

**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)
_____) **FINAL ORDER**

On September 5, 2007, the Director of the Idaho Department of Water Resources (“Director” or “Department”) issued a *Notice of Intent to Issue License* (“Notice”) for water right permit no. 01-7011. Based upon the files of the Department in this matter and the Director’s understanding of applicable law, the Director finds, determines and orders as follows:

FINDINGS OF FACT

I. Procedural Background

1. The North Side Canal Company and the Twin Falls Canal Company (“Canal Companies”) filed with the Department on March 30, 1977, application for permit no. 01-7011 to appropriate 12,000 cfs of the public waters of the state of Idaho from the Snake River to be diverted at Milner Dam and conveyed to a power plant adjacent to the Snake River downstream from Milner Dam, to be used for hydropower generation purposes.

2. The Department published notice of application for permit no. 01-7011 on May 19 and 26, 1977, in accordance with the requirements of chapter 2, title 42, Idaho Code, and no timely protests to the application were filed in response to the published notice.

3. The Department issued water right permit no. 01-7011 (the “Milner Permit”) to the Canal Companies on June 29, 1977, authorizing the diversion at Milner Dam of up to 12,000 cfs of water from the Snake River for hydropower purposes. The permit required that proof of beneficial use was to be submitted by June 1, 1982. The permit contained a condition requiring installation of a measuring device but did not contain a subordination condition.

4. On September 14, 1977, the Canal Companies filed an application for amendment of the Milner Permit to “include additional alternate points of beneficial use for power purposes.” The Department approved the requested application for amendment of the permit on September 28, 1977.

5. On March 31, 1982, the Department approved an application for extension of time that extended the due date for proof of beneficial use to June 1, 1987.

6. On February 26, 1987, the Canal Companies filed a second request for extension of time. On approximately November 18, 1987, the Department approved the second extension of time request, extending the due date for proof of beneficial use to November 1, 1990. The extension of time approval states that it is approved with the following condition added to the permit:

The rights for 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.

IDWR approval of *Request for Extension of Time* filed February 26, 1987. See Letter from former IDWR Director R. Keith Higginson to John Rosholt dated November 18, 1987.

7. On October 30, 1990, the Department approved a third application for extension of time that extended the due date for proof of beneficial use to May 1, 1992. The application for extension stated that the Federal Energy Regulatory Commission ("FERC") issued the Canal Companies and the Idaho Power Company a license for Milner Project No. 2899 on December 15, 1988 (45 FERC ¶ 61,423). The FERC found that the issuance of a license for the project is consistent with the zero minimum flow below the Milner Project required by the Idaho State Water Plan, "since the license would not require that minimum flows be provided below Milner." *Id.* at 28.

8. On April 28, 1992, the Department approved a fourth application for extension of time that extended the proof of beneficial due date to November 1, 1993.

9. The Canal Companies submitted proof of beneficial use for the Milner Permit on November 1, 1993, pursuant to Idaho Code § 42-217. The field examination report completed by Charles E. Brockway, P.E. on October 29, 1993, recommended that the water right be licensed for a total diversion rate of 5,714.7 cfs at Milner Dam for hydropower use at the power plant located below Milner Dam.

10. Proof of beneficial use having been submitted under the permit, the Department is prepared to issue a license for the water right pursuant to Idaho Code § 42-219. Counsel for the Canal Companies has orally requested that the Department issue a license for the water right.

11. The Department received written requests for notice for an opportunity to be heard on the form of the subordination condition to be included on the license for water right no. 01-7011 from the Bingham Ground Water District on January 11, 2007; from the Idaho Ground

Water Appropriators, Inc. on February 7, 2007, for and on behalf of its ground water districts and other members, represented by the law firm of Racine Olson Nye Budge & Bailey, Chartered; and from the Mud Lake Water Users, Independent Water Users, Jefferson Canal Co., Montevieu Canal Co., and Producer's Canal Co., on April 16, 2007, represented by the law firm of Holden, Kidwell, Hahn & Crapo, P.L.L.C.

12. Following the request from the Canal Companies that a license be issued, the Department issued a *Notice of Intent to Issue License*, dated September 5, 2007, in which it stated that it was prepared to issue a license for the water right, pursuant to Idaho Code § 42-219. In the *Notice*, the Department advised the Permit Holders that it would accept and consider written comments from interested parties "addressing the form of the subordination condition that should be included on the license." Such comments were to be postmarked no later than October 10, 2007.¹

13. In response to the *Notice of Intent to Issue License*, the Department received written Comments from 39 water distribution entities addressing the form of the subordination condition that should be included on the license for water right no. 01-7011.

