRBA Milner Aff., Exhibit 5 at 27 (Swan Falls Agreement, Exhibit 6). The IWRB amended the State Water Plan accordingly in 1985. *See id.*, Exhibit 6 at 4-5 (attachment 1 to Minutes of Senate Resources and Environment Committee) (Mar. 4, 1985). The Legislature approved the amendments. 1985 Idaho Sess. Laws 514.

[12] SRBA Milner Aff., Exhibit 10 at 3 ("News Release" at 2) (Office of the Attorney General) (Oct. 1, 1984).

[13] The IWRB held "public information meetings" on the Swan Falls settlement in October and November 1984, in which the three attorneys who negotiated the settlement on behalf of the Governor, the Attorney General and Idaho Power Company—Pat Costello, Pat Kole and Tom Nelson, respectively—explained the settlement to the public and the IWRB and answered questions. These meetings were recorded and the transcripts were submitted into the record in SRBA Consolidated Subcase 00-92023. *See* Orr Aff., Exhibit 15 (*Memorandum Decision And Order On Cross Motions For Summary Judgment,* In re SRBA, Consolidated Subcase 00-92023, at 33-34) (Apr. 18, 2008) (quoting from the IWRB's public information meetings).

[14] SRBA Milner Aff., Exhibit 11 at 9 (transcript of IWRB public information meeting on Swan Falls settlement at 27) (Twin Falls) (Oct. 25, 1984).

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."[15]

The "up-stream storage" development to which Mr. Costello referred was understood to include ground water recharge, which stores water in the aquifer. The District Court had already determined in the Swan Falls litigation that recharge and other off-stream "storage," "if done for the purpose of providing waters for irrigation during the summer months," fell within the scope of the subordination provision in the company's Hells Canyon license.[16] During the subsequent settlement negotiations, the Governor, the Attorney General and Idaho Power Company discussed "utilizing the aquifer as an additional upstream storage area for excess and surplus waters."[17] Moreover, in a public information meeting on the administrative rules to implement the settlement, Idaho Power's attorney acknowledged that recharge diversions above Milner

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[15] SRBA Milner Aff., Exhibit 12 at 20 (transcript of IWRB public information meeting on Swan Falls settlement at 66) (Boise) (Nov. 1, 1984).

[16] Orr Aff., Exhibit 20 at 5 ("Memorandum Decision," *Idaho Power Co. v. State*, Case no. 62237) (Fourth Jud. Dist., Ada County Dist. Ct.) (May 16, 1980). This decision rejected Idaho Power's argument that upstream diversions for off-stream storage—including recharge—were not protected by the subordination condition of the Hells Canyon license. *See generally* Orr Aff., Exhibit 21 at 3-5 (pages 3-5 of "Plaintiff's Memorandum in Support of Motion to Re-Consider and Amend Summary Judgment," *Idaho Power Co. v. State*, Case No. 62237) (Fourth Jud. Dist., Ada County Dist. Ct.) (Feb. 19, 1980). Idaho Power did not appeal the adverse recharge ruling.

[17] Orr Aff., Exhibit 19 (letters from Attorney General Jim Jones to Governor John V. Evans and Idaho Power Company chief executive officer James Bruce). The District Court in the original Swan Falls litigation had already determined that recharge and other "off-stream" storage, "if done for the purpose of providing waters for irrigation during the summer months," fell within the scope of the subordination provision in the company's Hells Canyon license. Orr Aff., Exhibit 20 at 5 ("Memorandum Decision," *Idaho Power Co. v. State*, Case no. 62237) (Fourth Jud. Dist., Ada County Dist. Ct.) (May 16, 1980). This decision rejected Idaho Power's argument that upstream diversions for off-stream storage—including recharge—were not protected by the Hells Canyon subordination language. *See generally* Orr Aff., Exhibit 21 at 3-5 (pages 3-5 of "Plaintiff's Memorandum in Support of Motion to Re-Consider and Amend Summary Judgment," *Idaho Power Co. v. State*, Case No. 62237) (Fourth Jud. Dist., Ada County Dist. Ct.) (Feb. 19, 1980). Idaho Power did not appeal the recharge ruling.

would not be subject to the hydropower water rights below Milner because of the Milner zero minimum flow policy.[18]

The Committee of Nine of Water District No. 1 (which includes representatives of both Canal Companies) passed a resolution supporting the Swan Falls Agreement only if it was clearly understood that there would continue to be no obligation to spill water over Milner Dam:

> BE IT FURTHER RESOLVED that in implementation it be clear that the following conditions prevail:
>
> 1. That 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.[19]

In the IWRB's 1985 hearings on the State Water Plan amendments proposed by the Swan Falls Agreement,[20] the Secretary of the Great Feeder Canal Company of Menan, Idaho, stated his understanding "that this entire policy is based on a minimum flow at Milner that anything that can develop or anything that's affected above Milner should not be affected by this agreement."[21] IWRB representative Frank Sherman clarified this point during the IWRB's 1985 hearings: "The negotiators agreed that above

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[18] In a May 23, 1985 public information meeting the Department held on the administrative rules proposed to implement the Swan Falls settlement, Idaho Power's attorney and Swan Falls negotiator stated as follows:

> MR. NELSON: One thing, Norm, on this gentleman's example. I don't think that the surface water diversions for recharge above Milner are part of the trust waters. To be part of the trust waters, the water has to be made available by reason of the subordination condition, and there's no water right at Milner. That's a zero flow under the state water plan. . . .

Orr Aff., Exhibit 22 at 7 (pages 23-24 of transcript of Department public information meeting).

[19] SRBA Milner Aff., Exhibit 13 at 3 ("Resolution" of Committee of Nine of Water District 1) (Jan. 17, 1985).

[20] Orr Aff., Exhibit 15at 76 (Swan Falls Agreement at Exhibit 6).

[21] SRBA Milner Aff., Exhibit 14 at 29 (transcript of IWRB hearing on proposed State Water Plan amendments at 28) (Idaho Falls) (Jan. 28, 1985, 2:00 p.m.).

Milner there is a requirement for zero flow back to the dam."[22] "They're going to continue the zero flow at Milner Dam. . . . there is no requirement for the water to be dumped past Milner Dam."[23]

The widespread understanding that retention of the Milner zero minimum flow in the State Water Plan meant that flows above Milner would remain available for storage and development above Milner, including ground water recharge, was thrown into doubt when the Department proposed administrative rules to implement the Swan Falls settlement's "trust water" provisions.[24] The proposed rules defined all surface and ground water flows above Milner as subject to the hydropower water rights held in trust by the State below Milner, despite the retention of the zero minimum flow. While the Department acknowledged that retaining the zero minimum flow at Milner had been interpreted "by some" to mean the hydropower water rights held in trust by the State did not have any effect on flows above Milner Dam, it nonetheless rejected this view because Idaho Code § 42-203B(2) as originally enacted contained no such limitation:

> The adopted minimum flow of zero cfs at Milner has been construed by some as exempting any water passing Milner from the trust water

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[22] SRBA Milner Aff., Exhibit 15 at 20 (transcript of IWRB hearing on proposed State Water Plan amendments at 15) (Pocatello) (Jan. 29, 1985, 7:00 p.m.).

[23] SRBA Milner Aff., Exhibit 16 at 20 (transcript of IWRB hearing on proposed State Water Plan amendments at 65) (Lewiston) (Feb. 6, 1985, 7:00pm).

[24] Pursuant to the Swan Falls Agreement and its implementing legislation—specifically Idaho Code § 42-203B—the State holds in trust certain hydropower water rights located below Milner Dam that formerly were claimed by Idaho Power. *See* Orr Aff., Exhibit 15 at 31 (*Memorandum Decision And Order On Cross Motions For Summary Judgment*) (SRBA Consolidated Subcase 00-92023) ("This Court holds that Exhibit 7B [of the Swan Falls Agreement] clearly and unambiguously provides that any portion of Idaho Power's water rights in excess of the minimum flows are held in trust by the State . . ."); *see also* Idaho Code § 42-203B(2) (similar). The flows encumbered by the hydropower water rights held in trust by the State are often referred to as "trust water." *See* Orr Aff., Exhibit 15 at 41 (*Memorandum Decision And Order On Cross Motions For Summary Judgment*) (SRBA Consolidated Subcase 00-92023) (stating that new appropriators received "a portion of the water freed up and encumbered as a result of the trust arrangement. This is where the reference to 'trust water' comes from . . . ."). The administrative rules proposed to implement Idaho Code § 42-203B would have defined, among other things, the geographic area in which "trust water" is found. *See* SRBA Milner Aff., Exhibit 17 at 3 (IDWR publication setting forth proposed rules) (Rule 1.5 and Figure 1).

> provisions. . . . A simple reading of S1008 (Section 42-203b(2)) indicates that all waters in excess of an established minimum flow up to the amount of the established hydropower right are to be considered trust waters. . . . I propose to draft the rules recognizing all flows tributary to Snake River above Swan Falls including water passing Milner as trust waters . . . . [25]

Thus, the proposed "rules for water allocation" provided that the entire Snake River drainage above Swan Falls, including the area upstream from Milner Dam, contained "flows subject to the trust water provisions as a result of the agreement and the legislation which implemented it."[26]

The Department's administrative interpretation was universally rejected. In his written comments on the proposed rules, attorney John Rosholt—who represented both of the Canal Companies in proceedings related to the Swan Falls settlement[27]—wrote that "its been my understanding all along that trust water flows can only exist between the Swan Falls Dam and the Milner Dam . . . . for the reason that the minimum stream flow at Milner is zero."[28] Attorney General Jim Jones stated: "the parties did not intend ground waters or surface waters tributary to the Snake River above Milner Dam to be included within the definition of trust water flows . . . . The reason for this conclusion is that the parties retained the minimum streamflow at Milner Dam at zero."[29] The United States Bureau of Reclamation also commented: "[S]ince it is further stated that the minimum flow at Milner is zero, meaning no surface flow is required past Milner for any

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[25] SRBA Milner Aff., Exhibit 18 at 3 (IDWR memorandum from Norm Young to Director Ken Dunn, "Legal Issues Associated With Senate Bill 1008") (June 14, 1985) (parentheses in original).

