

ORIGINAL

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) **AFFIDAVIT OF MICHAEL C. ORR**
WATER RIGHT PERMIT NO. 01-7011) **IN SUPPORT OF IDAHO**
IN THE NAME OF TWIN FALLS CANAL) **WATER RESOURCE BOARD'S**
COMPANY AND NORTH SIDE CANAL) **MOTION FOR SUMMARY**
COMPANY) **JUDGMENT**

STATE OF IDAHO)
) ss.
COUNTY OF ADA)

MICHAEL C. ORR, being first duly sworn upon his oath, deposes and states that:

1. I am a Deputy Attorney General in the Idaho Office of the Attorney General and one of the attorneys of record for the Idaho Water Resource Board in the above-entitled proceedings.
2. The following is based upon my own personal knowledge.
3. Attached hereto as **Exhibit 1** are true and correct copies of excerpted pages of the *Order On Petition For Judicial Review* entered on June 19, 2009 in *Clear*

Springs Foods, Inc. v. Idaho Ground Water Appropriators, Inc., Case. No. 2008-444 (Fifth Jud. Dist., Gooding County).

4. Attached hereto as **Exhibit 2** is a true and correct copy of the *Petition For Peremptory Writ Of Mandate*, filed on September 28, 2007 in *North Side Canal Co. & Twin Falls Canal Co. v. Tuthill*, Case No. CV 2007-1093 (Fifth Jud. Dist., Jerome County).

5. Attached hereto as **Exhibit 3** is a printout I caused to be made of the webpage of the Twin Falls Canal Company entitled "History of Milner Dam," at the following URL: <http://www.tfcanal.com/milner.htm>.

6. Attached hereto as **Exhibit 4** are true and correct copies of excerpted pages of *Before The Federal Energy Regulatory Commission - Application For Initial License: Project 2899-002* (Twin Falls Canal Company, North Side Canal Company) (July 1984) that I caused to be printed out from file entitled "Water Right Back File 1-7011," which can be accessed under the "Related Documents" for water right no. 01-7011 on the Department of Water Resources website, at the following URL: <http://www.idwr.idaho.gov/apps/ExtSearch/SearchWRAJ.asp>.

7. Attached hereto as **Exhibit 5** are true and correct copies of drawings of the Milner Dam and Milner hydropower project that I caused to be printed out from the file entitled "Water Right Back File 1-7011," which can be accessed under the "Related Documents" for water right no. 01-7011 on the Department of Water Resources website, at the following URL: <http://www.idwr.idaho.gov/apps/ExtSearch/SearchWRAJ.asp>.

8. Attached hereto as **Exhibit 6** are photographs of Milner Dam and nearby areas that I caused to be printed out from Google Earth®.

9. Attached hereto as **Exhibit 7** are true and correct copies of the 2009 annual reports of Twin Falls Canal Company and Milner Dam, Inc., that I caused to be printed out from the Idaho Secretary of State's website, at the following URL: <http://www.accessidaho.org/public/sos/corp/search.html?ScriptForm.startstep=crit>.

10. Attached hereto as **Exhibit 8** is a true and correct copy of the *Application For Alternative Writ Of Mandate* filed on September 28, 2007 in *North Side Canal Co. & Twin Falls Canal Co. v. Tuthill*, Case No. CV 2007-1093 (Fifth Jud. Dist., Jerome County).

11. Attached hereto as **Exhibit 9** is a true and correct copy of the *Order Denying Petition For Alternative Writ Of Mandate* entered on October 10, 2007 in *North Side Canal Co. & Twin Falls Canal Co. v. Tuthill*, Case No. CV 2007-1093 (Fifth Jud. Dist., Jerome County).

12. Attached hereto as **Exhibit 10** is a true and correct copy of the *Motion To Dismiss* filed on November 8, 2007 in *North Side Canal Co. & Twin Falls Canal Co. v. Tuthill*, Case No. CV 2007-1093 (Fifth Jud. Dist., Jerome County).

13. Attached hereto as **Exhibit 11** is a true and correct copy of the *Memorandum In Support Of Motion To Dismiss* filed on November 8, 2007 in *North Side Canal Co. & Twin Falls Canal Co. v. Tuthill*, Case No. CV 2007-1093 (Fifth Jud. Dist., Jerome County).

14. Attached hereto as **Exhibit 12** is a true and correct copy of the *Answer* filed on December 21, 2007 in *North Side Canal Co. & Twin Falls Canal Co. v. Tuthill*, Case No. CV 2007-1093 (Fifth Jud. Dist., Jerome County).