14. On September 28, 2007, the Canal Companies filed a *Petition for Peremptory Writ of Mandate* ("Petition") in district court, requesting an order prohibiting the Director from considering comments submitted pursuant to the *Notice* and compelling the Director to issue a license in conformance with the permit. The Department responded by filing a motion to dismiss which was granted on January 25, 2008.² The dismissal order of the district court was not appealed.

15. In their *Petition*, the Canal Companies alleged that based upon their compliance with the terms of the permit and the submission of proof of beneficial use in 1993, the permit represented a valid, enforceable and vested water right under Idaho Law. *Petition* at 15. The Canal Companies further alleged that the Department's "attempt to modify or add conditions that would now restrict the use of the water right at this point in time constitutes an unconstitutional and prohibited taking of [Canal Companies'] property without just compensation." *Id.*

16. The district court rejected the Canal Companies' argument that the issuance of the license by the Department following submission of proof of beneficial use is simply a ministerial act. *Writ Dismissal Order* at 10. The district court ruled:

Simply because there is a prior agreement in place with respect to the form of the subordination remark does not make the duty to issue the license ministerial. If a determination is made contrary to the terms of the agreement then the issue of the effect and enforceability of the agreement can still be raised with the Director and through judicial review if necessary.

Id.

¹ See Conclusion of Law 2, *infra*.

² *North Side Canal Co., et al v. Tuthill*, (5th Jud. Dist., Gooding Co. Case No. CV 2007-1093) (*Order Granting Motion to Dismiss Petition for Writ of Mandate* Jan. 25, 2008) (hereinafter "Writ Dismissal Order").

17. Canal Companies thereafter submitted to the Department a copy of their *Petition*, including the accompanying exhibits, as their comments for consideration by the Director in this matter. Letter to Director David R. Tuthill, Jr. from John K. Simpson (Jan. 31, 2008).

18. Canal Companies seek to have water right no. 01-7011 licensed with the same subordination condition as that in the Milner Permit, which subordinates water right 01-7011 “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.”³

19. If the Director were to issue the license for water right no. 01-7011 with the subordination condition sought by the Canal Companies, the right holder would be entitled to seek administration, including curtailment, of junior-priority recharge water rights diverting above Milner Dam.

20. In most years, requiring that a flow of 5,714 c.f.s. be available at Milner Dam before junior-priority recharge water rights located above Milner Dam would be allowed to divert would foreclose most recharge diversions upstream from Milner Dam for purposes of recharging the Snake River Plain aquifer.

II. The 1928 Constitutional Amendment

21. The constitutional debates over section 3 of article XV of the Idaho Constitution reflect that the delegates recognized that if hydropower uses of the state’s water were not limited, hydropower potentially could preclude agricultural development.⁴

22. Renewed concerns involving the use of water for hydropower purposes in the 1920s led to an amendment of section 3, article XV of the Idaho Constitution adopted in 1928, which provides that “the state may regulate and limit the use [of water] for power purposes.” Idaho Const. Art. XV, § 3 (including “Compiler’s notes” for the 1928 amendment).

23. In 1985, in response to the Swan Falls controversy, the Idaho Legislature authorized the Director to subordinate a water right license for hydropower purposes to “subsequent upstream beneficial depletionary uses.” Idaho Code § 42-203B(6).

III. The State Water Plan

24. Section 7 of Article XV of the Idaho Constitution was ratified in 1964 and amended in 1984, and provides for a “State Water Resource Agency” empowered to “formulate and implement a state water plan for optimum development of water resources in the public interest.”

³ Water right permit no. 01-7011.

⁴ II PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF IDAHO 1889, 1125-26 (I.W. Hart ed., 1912).

There shall be constituted a Water Resource Agency, composed as the Legislature may now or hereafter prescribe [T]he State Water Resource Agency shall have power to formulate and implement a state water plan for optimum development of water resources in the public interest. The Legislature of the State of Idaho shall have the authority to amend or reject the state water plan in a manner provided by law.

Idaho Const. Art. XV, § 7.