[26] SRBA Milner Aff., Exhibit 17 at 3 (IDWR publication setting forth proposed rules) (Rule 1.5 and Figure 1).

[27] *See* SRBA Milner Aff., Exhibit 19 at 1, 4 (letter from John A. Rosholt, as attorney for Twin Falls Canal Company, North Side Canal Company and American Falls Reservoir District, to Norman C. Young of IDWR) (Oct. 12, 1988).

[28] SRBA Milner Aff., Exhibit 20 at 2 (letter from John A. Rosholt to Kenneth Dunn, Director of Idaho Department of Water Resources) (Oct. 30, 1985). Mr. Rosholt also commented that re-evaluation of permit applications for storage projects upstream of Milner Dam "becomes totally unnecessary . . . since there can be no surface trust water above Milner Dam." *Id.* at 4-5.

[29] SRBA Milner Aff., Exhibit 21 at 3 ("News Release" at 2) (Office of the Attorney General) (Jan. 29, 1986).

downstream uses, it would appear to be a misinterpretation to include surface water above Milner."[30]

A water manager for several upper Snake River valley canal companies 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:

> I'm wishing for more of a clarification of whether flood waters is what – or relationship flood waters has with trust waters. 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.[31]

The Secretary of Menan's Great Feeder Canal Company pointedly emphasized that the settlement had been presented as reserving flows above Milner Dam for existing water rights and new development:

> I've been at two meetings in which I specifically asked the question of whether the Swan Falls agreement would affect the flow above Milner. And I was assured that under no circumstances would the Swan Falls agreement affect any of the diversion of water under any circumstances above Milner. . . . The water users that I have talked to feel as if they have been deceived . . . . you know, after being promised one thing and here we come and 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 because of the rules and regulations and the laws that are now made, it appears to us that it's pure deception. . . . I don't think you realize how the farmers feel, how the people feel, about that very principle.[32]

Mike Crapo, then a state senator, had played a key role in the passage of the 1985 Swan Falls legislation, including Idaho Code § 42-203B. He also emphasized the

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[30] SRBA Milner Aff., Exhibit 22 at 2 (letter from John W. Keyes III, Assistant Regional Director, U.S. Bureau of Reclamation, to A. Kenneth Dunn, Director, Idaho Department of Water Resources) (Jan. 27, 1986).

[31] 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).

[32] *Id.* at 7-8 (transcript at 16-18).

importance of the Milner zero minimum flow in a hearing on the proposed rules: "zero flow at Milner was very heavily discussed and was the basis upon which the [Swan Falls settlement] legislation was passed. And certainly with regard to surface flow, there are no trust waters above Milner, as my understanding of it goes."[33] "[I]t was the understanding of everyone last year that the flow at Milner was zero, and there was no trust water in the flow above Milner."[34]

The parties to the agreement therefore proposed a clarifying amendment to Idaho Code § 42-203B(2) to confirm that flows arising above Milner Dam would not be subject to hydropower water rights using water below Milner Dam. The amendment proposed to add two sentences to the statute. The first sentence addressed the hydropower water rights held in trust by State pursuant to the Swan Falls settlement. The second sentence of the proposed amendment to Idaho Code § 42-203B(2)—the passage quoted and discussed earlier in this memorandum—clarified that for all water rights 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" for purposes of "determination and administration." S.B. 1358, 48th Idaho Leg., 2d Reg. Sess. (1986);[35] Idaho Code § 42-203B(2).

The parties supported the amendment as a confirmation of the original intent of the Agreement.[36] The Committee of Nine of Water District No. 1[37] also passed a resolution endorsing the proposed amendment. The resolution recited the committee's

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[33] SRBA Milner Aff., Exhibit 24 at 5 (transcript of IDWR public hearing on proposed rules and regulations for water appropriation at 8) (Boise) (Jan. 16, 1986).

[34] *Id.* at 6 (transcript at 11).

[35] SRBA Milner Aff., Exhibit 25 at 3.

[36] *See* SRBA Milner Aff., Exhibit 26 at 2 (Minutes of Senate Resources and Environment Committee) (Feb. 19, 1986) (describing the 1986 amendment as "merely clarification").

[37] The Canal Companies were members of Water District No. 1, and were represented on the Committee of Nine.

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."[38] The Legislature enacted the proposed amendment to Idaho Code § 42-203B(2). 1986 Idaho Sess. Laws 309 (codified as amended at Idaho Code § 42-203B(2)).

Thus, the legislative history of the 1986 amendment to Idaho Code § 42-203B(2) demonstrates that through the amendment the Legislature specifically intended to affirm that the Milner zero minimum flow means not only that the river may be fully developed to support agricultural uses above Milner—including ground water recharge—but also that hydropower water rights using water downstream from Milner Dam have no legal standing to impair or interfere with such development.

IV. THE LICENSE FOR WATER RIGHT 01-7011 HAD TO BE FULLY SUBORDINATED TO BE CONSISTENT WITH THE MILNER ZERO MINIMUM FLOW POLICY OF THE STATE WATER PLAN.

The State Water Plan also reaffirms the Milner zero minimum flow: "The exercise of water rights above Milner Dam has and may reduce flow at the dam to zero." SRBA Milner Aff., Exhibit 1 (1996 State Water Plan at 17). Every revision of the State Water Plan since it was first issued in 1976 has included a Milner zero minimum flow provision. *See Final Order* at 5-7 (discussing Milner zero minimum flow provisions of 1976, 1982, 1985, 1986, 1992 and 1996 revisions of the State Water Plan). The Legislature approved the current State Water Plan and its predecessors, particularly with regard to the Milner

[38] SRBA Milner Aff., Exhibit 27 at 6 ("Resolution 19") (Committee of Nine and the Water Users of Water District 1) (Mar. 4, 1986).

"zero minimum flow." *See* 1978 Idaho Sess. Laws 885-86, 1011; 1982 Idaho Sess. Laws 944-46; 1985 Idaho Sess. Laws 514; 1987 Idaho Sess. Laws 818-19.[39]

While the wording of the State Water Plan's Milner zero minimum flow provisions has changed somewhat over the years, the underlying purpose has not: "In brief terms, the State Water Plan sets a 'zero flow' at Milner Dam to allow for full development of the River above Milner." *Clear Springs Order* at 40 n.12.

Including the subordination condition of the Milner Permit in the license for water right no. 01-7011 would have been inconsistent with the State Water Plan's Milner minimum flow policy for the same basic reason that it would have been contrary to Idaho Code section 42-203B(2). A condition that did not subordinate hydropower use below Milner to upstream ground water recharge uses would have precluded the full development of the Snake River above Milner Dam by requiring flows that otherwise could have been stored in the aquifer above Milner to be sent downstream in favor of hydropower use in the canyon below Milner.[40] As the Director found:

> Much of the time in most years, the Milner Permit subordination condition would require flows arising upstream of Milner Dam and otherwise available for recharge to instead be delivered to the Snake River downstream from Milner Dam. The result is that water rights for recharge above Milner Dam would not be allowed to divert unless water right no. 01-7011 was first being satisfied, requiring a flow of 5,714 cfs to be available for diversion around Milner Dam for delivery to the downstream power plant on the Snake River below the dam.

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[39] The Legislature did not pass a statute or resolution formally approving the 1992 State Water Plan, but also did not reject or amend it, and therefore the 1992 State Water Plan became effective as written sixty days after its submission to the Legislature. Idaho Const. art. XV § 7. Further, the Legislature directly amended the 1996 State Water Plan to incorporate the Milner "zero minimum flow" provision of the 1992 State Water Plan. *Compare* SRBA Milner Aff., Exhibit 8 (1992 State Water Plan at 28) *with* 1997 Idaho Sess. Laws 71. This fact suggests that the Legislature viewed the 1992 State Water Plan's "zero minimum flow" provision favorably, even if it was not specifically endorsed through formal legislative action in 1992.

[40] As explained previously and in a subsequent section of this memorandum, the Milner zero minimum flow policy is intended to promote upstream storage both in conventional surface reservoirs and in the aquifer. *See supra* pp. 19-20; *infra* pp. 45-48.

Final Order at 10. This result would have been inconsistent with the State Water Plan, as the Director correctly determined. *See Final Order* at 10 ("would not be consistent with Policy 5B of the Idaho State Water Plan.")

V. THE PUBLIC POLICY OF THE MILNER ZERO MINIMUM FLOW REQUIRES HYDROPOWER SUBORDINATION TO GROUND WATER RECHARGE.

While the IWRB's motion for summary judgment can be resolved solely on the basis of the plain language of Milner zero minimum flow provisions of the Idaho Code section 42-203B(2), the 1997 Idaho Session Laws and the State Water Plan, the IWRB submits that the Hearing Officer may consider the underlying "public policy" to resolve any alleged ambiguity. *Hayden Lake Fire Prot. Dist*, 141 Idaho at 398-99, 111 P.3d at 83-84_(internal quotation marks and citation omitted). This public policy has deep historical roots.