15. Attached hereto as **Exhibit 13** is a true and correct copy of the *Petitioners'*

Response To Respondents' Motion To Dismiss filed on December 14, 2007 in *North Side Canal Co. & Twin Falls Canal Co. v. Tuthill*, Case No. CV 2007-1093 (Fifth Jud. Dist., Jerome County).

16. Attached hereto as **Exhibit 14** is a true and correct copy of the *Order Granting Motion To Dismiss Petition For Writ Of Mandate* entered on January 25, 2008 in *North Side Canal Co. & Twin Falls Canal Co. v. Tuthill*, Case No. CV 2007-1093 (Fifth Jud. Dist., Jerome County).

17. Attached hereto as **Exhibit 15** is a true and correct copy of the *Memorandum Decision And Order On Cross-Motions For Summary Judgment* entered on April 18, 2008 in SRBA Consolidated Subcase 00-92023.

18. Attached hereto as **Exhibit 16** is a true and correct copy of 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. This exhibit is referred to as the "SRBA Milner Brief" in the *Memorandum in Support of Idaho Water Resource Board's Motion for Summary Judgment* filed in this proceeding.

19. Attached hereto as **Exhibit 17** is a true and correct copy of the *Reporter's Transcript* of the November 19, 2009 SRBA hearing on the State of Idaho's Motion for Summary Judgment Re: Milner Zero Minimum Flow, SRBA Subcase Nos. Nos. 00-92002GP, 02-00200, 02-00201, 02-00223, and 02-00224.

20. Attached hereto as **Exhibit 18** are true and correct copies of excerpted pages of the *Canal Companies' Memorandum In Opposition To State Of Idaho's Motion For Partial Summary Judgment Re: Milner Zero Minimum Flow* filed on November 5,

2009 in SRBA Subcase Nos. 00-92002GP, 02-0200, 02-0201, 02-0223, and 02-0224.

21. Attached hereto as **Exhibit 19** are true and correct copies of letters from Idaho Attorney General Jim Jones to Governor John V. Evans and James Bruce of Idaho Power Company, dated August 16, 1984.

22. Attached hereto as **Exhibit 20** is a true and correct copy of the *Memorandum Decision* entered on May 16, 1980 in *Idaho Power Co. v. State*, Case No. 62237) (Fourth Jud. Dist., Ada County Dist. Ct.). This document was attached as exhibit 25 to the Fourth Affidavit of Michael C. Orr, filed in SRBA Consolidated Subcase No. 00-92023 on October 16, 2008.

23. Attached hereto as **Exhibit 21** is a true and correct copy of the *Plaintiff's Memorandum in Support of Motion to Re-Consider and Amend Summary Judgment* filed on February 19, 1980 in *Idaho Power Co. v. State*, Ada County Case No. 62237 (Fourth Jud. Dist., Ada County Dist. Ct.). This document was attached as exhibit 24 to the Fourth Affidavit of Michael C. Orr, filed in SRBA Consolidated Subcase No. 00-92023 on October 16, 2008.

24. Attached hereto as **Exhibit 22** is a true and correct copy of excerpted pages of a court reporter's transcript of a recording of a Department of Water Resources public information meeting in Twin Falls, Idaho, on May 23, 1985. This document was attached as exhibit 48 to the Fourth Affidavit of Michael C. Orr, filed in SRBA Consolidated Subcase No. 00-92023 on October 16, 2008.

25. Attached hereto as **Exhibit 23** are true and correct copies of excerpted pages of the 1985 Journal of the Idaho State Senate. These pages were attached as exhibit 28 to the Affidavit of Michael C. Orr in Support of State of Idaho's Motion for

Partial Summary Judgment, filed in SRBA Consolidated Subcase No. 00-92023 on January 11, 2008.

26. Attached hereto as **Exhibit 24** are true and correct copies of excerpted pages of the transcript of the Deposition of Patrick Jerome Kole, *In re SRBA* Case No. 39576 (Fifth Jud. Dist., Twin Falls County Dist. Ct.), dated November 14, 1990. These pages were attached as exhibit 13 to the Second Affidavit of Michael C. Orr, filed in SRBA Consolidated Subcase No. 00-92023 on February 7, 2008.

27. Attached hereto as **Exhibit 25** is a true and correct copy of the Minutes of the Senate Resources and Environment Committee for January 18, 1985, including attachments. This document was attached as exhibit 8 to the Affidavit of Michael C. Orr in Support of State of Idaho's Motion for Partial Summary Judgment, filed in SRBA Consolidated Subcase No. 00-92023 on January 11, 2008.

28. Attached hereto as **Exhibit 26** is a true and correct copy of the *Affidavit of Michael C. Orr*, including exhibits thereto, filed on October 19, 2009 in SRBA Subcase Nos. 00-92002GP, 02-0200, 02-0201, 02-0223, and 02-0224. This exhibit is referred to as the "SRBA Milner Aff." in the *Memorandum in Support of Idaho Water Resource Board's Motion for Summary Judgment* filed in this proceeding.