25. In 1965 the Idaho Legislature thus established the Idaho Water Resource Board: “Pursuant to the provisions of article 15, section 7, of the constitution of the state of Idaho, there is hereby established as the constitutional water agency within the department of water resources the Idaho water resource board” Idaho Code § 42-1732. The Legislature has authorized the Idaho Water Resource Board to formulate “a comprehensive state water plan,” subject to legislative approval:

The board shall, subject to legislative approval, progressively formulate, adopt and implement a comprehensive state water plan for conservation, development, management and optimum use of all unappropriated water resources and waterways of this state in the public interest. . . . The comprehensive state water plan shall be based upon studies and public hearings in affected areas at which all interested parties shall be given the opportunity to appear, or to present written testimony in response to published proposals for such policy programs and proposed designations.

Idaho Code § 42-1734A(1).

26. The “comprehensive state water plan” contemplated by the Idaho Constitution and Idaho Code § 42-1734A(1) is entitled the “Idaho State Water Plan,” and was first adopted and published in 1976. In the 1976 Idaho State Water Plan, the Idaho Water Resource Board established, “after considering all current and potential uses of water on the main stem Snake River,” an average daily protected flow of “0 cfs” at the U.S.G.S. Milner gaging station below Milner Dam. 1976 Idaho State Water Plan at 116 (Policy 32).⁵

27. In 1978, the Idaho Legislature enacted Idaho Code § 42-1736B, which provides, in part: “All future filings, permits and decrees on the unappropriated waters of this state shall be determined with respect to the effect such filings, permits and decrees will have on the minimum daily flow of the affected stream or river” Idaho Code § 42-1736B(1).

28. The 1982 revision of the Idaho State Water Plan reaffirmed the “0 cfs” minimum flow at Milner Dam. 1982 Idaho State Water Plan at 42 (Policy 32). The 1982 Idaho State Water Plan also provided that: “Applications for future water permits shall not be approved if

⁵ See *Idaho Power Co. v. State*, 104 Idaho 570, 574, 661 P.2d 736, 740 (1983) (“The state water plan was adopted by the Water Resource Board December 29, 1976, and was effective as the date of its adoption, without any legislative action.”).

they are in conflict with the State Water Plan adopted by the Idaho Water Resource Board in the public interest.” *Id.* at 21 (Policy 1).

29. In 1985, the Idaho Water Resource Board adopted amendments to the Idaho State Water Plan that were intended to implement the Swan Falls Agreement. The amendments provided, in part: “It is the policy of Idaho that the ground water and surface water of the [Snake River] basin be managed to meet or exceed a minimum average daily flow of zero measured at the Milner gaging station.” “A Resolution” at 1, *In the Matter of Policy 32 of the State Water Plan* (Idaho Water Resource Board, Mar. 1, 1985). The 1985 amendments also provided: “The zero flow established at Milner means that river flows downstream from that point to Swan Falls Dam may consist almost entirely of ground-water discharge during portions of low-water years. The Snake River Plain aquifer which provides this water must therefore be managed as an integral part of the river system.” *Id.* at 2. The Idaho Legislature ratified these amendments in 1985. 1985 Idaho Sess. Laws 514.⁶

30. The 1986 revision of the Idaho State Water Plan included the 1985 amendments substantially unchanged, although the policies were re-numbered. 1986 Idaho State Water Plan at 35 (Policy 5A). The 1986 revision of the Idaho State Water Plan also provided:

It is the policy of Idaho that approval of applications to appropriate the waters of the state shall be subject to the requirement that the use is in the public interest as set forth in the State Water Plan and by state law. Having been adopted as being in the public interest, the State Water Plan shall be considered when establishing the public interest for water allocations.

Id. at 20 (Policy 1B). The Idaho Legislature approved the 1986 Idaho State Water Plan. Sen. Con. Res. No. 108, 1987 Idaho Sess. Laws 818-19.

31. In 1988, the Idaho Legislature enacted Idaho Code § 42-1734B, which provides, in part, that all state agencies “shall exercise their duties in a manner consistent with the comprehensive state water plan. These duties include but are not limited to the issuance of . . . licenses” Idaho Code § 42-1734B(4).