The zero minimum flow provisions of the State Water Plan and the 1986 amendment to Idaho Code § 42-203B(2) were not created out of whole cloth. Rather, they reflected the physical division of the Snake River at Milner and the long-established practice of subordinating hydropower uses to agricultural development. This subordination was intended to promote the capture and development of winter flows and flood waters above Milner to support summer irrigation uses, and—especially as understanding of the relationship between the Eastern Snake Plan Aquifer and the Snake River developed—was understood to apply not only to conventional reservoir storage but also to ground water recharge.[41]

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[41] The State of Idaho's *Memorandum in Support of Motion for Partial Summary Judgment re: Milner Zero Minimum Flow*, filed on October 16, 2009 in SRBA Subcase Nos. 00-92002GP, 02-00200, 02-00201, 02-00223, and 02-00224 ("SRBA Milner Brief") includes a discussion of the historical background of the Milner zero minimum flow on pages 21-52, which is incorporated herein by this reference. *See* Orr

A. The Milner Divide And The Need For Storage Above Milner.

"From Heise to Milner, a distance of 219 river miles, the [Snake] river is not deeply entrenched. . . . At Milner, the river enters a deep canyon cut through lava and sedimentary beds and continues for 216 miles in a west and northwesterly direction."[42] Historically, the principal use below Milner has been hydropower, because the canyon makes access to the flows of the river difficult for agricultural purposes downstream from Milner.[43] Above Milner, in contrast, the river is relatively easily diverted to irrigate the surrounding lands, and was quickly developed for this purpose. As a result, the reliable summer flow of the river at Milner was fully appropriated soon after the end of the nineteenth century.[44]

The full appropriation of irrigation season flows at Milner was a turning point in the development of the Snake River Basin. From that point on, storage reservoirs above

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Aff., Exhibit 16. The historic background discussion in the SRBA Milner Brief was based on undisputed historic documents, as is the discussion in this memorandum. The presiding Special Master in the SRBA proceedings on the Milner zero minimum flow approved of the historic discussion in the SRBA Milner Brief. Orr Aff., Exhibit 16 at (transcript of hearing at 13). The Canal Companies' brief stated that they "largely agree with the representations made by the State concerning the historical treatment of the Snake River at Milner divide." Orr Aff., Exhibit 17 (*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).

The State's summary judgment filing in the Milner zero minimum flow subcases in the SRBA also included a CD containing an electronic version of the State's memorandum. The electronic brief has hyperlinked citations that, when activated, display the corresponding portion of the record or the cited legal authority. For the convenience of the Hearing Officer and counsel, the IWRB has filed a copy of the CD with the Department and served copies of the CD on the other parties.

[42] SRBA Milner Aff., Exhibit 4 at 13 (1982 Idaho State Water Plan at 5).

[43] *See* SRBA Milner Aff., Exhibit 29 at 14 ("Report of Board of Engineers to Consider Projects in Snake River Valley Which May Affect the Proposed American Falls Reservoir" at 5) (April 10, 1920) ("Board of Engineers Report") ("The waters flowing in the stream below Milner Dam are not susceptible of diversion to any considerable amount, and therefore become of primary use in connection with the production of power."); SRBA Milner Aff., Exhibit 28 at 6 (Swendsen, "Report and Recommendations") ("Almost immediately below Milner Dam, Snake River enters what ultimately becomes a rather deep rock gorge, from which water can not be diverted by gravity for irrigation uses.").

[44] *See* SRBA Milner Aff., Exhibit 34 at 5 ("State of Idaho Response to Federal Energy Regulatory Commission Request for Additional Information" at 2) (*In the Matter of Petition for Declaratory Order by Idaho Power Company*) (FERC Docket no. EL85-38-000) (Jan. 30, 1987) ("The reliable natural flow during the summer month period was fully developed by the end of the 19th century."); *see also* Orr Aff., Exhibit 16 at 25-26 (SRBA Milner Brief).

Milner and the waters to fill them were necessary for further irrigation development. As the Director of the U.S. Reclamation Service emphasized in a 1920 letter to Idaho Power Company regarding the proposal to build a reservoir at American Falls:

> The time has already passed when the natural flow of the river was sufficient to irrigate the lands under cultivation along its shores and storage reservoirs have been recognized as a necessity for many years past. . . . without additional storage no new areas at all can be made productive and habitable and even the present projects will suffer occasional serious losses.[45]

The need to store winter flows and flood waters above Milner for agricultural use in the summer months was reaffirmed repeatedly over the years,[46] and was given greater urgency by devastating droughts in 1919 and the 1930s that left even established projects short of water.[47]

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[45] SRBA Milner Aff., Exhibit 35 at 1 (Letter from A.P. Davis, Director of U.S. Reclamation Service, to Idaho Power Company at 1) (Nov. 2 1920).

[46] In 1934 the State Commissioner of Reclamation reported:

> The limit of the development of the irrigation resources of the State from the natural flow of streams has long since been reached, and resort has been had to storage, pumping from lakes and streams, and the development of subterranean water to supplement and augment the supply necessary to irrigate the lands under cultivation.

SRBA Milner Aff., Exhibit 36 at 2 (R.W. Faris, State Commissioner of Reclamation, "Supplementary Water For Irrigation In Idaho, With Particular Reference To Boise And Snake River Valleys" at 1) (Oct. 15, 1934) (revised). A 1935 U.S. Geological Survey water utilization report stated: "Irrigation development has reached a point in the Snake River Basin beyond which there can be no large increase in acreage without the construction and utilization of additional storage reservoirs or through the development of additional water supply by pumping." SRBA Milner Aff., Exhibit 37 at 7 (W.G. Hoyt, "Water Utilization In The Snake River Basin" at 65) (U.S. Department of the Interior, Water Supply Paper 657) (1935). The Idaho Supreme Court also took notice of the fact that natural flow had been fully appropriated: "The normal flow of our streams has been appropriated, and therefore the limit of development by irrigation from that source has been reached." *State Water Conservation Board v. Enking*, 56 Idaho 722, 738, 58 P.2d 779, 785-86 (Holden, J., concurring) (1936); *see also* SRBA Milner Aff., Exhibit 38 at 7 ("Special Report – Upper Snake River Basin (Above Powder River) – Irrigation And Associated Developments" at 63) (U.S. Dept. of the Interior, Bur. of Reclamation, Regional Office, Boise, Idaho) (February 1955) ("Large scale irrigation of new lands or providing supplemental supplies in the upper portion of Snake Basin would depend upon development of a water supply in the river above Milner Dam.").

[47] After the 1919 drought, "[i]t became obvious to all that additional storage facilities had to be built to provide water when short supplies occurred in the future." SRBA Milner Aff., Exhibit 31 at 6 (Leonard J. Arrington, *Irrigation In The Snake River Valley: An Historical Overview,* IDAHO YESTERDAYS, Sping/Summer Issue, 1986, Vol. 30, Numbers 1-2). "The settlers immediately started a request for

B. The Need To Subordinate Hydropower To Uses Above Milner Dam.

The need for more irrigation storage led to coordinated planning and formal recognition of the objective of promoting full agricultural development above Milner, and the corollary principle of subordinating hydropower uses to that purpose. The Canal Companies were part of the planning group that first articulated these concepts—the 1920 "Board of Engineers"—which ultimately became known as the Milner zero minimum flow policy.

United States Director of Reclamation A.P. Davis and Idaho Governor D.W. Davis designated in 1920 a joint federal-state "Board of Engineers" to consider water projects in the Snake River Valley, particularly those affecting the proposed American Falls Reservoir.[48] The engineers selected to serve on the Board represented governmental and private interests: the U.S. Reclamation Service, the Idaho Department of Reclamation, the Twin Falls Canal Company, and the Twin Falls North Side Land & Water Company (the predecessor to North Side Canal Company).[49]

The Board of Engineers considered "[t]he total water supply available in the Snake River basin for irrigation," the "quantity of storage required for the utilization of the water supply and the relation of that supply to the size of the American Falls Reservoir and other reservoirs which may be necessary," and the loss of hydropower rights at American Falls through "the appropriation of all waters available for

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investigations for further storage" as a result of the 1930s drought. SRBA Milner Aff., Exhibit 60 at 14 ("The Palisades Dam And Reservoir Project – Hearings before a Subcommittee On Irrigation And Reclamation Of The Committee On Public Lands, House of Representatives and a Special Subcommittee Of The Committee On Interior And Insular Affairs, United States Senate – Eighty-First Congress – First Session on H.R. 5506" at 23) (United States Government Printing Office, Washington) (1949) (statements of Robert J. Newall, former regional director of the Bureau of Reclamation in Boise, Idaho). *See also generally* Orr Aff., Exhibit 16 at 25-26, 36-42 (SRBA Milner Brief).

[48] SRBA Milner Aff., Exhibit 29 at 10 (Board of Engineers Report at 1).

[49] *Id.* at 11 (Board of Engineers Report at 2).

irrigation."[50] The Board of Engineers issued a much-anticipated report in April 1920 ("Board of Engineers Report").[51]

The Board of Engineers Report concluded that "the greatest use of the water of Snake River will be found in the dedication of the entire flow of the stream to irrigation in so far as the water can be economically appropriated." [52] This meant favoring development above Milner, because flows in the canyon below Milner "are not susceptible of diversion to any considerable amount, and therefore become of primary use in connection with the production of power."[53] The Board reported that it was possible "with the requisite storage to utilize a very large percentage of all the waters originating in the watershed above Milner dam,"[54] and that because there was an excess of irrigable land above Milner, "the amount of water available in the river is the limiting factor."[55] "The net effect of this condition," the Board stated, "will be to dry up the river below Milner Dam during the irrigation season, also to as great an extent as possible below American Falls Reservoir, during the non-irrigation season."[56]

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50 *Id.*

51 *See* SRBA Milner Aff., Exhibit 44 (letter from Barry Dibble, Minidoka Project Manager, to the Chief Engineer of the U.S. Reclamation Service) (Apr. 16, 1920) ("There is considerable demand for this report, and I believe some of the papers will be interested in printing parts of it.").