29. Attached hereto as **Exhibit 27** are true and correct copies of excerpted pages of "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," dated Nov. 27, 1950 (House Document No. 720, 81st Congress, 2d Session).

30. Attached hereto as **Exhibit 28** is a true and correct copy of the *Order Granting Petition To Appear As Amicus Curiae, Order Setting Deadline For Comments and Special Master Report And Recommendation* entered on November 20, 2009 in SRBA Subcase Nos. 00-92002GP, 02-0200, 02-0201, 02-0223, and 02-0224.

31. Attached hereto as **Exhibit 29** is a true and correct copy of the Minutes of the Senate Resources and Environment Committee for January 21, 1985, including attachments. This document was attached as exhibit 9 to the Affidavit of Michael C. Orr in Support of State of Idaho's Motion for Partial Summary Judgment, filed in SRBA Consolidated Subcase No. 00-92023 on January 11, 2008.

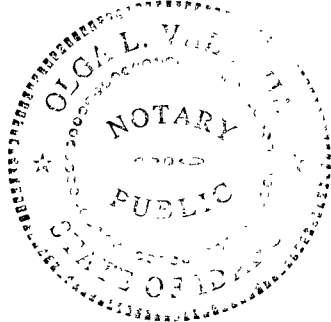
32. Attached hereto as **Exhibit 30** is a true and correct copy of the Minutes of the Senate Resources and Environment Committee for January 25, 1985, including attachments. This document was attached as exhibit 10 to the Affidavit of Michael C. Orr in Support of State of Idaho's Motion for Partial Summary Judgment, filed in SRBA Consolidated Subcase No. 00-92023 on January 11, 2008.


Further your affiant sayeth naught.

DATED this 11th day of February 2010.


MICHAEL C. ORR

SUBSCRIBED AND SWORN to before me this 11th day of February 2010.





Notary Public for Idaho
Residing at: Boise
My commission expires 2/8/2012

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of February 2010, I caused a true and correct copy of the foregoing **AFFIDAVIT OF MICHAEL C. ORR IN SUPPORT OF IDAHO WATER RESOURCE BOARD'S MOTION FOR SUMMARY JUDGMENT** to be filed with the Court and served on the following parties by the indicated methods:

<p>John Rosholt Travis Thompson Barker Rosholt 113 Main Ave., W. Ste 303 Twin Falls, ID 83301-6167</p>	<p><input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Certified Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile: _____ <input checked="" type="checkbox"/> E-mail (Affidavit only – no exhibits): jar@idahowaters.com tlt@idahowaters.com</p>
<p>John Simpson Barker Rosholt PO Box 2139 Boise, ID 83701-2139</p>	<p><input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Certified Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile: _____ <input checked="" type="checkbox"/> E-mail (Affidavit only – no exhibits): jks@idahowaters.com</p>
<p>Randall C. Budge Candice M. McHugh Racine Olson Nye Budge & Bailey, Chartered PO Box 1391 Pocatello, Idaho 83204-1391</p>	<p><input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Certified Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile: _____ <input checked="" type="checkbox"/> E-mail (Affidavit only – no exhibits): rbc@racinelaw.net cmm@racinelaw.net</p>
<p>Robert L. Harris PO Box 50130 Idaho Falls, ID 83405</p>	<p><input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Certified Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile: _____ <input checked="" type="checkbox"/> E-mail (Affidavit only – no exhibits): rharris@holdenlegal.com</p>

<p>Craig B. Evans, Chairman Bingham Group Water District PO Box 1268 Blackfoot, ID 83221</p>	<p><input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Certified Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile: _____ <input checked="" type="checkbox"/> E-mail (Affidavit only – no exhibits): <u>binghamgroundwtr@cableone.net</u></p>
<p>Lyle Swank IDWR 900 N. Skyline Dr. Idaho Falls, ID 83402-6105</p>	<p><input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Certified Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile: _____ <input checked="" type="checkbox"/> E-mail (Affidavit only – no exhibits): <u>lyle.swank@idwr.idaho.gov</u></p>
<p>Allen Merritt Cindy Yenter IDWR 1341 Fillmore St. Ste 200 Twin Falls, ID 83301-3033</p>	<p><input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Certified Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile: _____ <input checked="" type="checkbox"/> E-mail (Affidavit only – no exhibits): <u>allen.merritt@idwr.idaho.gov</u> <u>Cindy.yenter@idwr.idaho.gov</u></p>


 MICHAEL C. ORR
 Deputy Attorney General