32. The 1992 revision of the Idaho State Water Plan provided: “*The state recognizes that the exercise of water rights above Milner Dam has and may reduce the flow at the dam to zero.*” 1992 Idaho State Water Plan at 28 (Policy 5A) (emphasis in original). The explanatory text following Policy 5A stated: “The zero flow at Milner Dam is not a target or a goal to be achieved, and may not necessarily be desirable. It is, rather, a recognition of the current condition in which zero flow passes Milner Dam during certain periods of time.” *Id.* Like the 1986 revision of the Idaho State Water Plan, the 1992 revision again provided that “[t]he Snake River Plain aquifer which provides this water [Snake River flows downstream from Milner Dam] must therefore be managed as an integral part of the river system.” *Id.* Also like the 1986 revision, the 1992 revision of the State Water Plan provided:

⁶ Chapter 204 (Senate Bill 1205).

It is the policy of Idaho that approval of applications to appropriate the waters of the state shall be subject to the requirement that the use is in the public interest as set forth in the State Water Plan and by state law.

Having been adopted as being in the public interest, the State Water Plan shall be considered when establishing the public interest for water allocations.

Id. at 16 (Policy 1B) (emphasis in original). The 1992 revision of the Idaho State Water Plan was submitted to the Idaho Legislature for review and became effective sixty days following submission without legislative action pursuant to Idaho Const. Art. 15, § 7.

33. The current “Idaho State Water Plan” was adopted by the Idaho Water Resource Board in 1996. Through legislation ratifying the 1996 revision of the Idaho State Water Plan, the Legislature amended Policy 5B of the Plan to add: “The exercise of water rights above Milner Dam has and may reduce the flow at the dam to zero.” 1997 Idaho Sess. Laws 67, 71. The language added by the Legislature is part of the Idaho State Water Plan’s policy for “Snake River Minimum Flows.” Idaho State Water Plan at 17 (Policy 5B).

34. Findings of Fact later determined to be Conclusions of Law are herein made as Conclusions of Law.

CONCLUSIONS OF LAW

1. Paragraphs 21 through 33 of the Director’s findings of fact are incorporated herein by this reference in their entirety and made a part of the Director’s conclusions of law. A threshold issue raised by the Canal Companies is whether the Director may consider comments submitted in response to the *Notice of Intent to Issue License*. The Canal Companies have asserted that the Director acted outside the scope of his authority by reopening the administrative record to comments after the protest period closed.⁷ Although the comments submitted are included in the agency record, they were not considered by the Director. As addressed below, the form of the subordination condition in the license for water right no. 01-7011 is controlled by and is based solely on provisions of state law and the Idaho State Water Plan.

2. The Director is statutorily authorized to issue water right licenses, but prior to issuing a license must be “satisfied that the law has been fully complied with”:

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

Idaho Code § 42-219(1) (emphasis added).

⁷ *Writ Dismissal Order* at 5. The district court held that, “The *Notice* did not reopen a protest period nor did it give those submitting comments party status.” *Id.* at 9.

3. Several statutory provisions specific to water right permits for power purposes are contained in Idaho Code §§ 42-206 through -209 requiring approval by the Director of any sale, transfer, assignment or mortgage of a permit to appropriate water for power purposes and setting forth consequences for failure to comply. Although the file for permit no. 01-7011 contains several documents suggesting that an interest in the permit may have been assigned, pledged or mortgaged as security for financing of the project or for other purposes, no document assigning, pledging or mortgaging the permit has been submitted by the Canal Companies or otherwise made available to the Department. For example, the file reflects that orders from FERC relating to the Milner project have been issued to Idaho Power Company and Milner Dam, Inc., although neither entity is shown in the Department file to hold any interest in permit no. 01-7011. *See Order Approving Transfer of License*, Project No. 2899 (FERC May 2 1989) (“Approval of the transfer is contingent upon transfer of the title of the properties under license”); *Order Approving Transfer of License*, Project No. 2899 (FERC February 10, 1992) (Transferring Canal Companies interest in FERC license to Milner Dam, Inc.).

4. The Director’s licensing determinations must be consistent with the Idaho State Water Plan:

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

Idaho Code § 42-1734B(4) (emphasis added).

5. The Idaho State Water Plan provides, in part: “It is the policy of Idaho to insure that public interests, existing water rights, related settlement agreements, and the future water and energy needs of the State are considered *in hydropower licensing*.” Idaho State Water Plan at 14 (Policy 4D) (emphasis added). The Idaho State Water Plan expressly recognizes that “[h]ydropower water rights may be limited to a specific term and subordinated to upstream depletionary uses [Idaho Code, 42-203B(6) and (7)].” *Id.* (brackets in original).