52 SRBA Milner Aff., Exhibit 29 at 14 (Board of Engineers Report at 5); *see also id.* at 6 (transmittal letter at 2) ("The board is of the opinion that all of the water of Snake River susceptible of economical diversion should be dedicated to irrigation.").

53 SRBA Milner Aff., Exhibit 29 at 14 (Board of Engineers Report at 5). The advent of high-lift pumping in the 1960s eventually would make feasible some agricultural development of the river downstream from Milner. *See* SRBA Milner Aff., Exhibit 45 at 9-11 (Susan M. Stacy, Legacy of Light: A History of Idaho Power Company at 135-37) (Idaho Power Co. 1991) (discussing high-lift pumping developments).

54 SRBA Milner Aff., Exhibit 29 at 14 (Board of Engineers Report at 5).

55 *Id.* at 14 (Board of Engineers Report at 5); *see also id.* at 7 (letter of transmittal of report at 2) ("The available water supply is not sufficient for the irrigation of all the land which can be reached from the river.").

56 *Id.* at 14 (Board of Engineers Report at 5).

The Board also recognized that the spring-fed flows below Milner would sustain hydropower development in the canyon. Thus, the Board outlined a development plan based on the unique geography and hydrology of the Milner divide:

> The principle involved therefore is to secure as nearly as possible a total use of the waters for irrigation above Milner Dam, and to secure the greatest possible use for power below Milner Dam. To a moderate extent these interests conflict with each other but fortunately on account of the large accretions to the stream below Milner Dam the power resource is restored at Upper Salmon Falls and the injury to that resource which would be susceptible of future development is relatively not very great.[57]

The subordination of hydropower uses to agricultural development was crucial to this plan of development, because, as the Board of Engineers acknowledged, such a development plan would "will shut off the winter flow at [American Falls] which will thereby to a very large extent deprive the remaining power sites of the winter water which now passes American Falls.[58]

Further, because it was possible that hydropower water rights for the use of winter flows might attach or perfect before irrigation development had been completed, the Board of Engineers advised: "In granting power rights in the future the Federal Government and the State should so far as possible provide restrictions requiring its eventual surrender when . . . as the waters are required for application to the land."[59] The Idaho State Commissioner of Reclamation made this same point in his 1922 report and recommendations to the Federal Power Commission ("FPC"):

> it is extremely important that any power permits granted in connection with these applications shall be conditioned upon the State's present and

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[57] *Id.* at 14-15 (Board of Engineers Report at 5-6).

[58] SRBA Milner Aff., Exhibit 29 at 17 (Board of Engineers Report at 23); *see also id.* at 16 (Board of Engineers Report at Table 5, "Power Possibilities on the Snake River from American Falls to Swan Falls, inclusive") ("Proposed Conditions: All flow stopped at American Falls in non-irrigation season. All flow except waste waters to be diverted at Milner Dam or above in all seasons") (underlining in original).

[59] *Id.* at 19 (Board of Engineers Report at 31).

> future right to divert, use and impound as much water as may be necessary for a complete development of its agricultural resource, both for irrigation, domestic and other consuming uses.[60]

General recognition of the threats to future development posed by unsubordinated hydropower water rights eventually led to a 1928 amendment to the Idaho Constitution authorizing the State to "regulate and limit" water rights for power purposes. Id. Const. art. XV § 3.[61]

C. Reaffirmation Of Hydropower Subordination.

The principles established by the Board of Engineers Report became the foundation for subsequent water resource development in the Snake River basin. As the basin developed, agriculture and hydropower came into conflict on a number of occasions at different dams: American Falls, Twin Falls, Minidoka, Palisades, Hells Canyon, and Swan Falls. In each instance, the original goals of reserving winter flows and flood waters above Milner for agricultural development, and of subordinating hydropower use to such uses, were reaffirmed.

1. Hydropower Subordination At American Falls And Twin Falls.

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60 SRBA Milner Aff., Exhibit 28 at 5 (Swendsen, "Report and Recommendations").

61 As District Judge Melanson stated in his summary judgment order in the SRBA subcase dealing with the interpretation and application of the Swan Falls Agreement:

> Delegates to the constitutional convention recognized that because power generation relies on instream flows, an unlimited right to appropriate water for hydropower generation could result in water being unavailable for appropriation for upstream consumptive uses such as irrigation. . . . It was not until 1928, however, after the development of hydropower projects on the Snake River and its tributaries began in earnest, that the Idaho Constitution was amended to add the following provision: "except may regulate and limit the use thereof for power purposes."

Orr Aff., Exhibit 15 at 5 (*Memorandum Decision and Order on Cross-Motions for Summary Judgment*).

The 1919 drought galvanized efforts to build an irrigation storage reservoir at American Falls, where Idaho Power owned land, hydropower facilities and water rights.[62] Federal and state authorities entered into negotiations with Idaho Power on these subjects and eventually reached an agreement.[63] The resulting contract, dated June 15, 1923 (the "American Falls Contract"), recognized that "the storing by the United States of winter flow at American Falls will interfere with certain power and other rights of company at American Falls and points below."[64]

The American Falls Contract also limited Idaho Power Company's right "to demand the turning out of water from the reservoir for release by and use below Milner,"[65] and granted the United States "[t]he right to limit all other rights of the company on Snake River . . . insofar as and no farther than the rights allowed and granted to the United States to store and use water as herein provided may interfere with any rights of the company at any lower points on Snake River."[66] The State Commissioner of Reclamation informed the Governor that the agreement provided "for the regulation of Snake River in the interest of irrigation."[67] The American Falls Contract cleared the way for the construction of the American Falls Dam, which was completed in 1927.[68]

Negotiations regarding Idaho Power Company's proposal to develop the Twin Falls power site proceeded in tandem with the American Falls negotiations because both projects raised the question of the extent to which storable winter flows would be spilled over Milner Dam. The Twin Falls hydropower development, which was below Milner

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62 *See generally* Orr Aff., Exhibit 16 at 25-27, 30-31 (SRBA Milner Brief).

63 SRBA Milner Aff., Exhibit 43 at 3 (Letter from W.G. Swendsen, State Reclamation Commissioner, to Governor C.C. Moore) (Jul. 9, 1923).

64 SRBA Milner Aff., Exhibit 51 (American Falls Contract at 2).

65 *Id.* (American Falls Contract at 21) ("Company's Rights below Milner Dam").

66 *Id.* (American Falls Contract at 11).

67 SRBA Milner Aff., Exhibit 43 at 4 (Swendsen letter to Moore).

68 SRBA Milner Aff., Exhibit 31 at 2 (Arrington article at 1).

Dam, could have undermined the American Falls Reservoir by requiring winter flows to be sent past Milner. As a 1921 Reclamation Service report to the FPC on Idaho Power's application for a preliminary permit for the Twin Falls site stated: "The further development of this site—in fact even the present development would interfere seriously with the storage of water in the American Falls reservoir, which reservoir is the key to the full development of the Snake river for irrigation purposes."[69] The report further explained that the federal and state governments and water user associations were making plans for storage reservoirs "that will ultimately conserve all the water of Snake river susceptible of economical diversion for irrigation purposes. The lowest point on the river at which diversion is practicable in large amounts is at Milner dam."[70]

Thus, the Reclamation Service steadfastly opposed Idaho Power's attempts in the Twin Falls negotiations to obtain rights to winter flows above Milner Dam, as Idaho Power's corporate secretary made clear in a 1931 status report to the company's vice president and general manager: "we may expect little concession from the Department of Reclamation in the way of further prior rights to the use of the waters of Snake River so far as the same may be available for irrigation use at, or at points above, Milner Dam."[71]

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[69] SRBA Milner Aff., Exhibit 49 at 2 (George L. Hoffman, U.S. Reclamation Service Engineer, "Report on Application Before Federal Power Commission by Idaho Power Company, Serial No. 18, For Preliminary Permit covering Twin Falls site, on Snake River") (Mar. 15, 1921).

[70] *Id.* at 3 (Hoffman report at 3). The Director of the U.S. Reclamation Service made the same points in a letter to the Federal Power Commission regarding the Upper Salmon power project:

> [The American Falls] reservoir will completely control and utilize Snake River above Milner dam and it would manifestly be opposed to the public interest to grant to a private company rights which might enable them to handicap seriously, if not prohibit, the otherwise feasible complete development of the power and irrigation resources of the Snake River Basin.

SRBA Milner Aff., Exhibit 52 at 1 (letter from A.P. Davis, Director, U.S. Reclamation Service, to Mr. Merrill, Executive Secretary, Federal Power Commission at 1) (Mar. 26, 1921).