6. The Director is statutorily authorized to subordinate a water right license for hydropower purposes to “subsequent upstream beneficial depletionary uses” and “to limit a permit or license for power purposes to a specific term”:

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. The director shall also have the authority to limit a permit or license for power purposes to a specific term.

Subsection (6) of this section shall not apply to licenses which have already been issued as of the effective date of this act.

Idaho Code § 42-203B(6) (emphasis added).

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

8. Idaho Code § 42-203B(6), enacted in 1985, was an implementation of the State's constitutional authority to "regulate and limit" water rights for power purposes. *See* Idaho Code § 42-203B(1) ("The legislature finds and declares that it is in the public interest to specifically implement the state's power to regulate and limit the use of water for power purposes . . ."). 1985 Idaho Sess. Laws, ch. 17, § 2, p. 25-26; *see also Miles v. Idaho Power Co.*, 116 Idaho 635, 637, 778 P.2d 757, 759 (1989) ("Subsequently, our legislature enacted legislation to implement the [Swan Falls] agreement. *See* 1985 Idaho Sess. Laws, ch. 14-17 . . .").

9. Idaho Constitution, Article XV, § 3 provides: "The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, *except that the state may regulate and limit the use thereof for power purposes.*" Emphasis added.

10. There is an extensive record of legislative history associated with the enactment of Idaho Code § 42-203B. *See, e.g.*, "Statement of Purpose" for 1985 Senate Bill 1008 ("This legislation would implement the state's authority under the 1928 amendment to Article 15, Section 3 of the Idaho Constitution to limit and regulate the use of water for power purposes Future hydropower water rights could be subordinated to future upstream beneficial uses").

11. Upon passing the legislation that enacted and codified the provisions of Idaho Code § 42-203B(6), the Idaho Senate unanimously adopted a "Statement of Legislative Intent" for the bill. JOURNAL OF THE STATE SENATE, ORGANIZATIONAL SESSION AND FIRST REGULAR SESSION OF THE FORTY-EIGHTH LEGISLATURE OF THE STATE OF IDAHO, 1985 at 58. The "Statement of Legislative Intent" states, in part: "*The Director of the Department of Water Resources is empowered as to all future licenses to subordinate the rights granted in either a permit or a license to subsequent upstream beneficial depletionary uses, to ensure the availability of water for such uses.*" *Id.* at 60 (emphasis added).

12. When explaining the legislation that became Idaho Code § 42-203B(6) to members of the Senate Resources and Environment Committee, the proponents of the legislation stated that the provision was intended "to make sure that as best we can foresee we do not get ourselves into another Swan Falls situation in the future." Minutes, Senate Resources and Environment Committee, January 18, 1985, p. 9 (Pat Kole); *see also id.* ("The primary reason I see [section 203B(6)] there is to avoid Swan Falls reoccurring again.") (Ken Dunn).

13. The Idaho Legislature has provided that:

For the purposes of the determination and administration of rights to the use of the waters of the Snake river or its tributaries downstream from Milner dam, no portion of the waters of the Snake river or surface or ground water tributary to the Snake river upstream from Milner dam shall be considered.

Idaho Code § 42-203B(2).

14. The subordination condition in the Milner Permit would permit a flow of 5,714 c.f.s. to pass from the Snake River upstream of Milner Dam to the Snake River downstream from Milner Dam and thereby potentially preclude future uses of water for recharge upstream from Milner Dam. The subordination condition in the Milner Permit would therefore impermissibly circumvent Idaho Code § 42-203B(2), as quoted above. Through this statute, the Legislature directed that for purposes of determining and administering hydropower water rights below Milner Dam, the waters above Milner Dam shall not be considered. 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. 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. Thus, including the subordination condition of the Milner Permit in the license for water right no. 01-7011 would be contrary to the plain language of Idaho Code § 203B(2).

15. For similar reasons, the subordination condition in the Milner Permit impermissibly conflicts with the Idaho Legislature's determination that "[t]he exercise of water rights above Milner Dam has and may reduce the flow at the dam to zero," and with the identical language in Policy 5B of the Idaho State Water Plan. 1997 Idaho Session Laws 71; Idaho State Water Plan at 17. 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. Thus, including the subordination condition of the Milner Permit in the license for water right no. 01-7011 would be contrary to the plain language of section 1 of chapter 38 of the 1997 Idaho Session Laws, and would not be consistent with Policy 5B of the Idaho State Water Plan.

16. Policy 1J of the Idaho State Water Plan provides: "It is the policy of Idaho that managed recharge be encouraged, pursuant to state law." Idaho State Water Plan at 7. The Legislature has expressly ratified this policy. 1997 Idaho Session Laws 68. The subordination

condition in the Milner Permit would interfere with and potentially preclude diversions of water upstream from Milner Dam for meaningful recharge of the Snake River Plain aquifer much of the time in most years. Thus, including the subordination condition of the Milner Permit in the license for water right no. 01-7011 would discourage recharge and therefore would not be consistent with Policy 1J of the Idaho State Water Plan.

17. Policy 5H of the Idaho State Water Plan provides: “It is the policy of Idaho to seek to maintain spring flows in the American Falls and Thousand Springs reaches of the Snake River which will sustain beneficial uses of surface and ground water supplies in accordance with state law.” Idaho State Water Plan at 19. The Legislature has expressly ratified this policy. 1997 Idaho Session Laws 71. Further, the “Comment” to Policy 5H of the Idaho State Water Plan states:

Spring discharge in the American Falls and Thousand Springs reaches of the Snake River are vital to the Snake River Basin and Idaho economy. The springs near American Falls provide an important part of Snake River flow appropriated by Magic Valley appropriators. In the Thousand Springs reach, spring flow is the only practical source of water for many of the state’s aquaculture facilities. During portions of low-water years, river flows downstream from Milner Dam to the Murphy gaging station consist almost entirely of ground-water discharge from the Thousand Springs reach. *Maintaining these discharges should be the goal of water managers. Managed recharge of the aquifers and continued efforts to efficiently use ground water are two strategies for maintaining spring discharges in these reaches.*

Idaho State Water Plan at 19 (“Comment” to Policy 5H) (emphasis added).

18. Similarly, the “Comment” to Policy 1J of the Idaho State Water Plan states: “*Managed aquifer recharge may enhance spring flows and maintain desirable aquifer levels. Managed recharge should be monitored to document the beneficial effects on the state’s water resources and to minimize any concerns or issues.*” Idaho State Water Plan at 7 (“Comment” to Policy 1J) (emphasis added); *see also* Idaho State Water Plan at 6 (“Aquifers, in turn, serve as underground reservoirs, and can stabilize stream discharges during dry periods.”) (“Comment” to Policy “1F – Conjunctive Management”). These provisions of the Idaho State Water Plan expressly contemplate that managed recharge is an important strategy to maintain, enhance and stabilize aquifer levels and spring discharges in the Thousand Springs reach. The subordination condition in the Milner Permit would be inconsistent with enhancing or stabilizing aquifer levels and/or spring discharges much of the time in most years in contravention of Policies 5H and 1J of the Idaho State Water Plan.

19. Including the subordination condition in the Milner Permit in the license for water right no. 01-7011 would also tend to create “another Swan Falls situation,” the avoidance of which was a principal reason for empowering the Director, under Idaho Code § 42-203B(6), to subordinate hydropower water right permits and licenses. Minutes, Senate Resources and Environment Committee, January 18, 1985, p. 9. The issue in the Swan Falls controversy was whether certain hydropower water rights “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.” JOURNAL OF THE STATE SENATE, ORGANIZATIONAL SESSION AND FIRST REGULAR SESSION OF THE FORTY-EIGHTH LEGISLATURE OF THE STATE OF IDAHO, 1985 at 58 (parenthetical in original). The Legislature resolved this issue with respect to future hydropower water rights by authorizing the Director to subordinate hydropower water right permits and licenses in order to prevent such water rights from having the effect of blocking “uses which would be beneficial to Idaho.” *Id.* As discussed above, the Legislature and the Idaho Water Resource Board have determined that recharge uses upstream from Milner Dam are beneficial to Idaho, and including the subordination condition of the Milner Permit in the license for water right no. 01-7011 would potentially preclude recharge uses upstream of Milner Dam much of the time in most years. Thus, including the subordination condition of the Milner Permit in the license for water right no. 01-7011 would be inconsistent with the legislative intent that Idaho Code § 42-203B(6) be used to prevent “another Swan Falls situation.”