[71] SRBA Milner Aff., Exhibit 53 at 1 (letter from James L. Boone to Mr. Hibbard) (May 29, 1931). Mr. Hibbard and Mr. Boone were, respectively, the vice president and the corporate secretary of Idaho

"It was very clear to me that it is not [District Counsel Stoutemyer's] nor the Reclamation Department's intention that we shall gain, without his or their serious protest, any further prior rights to water of Snake River which may be used for irrigation purposes at or above Milner Dam."[72] Ultimately, a stipulation confirmed that power use at the Twin Falls site was subordinate to existing and future irrigation uses and strictly limited the water supply to flows below Milner Dam (with the exception of 45,000 acre-feet of "primary storage" Idaho Power held under the American Fall Contract). The stipulation was incorporated into the 1934 FPC license for the Twin Falls site as Article 14:

> Article 14. As a condition of this license, the Licensee, for itself, its successors and assigns, hereby stipulates and agrees that all rights to the use of water for power purposes heretofore or hereafter acquired for the development of power at the site of this project shall be held and considered at all times to be subject, inferior and subordinate to all rights heretofore or hereafter acquired by the United States or other parties for irrigation purposes, except (a) the right to use for power development at this project the water from the 45,000 acre-feet of primary storage capacity which the Licensee holds in American Falls Reservoir under paragraph 16 of that certain contract between the United States of America and Idaho Power Company, dated June 15, 1923, and the discharge of which it may control under the terms of said contract; (b) the right to use for power development at this project the seepage, percolation, drainage, spring or springs, waste, and/or other influent waters which do not flow or spill over Milner Dam but which enter in, arise in, and flow in and along the channel of Snake River between the down-stream toe of Milner Dam in Snake River, Idaho, and the site of the project covered by this license.[73]

Power Company. *See* SRBA Milner Aff., Exhibit 54 (letter from M.L. Hibbard, Vice President and General Manager of Idaho Power Company, to E.B. Darlington, Superintendent, U.S. Reclamation Service) (Apr. 7, 1931); SRBA Milner Aff., Exhibit 55 at 3 ("Idaho Power Company Minutes of Special Meeting of Board of Directors" at 2) (May 11, 1934) (certification of corporate secretary James L. Boone).

[72] SRBA Milner Aff., Exhibit 53 at 1 (Boone letter to Hibbard at 1).

[73] SRBA Milner Aff., Exhibit 56 at 13 ("Federal Power Commission, License on Government Lands, Project No. 18, Idaho, Idaho Power Company") (May 11, 1934) (emphasis added). The Article 14 stipulation also provided that it was "a covenant running with the title to the said power plant at Twin Falls, and all rights in connection therewith" and "effective to bind the Licensee and its successors and assigns." *Id.* Idaho Power agreed to "to execute and acknowledge under authority of a suitable resolution of its board of directors" a recordable contract or deed embodying the stipulation, *id.*, and the company's Board of Directors unanimously approved a corresponding resolution on the same date the license was approved. SRBA Milner Aff., Exhibit 55 at 2-3 ("Idaho Power Company, Minutes of Special Meeting of Board of Directors") (May 11, 1934).

Subsequently, when Idaho Power sought to perfect additional hydropower water rights at Twin Falls and Lower Salmon Falls, Interior Department District Counsel Stoutemyer cited the subordination provisions of the Article 14 stipulation in a letter to the Idaho State Commissioner of Reclamation. District Counsel Stoutemyer also emphasized that hydropower uses below Milner should not be allowed to establish rights to flows above Milner:

> It seems to us that it would be contrary to sound public policy to allow any additional power rights to attach for use in the Snake River Canyon to such an extent as would require the waste of water over Milner Dam, since all the water available in Snake River above the Milner Dam is needed for irrigation purposes even at the present time (especially so in low water years when there have been serious water shortages even for the lands now under irrigation) and with increasing irrigation requirements, and construction of additional reservoirs to store flood water and to carry over excess water of high water years for use in low water years, the need to conserve all the available water above Milner Dam for irrigation purposes will become more and more evident as the years go on . . . . Any additional power rights which would require the waste of water over Milner Dam would conflict with both of these propositions . . . .[74]

2. The 1930s Drought and Hydropower Subordination at Minidoka Dam.

The severe drought of the early 1930s renewed calls for more storage above Milner, and led to a number of State and Federal efforts to develop new storage facilities and water conservation strategies.[75] The measure of potential winter water conservation and storage efforts, and their success, was the amount of water that spilled over Milner Dam. As a Department of the Interior water supply paper stated in 1935: "Present or future power rights not being taken into account, the amount of water that passes the Milner diversion dam is an index of the present utilization of the Snake River for

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[74] SRBA Milner Aff., Exhibit 71 at 3, 4 (letter from B.E. Stoutemyer, District Counsel, U.S. Reclamation Serice, to R.W. Faris, Idaho State Commissioner of Reclamation) (Jun. 21, 1937) (parentheses in original).

[75] *See generally* Orr Aff., Exhibit 16 at 36-42 (SRBA Milner Brief).

irrigation above Milner and a measure of future possibilities."[76] Upper Snake River Watermaster Lynn Crandall made similar points in a 1934 letter to the United States Commissioner of Reclamation:

> Inasmuch as all water passing Milner is waste as far as irrigation is concerned . . . . Only by decreasing present discharge past Milner dam can the supply for American Falls reservoir be increased . . . . Sooner or later the need for irrigation water on Snake River will require the elimination of any discharge past Milner in years of deficient runoff . . . .[77]

Thus, the United States curtailed its winter power production at Minidoka Dam so that flows that otherwise would have been used for power generation at Minidoka and then spilled over Milner Dam were retained at American Falls Reservoir.[78] In written findings on the subject, the Secretary of the Interior stated that "the very serious water shortages which have occurred in large sections of the Snake River Valley during the last five years" demonstrated "the urgent importance of having every acre foot of the winter flow of Snake River which it is possible to save, and storing the water for use during the next irrigation season."[79] The Secretary thus found that "the public interest requires that

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[76] SRBA Milner Aff., Exhibit 37 at 9 (Hoyt report, "Water Utilization In The Snake River Basin"); *see also* SRBA Milner Aff., Exhibit 63 at 10 (Thomas R. Newall, U.S. Geological Survey engineer, *Newell On Administrative Water Problems*, 94 TRANSACTIONS OF THE AMERICAN SOCIETY OF CIVIL ENGINEERS 321 (1930) (Newell's comments on Baldwin, *Transmission and Delivery of Reservoir Water* in *Administrative Water Problems: A Symposium*) ("The small percentage of ultimate wastage (flow past Milner during regulation period) is a real index of the excellence and efficiency of the control system of river operation as a whole."); *see also* SRBA Milner Aff., Exhibit 61 at 8 (E.B. Debler, Hydraulic Engineer & J.R. Riter, Associate Engineer, "Report on Upper Snake River Storage Investigations – Volume I – Snake River Above Idaho Falls") (U.S. Dept. of the Interior, Bureau of Reclamation) (June 1935) ("any winter use below the [American Falls] Reservoir is a total loss as far as irrigation is concerned") (quoting Lynn Crandall report).

[77] SRBA Milner Aff., Exhibit 64 at 2, 3 (Letter from Lynn Crandall to Elwood Mead, Commissioner, U.S. Bureau of Reclamation at 2-3) (Feb. 21, 1934).

[78] Hydropower curtailment at Minidoka Dam and the associated water conservation at American Falls Reservoir were made possible, in part, by a contract with Idaho Power under which the company furnished power to the Minidoka project. *See* SRBA Milner Aff., Exhibit 70 at 12 ("Contract between United States and Idaho Power Company for conservation of Snake River Water and furnishing transmission service") (Symbol Ilr-801) (Oct. 1, 1934) (". . . the water conserved and made available by the terms of this agreement is for storage in the American Falls Reservoir . . .").

[79] SRBA Milner Aff., Exhibit 62 at 1-2 (T.A. Walters, Acting Secretary of the Interior, "Findings of the Secretary of the Interior as to net profits from the Black Canyon and the Minidoka Power Plants,

the water supply needed for irrigation purposes should not be sacrificed for the purpose of providing increased power profits . . . . It has therefore been found necessary (in order to avoid the waste of water for irrigation purposes) to limit the operation of the Minidoka Power Plant during the non-irrigation season . . . ."[80]

The United States Court of Appeals for the District of Columbia Circuit endorsed the Secretary's decision to store winter flows above Milner. In rejecting Burley Irrigation District's challenge to the Secretary's accounting methodology for the Minidoka power plant under the winter water conservation program, the court stated: "Water passing [Minidoka Dam] in winter serves only to generate power at the plant for commercial sale, is useless for irrigation and pumping, and is lost therefore to the project, including Burley District, for its primary purposes. Winter flow is therefore highly wasteful." *Burley Irr. Dist. v. Ickes*, 116 F.2d 529, 535 (D.C. Cir. 1940). The Court also noted that with respect to the relevant federal reclamation statute, "[i]t would seem that the statute's clear mandate would subordinate the commercial uses of power to those of irrigation in any case where the two uses might be in conflict." *Id.* at 541 n.15.

3. Hydropower Subordination At The Palisades Project.

The United States' storage investigations of the 1930s and 40s culminated in the Palisades dam and reservoir project. Idaho Congressman John Sanborn stated in supporting the 1949 legislation authorizing the Palisades project that the Bureau of Reclamation had been conducting studies for more than 20 years "for the purpose of developing a plan to place under beneficial use all available water in the Snake River

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through sales of power on the Minidoka project and towns adjacent thereto, during the year 1935") (United States Department of the Interior, Bureau of Reclamation) (Mar. 12, 1936).

[80] SRBA Milner Aff., Exhibit 62 at 2 (findings of the Secretary of the Interior) (parentheses in original).

Valley above Milner, Idaho."[81] He also stated that the Palisades project pertained to "the control and use of water in the entire watershed of the Snake River above Milner Dam. . . The proposed legislation will authorize the construction of units for the storage and use of nearly all of the water not now utilized in the upper Snake River Valley."[82]

The Palisades project also included hydropower production capability, however, which created a potential conflict with the project's agricultural purposes. This tension was resolved by the authorizing legislation of 1949, which provided for construction and operation of the Palisades facility "substantially in accordance" with the reports of the Secretary of the Interior. 64 Stat. 1083 (Public Law 864). The supplemental reports of the Bureau of Reclamation and the Secretary pursuant to the legislation, in turn, unequivocally provided that hydropower production at Palisades would be subordinate to irrigation storage:

> The production of power at Palisades Dam will be entirely incidental to the operation of the reservoir for irrigation and flood control. The production of firm power is possible only because a certain amount of water must be passed through the reservoir during the winter to fill the prior storage right of the American Falls Reservoir.[83]

4. Hydropower Subordination At Hells Canyon And CJ Strike.

The policy of subordinating downstream hydropower uses to the conservation and storage of winter and flood flows above Milner was also recognized in the FPC proceedings on Idaho Power's Hells Canyon project in the 1950s. In his report analyzing future depletions above Hells Canyon, which Idaho Power offered in support of its FPC

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81 SRBA Milner Aff., Exhibit 60 at 5 (Palisades hearings) ("Statement of Honorable John Sanborn, a Representative in Congress from the State of Idaho").

82 *Id.*

83 Orr Aff., Exhibit 27 at 8 ("Palisades Dam and Reservoir Project In Idaho – Letter from the Secretary of the Interior transmitting A Supplemental Report On The Allocation And Repayment Of Costs Of The Palisades Dam And Reservoir Projects In Idaho, Pursuant To Public Law 864, 81st Congress") (Nov. 27, 1950) (House Document No. 720, 81st Congress, 2d Session).

application,[84] Upper Snake River Watermaster Lynn Crandall stated that "flood waters in years of ample runoff will be stored in new reservoirs such as Palisades and will be fed out onto the lands in dry years."[85] His report also stated that future development would probably eliminate spills past Milner: "Except in years of well above normal runoff it is quite likely that future years will see the flow of upper Snake River controlled so as to practically eliminate spills past Milner except for storage rights owned by the Idaho Power Company . . . ."[86]

These policies were given effect by subordination conditions inserted into the federal licenses for Idaho Power's Hells Canyon project at the insistence of the State. Idaho Power sought the support of the State and Idaho irrigators for its Hells Canyon project proposal over competing federal proposals. *Idaho Power Co. v. State*, 104 Idaho 575, 579-80, 661 P.2d 741, 745-46 (1983). As a condition of supporting the company's project, the State insisted that the company's Hells Canyon and C.J. Strike facilities be subordinated to future upstream uses, and Idaho Power agreed to such conditions in the licenses. *Id.*

5. Confirming Hydropower Subordination At American Falls Dam.

The need to subordinate hydropower to storage above Milner was forcefully reaffirmed in the 1960s and the 1970s. In a 1962 letter to the FPC commenting on Idaho Power's application for a single FPC license to cover its facilities at American Falls, Upper Salmon Falls and Shoshone Falls, the Assistant Secretary of the Interior pointed

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[84] *See* SRBA Milner Aff., Exhibit 58 at 17 (Transcript of Examination of Lynn Crandall, Formnal Hearings Before Federal Power Commission, Project No. 1971, P-2132, P-2133) (Jan. 1954) ("This report, which is his direct testimony, was offered by the applicant . . .").

[85] SRBA Milner Aff., Exhibit 59 at 7 (Lynn Crandall, "Future Upstream Depletion Abve Hells Canyon") (Apr. 6, 1953).

[86] *Id.* at 8 (CrandallrReport at 6).

out that Interior "has constructed upstream from Milner a reservoir system in excess of 4,500,000 acre-feet, all of which is operated with the objective of conserving the water to minimize spills past Milner Dam," and emphasized the "long history of the obvious need for the conservation of water above Milner Dam."[87] The letter stated that Idaho Power officials had been "repeatedly advised," since the negotiations on the American Falls Contract, "that the best development of the waters of the Snake River require there be no power developments below Milner Dam which rely on flows of water past Milner Dam for power production."[88] The Assistant Secretary thus recommended that the license Idaho Power sought "clearly subordinate" the hydropower facilities.[89]

In the early 1970s, deteriorating concrete at American Falls Dam limited the reservoir's storage capacity and led to a replacement proposal under which Idaho Power would obtain the right to use falling water from the dam for hydropower purposes.[90] This proposal raised concerns that the new arrangement would allow Idaho Power to demand the release of water from American Falls for hydropower production, which would have undermined the irrigation storage purposes of the reservoir.

Thus, subordination of hydropower to irrigation purposes at the rebuilt American Falls Dam was reaffirmed through two new contracts: the "Government Contract" between the American Falls Reservoir District and the United States, and the "Falling Water Contract" between the Reservoir District and Idaho Power. The Government Contract provided that the United States would operate and maintain the new dam "as a part of the Minidoka Project for the beneficial use of the water on the land within the

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87 SRBA Milner Aff., Exhibit 81 at 5 (letter from Assistant Secretary of the Interior Kenneth Holum to Joseph C. Swidler, Chairman, Federal Power Commission) (Aug. 30, 1962).

88 *Id.*

89 *Id.* at 4-5.

90 Orr Aff., Exhibit 16 at 48-49 (SRBA Milner Brief).

service areas of the Spaceholders pursuant to Section 8 of the Reclamation Act of June 17, 1902."[91] Article 16 of the Government Contract further provided that "the primary irrigation purpose and the incidental purposes of the Minidoka Project shall not be impaired by the subordinate utilization for power generation,"[92] and that the United States "is not obligated to operate the Replacement Dam in a manner to have water in the Replacement Dam at elevations for power generation or to operate to increase the head in the Replacement Dam for power generation."[93] Idaho Power acknowledged and agreed to these provisions in the Falling Water Contract.[94]

Thus, in issuing a license for Idaho Power's existing hydropower power facility at American Falls included a subordination condition:

> The project shall be operated in such a manner as will not conflict with the future depletion in flow of the waters of the Snake River and its tributaries, or prevent or interfere with the future upstream diversion and use of such water above the backwater created by the project for the irrigation of lands and other beneficial consumptive uses in the Snake River watershed.[95]

With respect to the unconstructed power plant that was to be connected to the replacement dam, however, the FPC found a subordination condition unnecessary because under the Government Contract and the Falling Water Contract Idaho Power would have no control over releases from the replacement dam:

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91 SRBA Milner Aff., Exhibit 85 at 6 ("Contract between The United States Of America and The American Falls Reservoir District for Construction And Operation And Maintenance Of The American Falls Replacement Dam Program Dated as of March 31, 1976" at 10) ("Government Contract").

92 *Id.*

93 *Id.*

94 *See* SRBA Milner Aff., Exhibit 86 at 10 ("Falling Water Contract Dated as of March 31, 1976 by and between American Falls Reservoir District and Idaho Power Company" at 19) ("The Idaho Power Company agrees to the provisions of the Government Contract governing operation and maintenance of the Replacement Dam.").

95 Second Affidavit of Michael C. Orr in Support of Idaho Water Resource Board's Motion for Summary Judgment, Exhibit 1 (*Order Issuing Major License (Constructed)*, Project No. 2258 at 21 § 32) (FPC) (Mar. 31, 1975).

> Even though the Applicant would agree to the insertion of the provision contemplated by Interior in (a) above, we consider it unnecessary from a practical standpoint and do not require its inclusion. The use of falling water releases for power generation is so thoroughly under the control of Reclamation in its releases for irrigation and other purposes of the Minidoka Project that the Applicant would have no opportunity to operate the project in a manner to conflict with the future depletion or diversion of the water of the Snake River. The use of the resource is a non-depleting one and under the Act of December 28, 1973, and related contracts, the operation of the hydroelectric facility shall not impair the efficiency of the Replacement Dam Program to serve the other purposes of the Minidoka Project.[96]

6. Recognition Of Ground Water Recharge As A Means Of Promoting Agricultural Development Above Milner.

In the early years of the development of the Milner zero minimum flow policy, achieving the objective of conserving winter flows and flood waters above Milner for agricultural development was assumed to require construction of conventional surface storage reservoirs. Beginning several decades prior to the Swan Falls controversy, however, recognition grew that these objectives could also be achieved through an alternative method: diverting winter flow and flood waters into the aquifer rather than into a surface storage reservoir.

As early as 1954, Upper Snake River Watermaster Lynn Crandall reported the possibility of diverting "surplus flows that would otherwise spill past Milner" for purposes of recharging "the ground-water reservoir."[97] When examined on this point during the FPC proceedings on Idaho Power's Hells Canyon proposal, Mr. Crandall testified that it would be possible "to provide greater storage and offset to some extent

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[96] Second Affidavit of Michael C. Orr in Support of Idaho Water Resource Board's Motion for Summary Judgment, Exhibit 2 (*Order Issuing Major License (Unconstructed), Project No. 2736* at 11-12 (FPC) (Mar. 31, 1975) (emphasis added).

[97] SRBA Milner Aff., Exhibit 58 at 17 (Crandall Examination).

depletions arising out of ground water pumping"[98] by recharging the ground water using "waters that would otherwise spill down past Milner into the Columbia."[99]

Subsequent analyses also recognized ground water recharge as a means of conserving winter and flood flows above Milner Dam. A 1955 report by the Bureau of Reclamation referred to "the possibility of using the lavas under this plain as a ground-water storage reservoir which would outlet into the Snake River."[100] In discussing opportunities for obtaining new irrigation water supplies above Milner Dam, a joint report in 1960 by the Bureau of Reclamation and the Army Corps of Engineers pointed out: "In a sense, the ground water is storage. In considering future development it could be used much as a conventional storage reservoir."[101] The joint report pointed out "the possibility of artificially recharging [the underground reservoir] by diverting surplus flows, beyond requirements of existing and future developments, from the Snake River during the flood season into highly permeable areas of raw volcanics."[102]

Governor Smylie also pointed out in a 1966 letter to the Secretary of the Interior the potential to use flows above Milner Dam for "ground water recharge."[103] In a 1967 letter to the IWRB, the Assistant Regional Director of the Bureau of Reclamation stated: "Artificial recharge would consist of diverting surplus surface flows of wet years from Snake River or Henrys Fork to infiltration areas where this water would enter the porous materials of the Snake Plain aquifer," and thereby "[p]ut underground in an evaporation-

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98 *Id.* at 34 (Crandall Examination).

99 *Id.* at 35 (Crandall Examination).

100 SRBA Milner Aff., Exhibit 38 at 6 (Special Report on Upper Snake River Basin).

101 SRBA Milner Aff., Exhibit 76 at 7 ("Information Bulletin On A Study Of Water Resource Development Possibilities – Upper Snake River Basin" at 5) (U.S. Army Corps of Engineers & U.S. Department of the Interior, Bureau of Reclamation) (Sept. 29, 1960).

102 *Id.* at 11.

103 SRBA Milner Aff., Exhibit 46 at 2 (letter from Idaho Governor Robert E. Smylie to U.S. Secretary of Interior Stewart Udall).

free reservoir, surplus flows of Henrys Fork and Snake River that would otherwise spill past Milner unused."[104] In a 1972 IWRB meeting, IWRB Director Dr. Robert Lee stated that recharge "really represents an alternative to capture waste water that is now spilling down the Snake . . . . It is an alternative to future dams in the area."[105]

By the time of the Swan Falls controversy, it was widely recognized that ground water recharge uses above Milner were a means of conserving winter flows and flood waters, and, like conventional surface storage uses, were protected by the Milner zero minimum flow policy.[106] Even Idaho Power Company's attorney acknowledged that because of the Milner zero minimum flow policy, recharge diversions above Milner would not be subject to hydropower water rights below Milner.[107]

7. Swan Falls: Confirming Hydropower Subordination To Uses Above Milner.

The Swan Falls controversy of the 1980s involved the question of subordination of all of Idaho Power's projects below Milner except Hells Canyon and C.J. Strike, which were subordinated by express provisions in the licenses. The controversy was resolved by the Swan Falls Agreement of 1984, which was contingent upon, among other things, the enactment of several pieces of legislation and the adoption of certain amendments to the State Water Plan.[108]

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[104] SRBA Milner Aff., Exhibit 77 at 3 (letter from Norman H. Moore, Assistant Regional Director, U.S. Department of the Interior, Bureau of Reclamation, to Dr. Robert E. Lee, Director, Idaho Water Resource Board) (Oct. 27, 1967).

[105] SRBA Milner Aff., Exhibit 78 at 3 ("Minutes of Meeting No. 4-72") (Idaho Water Res. Bd., Jun. 13, 1972).

[106] *See supra* pp. 19-20.

[107] *See supra* p. 20.

[108] *See* Orr Aff., Exhibit 15 52-53, 57-58, 63-82 (*Swan Falls Agreement* ¶¶ 6, 13, & Exhibits 1-8); *see also* id. at 26 ("'the Swan Falls Agreement was not a self-executing instrument, but rather proposed a suite of legislative and administrative action that if implemented would resolve the controversy and the legal issues to the mutual satisfaction of the parties'") (*Memorandum Decision and Order on Cross-Motions for Summary Judgment*).

As previously discussed, one of the settlement contingencies was retention of the Milner zero minimum flow in the State Water Plan. Further, the parties and the Legislature specifically clarified through the 1986 amendment to Idaho Code § 42-203B(2) the historic understanding that hydropower water rights using water below Milner Dam were barred from interfering with the development and use of flows above Milner Dam, including recharge.[109] In short, the Swan Falls settlement emphatically confirmed the historic policy and understanding that hydropower uses below Milner were subordinate to uses above Milner—including ground water recharge.

8. The Director's Licensing Order Is Consistent With And Supported By The Public Policy Of The Milner Zero Minimum Flow.

The foregoing discussion of the public policy of the Milner zero minimum flow demonstrates that the original purpose was to prevent hydropower uses below Milner Dam from interfering with conservation and storage of flows for irrigation uses above Milner, and that through the years hydropower subordination has been reaffirmed as the core of the Milner zero minimum flow policy. This is an important aspect of the larger, and equally long-standing, policy subordinating all hydropower activities on the Snake River to agricultural uses, which also applies to hydropower facilities above Milner, such as Minidoka, American Falls and Palisades. The Canal Companies helped to develop and enforce these policies and principles for many years, and it is ironic that they are now challenging them.

The very purpose of the Milner zero minimum flow has been to prevent hydropower uses in the canyon below Milner from establishing rights to any flows above Milner, but this is precisely what the Canal Companies now seek to do. Issuing a water

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109 *See supra* pp. 17-25.

right license in the form sought by the Canal Companies would fly in the face of almost a century of public policy and water resource development in the Snake River basin. It would fatally undermine the Milner zero minimum flow, which has been a crucial part of planning and settled property rights expectations for decades. Indeed, as discussed in a subsequent section, it would create another Swan Falls situation: a hydropower water right would be in a position to block or control upstream development.

The Director's licensing order is consistent with and fully supported by the public policy of the Milner zero minimum flow. Thus, even if the plain terms of Idaho Code § 42-203B(2) were ambiguous—which they are not—the public policy and legislative intent of the statute requires that the Director's order be affirmed.

V. THE LICENSE FOR WATER RIGHT 01-7011 HAD TO BE FULLY SUBORDINATED TO BE CONSISTENT WITH THE AQUIFER RECHARGE AND HYDROPOWER LICENSING POLICIES OF THE STATE WATER PLAN.

The Director correctly concluded that a subordination condition for water right no. 01-7011 that does not apply with respect to ground water recharge would have been contrary to the State Water Plan's policy of encouraging recharge uses. *Final Order* at 10-11. Policy 1J of the State Water Plan provides: "It is the policy of Idaho that managed recharge be encouraged, pursuant to state law." State Water Plan at 7.[110] This policy complements and supports the Milner zero minimum flow policy, because the development of flows above Milner Dam means that flows below Milner Dam are highly dependent on spring discharges, which in turn are dependent on aquifer levels. Thus, the

[110] The Legislature has declared that it is state policy "to promote and encourage the optimum development and augmentation of the water resources of this state" and deemed it "essential . . . that water projects "designed to advance this policy be given maximum support." Idaho Code § 42-234(1). In the same statute, the Legislature found that the use of water for ground water recharge in accordance with Idaho law and the State Water Plan "may enhance the full realization of our water resource potential by furthering water conservation and increasing the water available for beneficial use," *id.*, and recognized that ground water recharge is a "beneficial use" of water under Idaho law. *Id.* § 42-234(2). .

State Water Plan provides that it is State policy to maintain spring flows in the Thousand Springs reach of the Snake River downstream from Milner Dam, State Water Plan at 19 (Policy 5H), and states that maintaining spring discharges downstream from Milner Dam should be the goal of water managers. State Water Plan at 19 (comment to Policy 5H). The State Water Plan recognizes that aquifer recharge "may enhance spring flows and maintain desirable aquifer levels," State Water Plan at 7, and is a strategy "for maintaining spring discharges" in the reach downstream from Milner Dam. State Water Plan at 19.

The Director's decision to fully subordinate water right no. 01-7011 is also consistent with the State Water Plan's policy regarding "Hydropower Licensing." State Water Plan at 14 (Policy 4D). This policy specifically recognizes that subordination of hydropower water rights to upstream depletionary uses pursuant to Idaho Code section 42-203B(6)[111] may be necessary upon consideration of the public interest and the future water and energy needs of the State. *Id.* State Water Plan at 14 (Policy 4D). The State Water Plan's policies regarding the Milner zero minimum and ground water recharge by definition are expressions of the public interest and take the future water and energy needs of the State into account, because they are part of the comprehensive state plan "for optimum development of water resources in the public interest." Id. Const. art. XV § 7; *see also* Idaho Code § 42-1734A(1). The policies of the State Water Plan are "based upon studies and public hearings," Idaho Code § 42-1734A(1), formulated by the IWRB and approved by the Legislature. *Id.*; Idaho Code §§ 42-1734B(6)-(7), 42-1736. Thus,

[111] This statute gives the Director "the authority authorizes to the rights granted in a permit or license for power purposes to subsequent upstream beneficial depletionary uses," Idaho Code § 42-203B(2), and is discussed in the next section of this memorandum.

the State Water Plan's hydropower licensing policy also supports full subordination of water right no. 01-7011.

Accordingly, including an incomplete subordination condition in the license for water right no. 01-7011 would have been inconsistent with the ground water recharge and hydropower licensing policies of the State Water Plan. Idaho Code § 42-1734B(4) ("All state agencies shall exercise their duties in a manner consistent with the comprehensive state water plan. These duties include . . . licensing . . . .").

VI. THE LEGISLATURE INTENDED THE DIRECTOR TO EXERCISE HIS HYDROPOWER SUBORDINATION AUTHORITY UNDER IDAHO CODE § 42-203B(6) TO PREVENT "ANOTHER SWAN FALLS."

Idaho Code section 42-203B expressly authorizes the Director to subordinate a license for a hydropower water right to junior water rights:

> The director shall have the authority to subordinate the rights granted in a permit or license for power purposes to subsequent upstream beneficial depletionary uses. A subordinated water right for power use does not give rise to any claim against, or right to interfere with, the holder of subsequent upstream rights established pursuant to state law.

Idaho Code § 42-203B(6). This provision was enacted to implement the State's constitutional authority to "regulate and limit" hydropower water rights, Idaho Const. art. XV § 3, Idaho Code § 42-203B(1), as part of the legislative implementation of the Swan Falls settlement of 1984.[112] *See Miles v. Idaho Power Co.*, 116 Idaho 635, 637, 778 P.2d 757, 759 (1989) ("our legislature enacted legislation to implement the [Swan Falls] agreement. *See* 1985 Idaho Sess. Laws, ch. 14-17 . . . .").

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[112] Orr Aff., Exhibit 15 at 77 (Swan Falls Agreement at Exhibit 7A); *see also* Orr Aff., Exhibit 23 at 5 ("Statement of Legislative Intent – S 1008" at 60) ("The Director of the Department of Water Resources is empowered as to all future licenses to subordinate the [hydropower] rights granted in either a permit or a license to subsequent upstream beneficial depletionary uses . . . .").

The principal issue in the Swan Falls controversy was "whether the water rights of Idaho Power Company should be subordinated to future appropriators to encourage further development of agricultural uses, domestic, commercial, municipal or industrial (DCMI) uses, or other uses which would be beneficial to Idaho."[113] If Idaho Power Company's hydropower water rights were not subordinated, the Company could have asserted them to prevent or control future development of the water resources of the Snake River basin.[114] Idaho Code section 42-203B(6) was intended to prevent a similar situation from developing again, by authorizing the Director to directly subordinate hydropower water rights that had the potential to block or control future water resource development. This was explained by Pat Kole, the attorney who negotiated the Swan Falls settlement on behalf of the Attorney General, and Ken Dunn, the Director of the Department, when responding to questions about proposed section 42-203B(6) during a Senate committee hearing on the legislation in 1985:

> Pat Kole: . . . The effort here was to make sure that as best we can foresee we do not get ourselves into another Swan Falls situation in the

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113 Orr Aff., Exhibit 23 at 3 ("Statement of Legislative Intent – S 1008" at 58).

114 As Pat Kole, the attorney who negotiated the Swan Falls settlement for the Attorney General, subsequently testified, Idaho Power's hydropower water rights threatened to put control and management of the Snake River in Idaho Power's hands:

> A: The principal issue [of the negotiation] was who would run the river, whether it would be a private utility or whether it would be public ownership. And the State had always wanted to make it clear that this was their job to be the water master and not a private utility. And once both sides agreed that the State should be in charge, that it just then became a question of protecting everybody's water rights through the system and making sure that everybody was treated fairly and equitabl[y].
>
> Q: Why did Idaho Power Company or did Idaho Power Company want to run the river?
>
> A: Well, whether they wanted to or not, they were as a result of the [Supreme] [C]ourt decision de facto in charge of the river because of the way they could assert their water right or not assert their water right against different uses that would give them the ability to manage the resource. From the State's point of view that was untenable.

Orr Aff., Exhibit 24 at 6-7 (excerpted pages of Deposition of Patrick Jerome Kole, *In re SRBA*, Case No. 39576) (Nov. 14, 1990).

> future. That is the reason why [proposed Idaho Code § 42-203B(6)] is in the agreement and why we think it is necessary.
>
> . . .
>
> Ken Dunn: The primary reason I see it there is to avoid another Swan Falls recurring again. Without that if Idaho Power decides to build one of the dams they have proposed on the Snake River, we are back in the Swan Falls situation if there isn't clear subordination authority. . . .[115]

In written testimony submitted on the proposed legislation, Attorney General Jim Jones stated that Idaho Code § 42-203B(6) is "an express implementation" of the State's constitutional authority to regulate and limit hydropower water rights, and that such direct subordination authority was necessary to "ensure that future use of the unappropriated waters of the state will not be precluded by future hydropower projects."[116] The Attorney General's supplemental testimony emphasized that a principal purpose of legislation was "to prevent future Swan Falls types of situations from arising."[117]

As the Director determined, licensing water right no. 01-7011 with the subordination condition of the Milner Permit would allow the Canal Companies to preclude future recharge development upstream of Milner Dam. *Final Order* at 12. Such a license would put a hydropower water right in the position to block or control future development, thus creating "another Swan Falls."[118] Such a result would be contrary to the intent of Idaho Code section 42-203B(6), and therefore the license for water right no. 01-7011 must be fully subordinated to comply with the intent of the statute, as the Director correctly determined. *Final Order* at 12.

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115 Orr Aff., Exhibit 25 at 9 (Minutes, Senate Resources and Environment Committee, Jan. 18, 1985).

116 *Id.* at 19 (attachment to Minutes entitled "Prepared Testimony of Jim Jones, Idaho Attorney General, on Senate Bills 1006 and 1008," at 6).

117 Orr Aff., Exhibit 30 at 10 (Minutes of Senate Resource and Environment Committee, Jan. 25, 1985) (attachment entitled "Supplemental Testimony of Attorney General Jim Jones Before the Idaho Senate Committee on Resources and Environment").

118 Orr Aff., Exhibit 25 at 9 (Minutes, Senate Resources and Environment Committee, Jan. 18, 1985).

The Canal Companies' argument that subsection (6) of Idaho Code section 42-203B was never intended to apply to the licensing of the Milner Permit is also contrary to the comprehensive subordination framework established by the statute, which was intended both "to prevent future Swan Falls types of situations from arising" and "to provide a mechanism under which current Swan Falls type problems can be resolved without expensive litigation."[119] The trust water provisions of subsections (2) and (3) addressed the latter issue, "current Swan Falls type problems"—that is, hydropower water rights that had vested prior to the enactment of the statute. Subsection (6), in contrast, was intended to be applicable to all other hydropower water rights in order to prevent "future Swan Falls types of situations." In short, there are no gaps in the statutory subordination framework. The Canal Companies' argument creates a third class of hydropower water rights that are entirely exempt from subordination. Nothing in the statute supports such an interpretation, which would undermine the comprehensive hydropower subordination solution enacted by the Legislature.

CONCLUSION

For the reasons set forth herein, the Idaho Water Resource Board requests that the Hearing Officer grant the Board's motion for summary judgment.

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[119] Orr Aff., Exhibit 30 at 10 (Minutes of Senate Resource and Environment Committee, Jan. 25, 1985) (attachment entitled "Supplemental Testimony of Attorney General Jim Jones Before the Idaho Senate Committee on Resources and Environment").

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Respectfully submitted this 11th day of February 2010.

LAWRENCE G. WASDEN
Attorney General

STEVEN L. OLSEN
Chief, Civil Litigation Division

Michael C. Orr FOR
MICHAEL S. GILMORE
Deputy Attorney General

Michael C. Orr
MICHAEL C. ORR
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of February 2010, I caused a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF 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:

John Rosholt Travis Thompson Barker Rosholt 113 Main Ave., W. Ste 303 Twin Falls, ID 83301-6167	☒ U.S. Mail ☐ Hand Delivery ☐ Certified Mail ☐ Overnight Mail ☐ Facsimile: _____ ☒ E-mail: jar@idahowaters.com tlt@idahowaters.com
John Simpson Barker Rosholt PO Box 2139 Boise, ID 83701-2139	☒ U.S. Mail ☐ Hand Delivery ☐ Certified Mail ☐ Overnight Mail ☐ Facsimile: _____ ☒ E-mail: jks@idahowaters.com
Randall C. Budge Candice M. McHugh Racine Olson Nye Budge & Bailey, Chartered PO Box 1391 Pocatello, Idaho 83204-1391	☒ U.S. Mail ☐ Hand Delivery ☐ Certified Mail ☐ Overnight Mail ☐ Facsimile: _____ ☒ E-mail: rcb@racinelaw.net cmm@racinelaw.net
Robert L. Harris PO Box 50130 Idaho Falls, ID 83405	☒ U.S. Mail ☐ Hand Delivery ☐ Certified Mail ☐ Overnight Mail ☐ Facsimile: _____ ☒ E-mail: rharris@holdenlegal.com
Craig B. Evans, Chairman Bingham Group Water District PO Box 1268 Blackfoot, ID 83221	☒ U.S. Mail ☐ Hand Delivery ☐ Certified Mail ☐ Overnight Mail ☐ Facsimile: _____ ☒ E-mail: binghamgroundwtr@cableone.net

Lyle Swank IDWR 900 N. Skyline Dr. Idaho Falls, ID 83402-6105	☒ U.S. Mail ☐ Hand Delivery ☐ Certified Mail ☐ Overnight Mail ☐ Facsimile: _____ ☒ E-mail: lyle.swank@idwr.idaho.gov
Allen Merritt Cindy Yenter IDWR 1341 Fillmore St. Ste 200 Twin Falls, ID 83301-3033	☒ U.S. Mail ☐ Hand Delivery ☐ Certified Mail ☐ Overnight Mail ☐ Facsimile: _____ ☒ E-mail: allen.merritt@idwr.idaho.gov Cindy.yenter@idwr.idaho.gov

Michael C. Orr

MICHAEL C. ORR