20. The Idaho Legislature and the Idaho Water Resource Board have already carefully considered and weighed the policy questions implicit in the question of the form of the subordination condition for water right no. 01-7011. The Legislature has determined that the Snake River upstream from Milner Dam should be administered for purposes of hydropower generation separate and independent from the Snake River downstream of Milner Dam for purposes of determining and administering water rights above and below Milner Dam, and that the source of flows for water rights downstream from Milner Dam is limited to flows arising downstream from Milner Dam. The Legislature and the Idaho Water Resource Board have determined that flows at Milner Dam may be reduced to zero for purposes of satisfying water rights above Milner Dam, that flows downstream from Milner Dam are to be principally supplied by ground water discharge from the Snake River Plain aquifer, that the Snake River Plain aquifer and the Snake River must be managed as a single resource, and that managed recharge is an important component of the unified management regime necessary to maintain, enhance and stabilize aquifer levels, spring discharges and stream flows in the river-aquifer system. The Director is statutorily obligated to adhere to these determinations in issuing the license for water right 01-7011. Including the subordination condition of the Milner Permit in the license for water right 01-7011 would directly contravene these determinations.

21. The foregoing discussion demonstrates that full subordination of water right no. 01-7011 is consistent with Idaho Code §§ 42-234(2) and 42-4201A(2). Sections 42-234(2) and 42-4201A(2) do not specifically address the question of the determination and administration of water rights with respect to river flows upstream and downstream from Milner Dam. The general directive that recharge water rights shall be secondary to prior perfected rights does not control over specific legislative determinations and statutory provisions limiting the source of hydropower uses downstream from Milner Dam to flows arising downstream from Milner Dam, and providing that all flows arising above Milner Dam may be diverted for uses above Milner Dam. *See Mulder v. Liberty Northwest Ins. Co.*, 135 Idaho 52, 57, 14 P.3d 372, 377 (2000) (“A basic tenet of statutory construction is that the more specific statute or section addressing the issue controls over the statute that is more general.”). For similar reasons, Idaho Code §§ 42-234(2) and 42-4201A(2) do not override or repeal Idaho Code §§ 42-203B(2), 42-1734B(4) or

1997 Idaho Session Laws chapter 38, section 1 by implication.⁸ *See Gooding County v. Wybenga*, 137 Idaho 201, 204, 46 P.3d 18, 21 (2002) (“Repealing or amending a statute by implication is disfavored in the law, and it will not be inferred absent a clear, legislative intent.”). Rather, sections 42-234(2) and 42-4201A(2) must be interpreted harmoniously with Idaho Code §§ 42-203B(2), 42-1734B(4) and 1997 Idaho Session Laws chapter 38, section 1. *See State v. Barnes*, 133 Idaho 378, 380, 987 P.2d 290, 292 (1999) (“Statutes relating to the same subject matter, although in apparent conflict, are to be construed in harmony, if reasonably possible.”) Interpreting sections 42-234(2) and 42-4201A(2) as prohibiting the Director from following the clear mandates of Idaho Code §§ 42-203B(2) and section 1 of chapter 38 of the 1997 Idaho Session Laws would unnecessarily introduce tension among statutes that can be construed harmoniously, for reasons previously discussed.⁹

22. The subordination condition proposed by the Canal Companies contravenes the applicable statutes and provisions of the Idaho State Water Plan in effect at the time. The above-quoted provisions of Idaho Code § 42-203B were in force in 1987, having been enacted in the 1985 and 1986 legislative sessions. Further, Idaho Code § 42-1736B(1) had been in force since 1978, and provided that “[a]ll future filings, permits and decrees on the unappropriated water of this state shall be determined with respect to the effect such filings, permits and decrees will have on the minimum daily flow of the affected stream or river” The minimum daily flow for the Milner gaging station under the Idaho State Water Plan at the time was “0 c.f.s.,” and the plan provided that the Snake River Plain aquifer “must therefore be managed as an integral part of the [Snake] river system.” 1986 Idaho State Water Plan at 35 (Policy 5A). The Idaho State Water Plan further provided at the time that “approval of applications to appropriate the waters of the state shall be subject to the requirement that the use is in the public interest as set forth in the State Water Plan” and “the State Water Plan shall be considered when establishing the public interest for water allocations.” *Id.* at 20 (Policy 1B). Thus, for reasons similar to those discussed above, the subordination condition included in the permit in 1987 contravenes applicable statutes and the provisions of the Idaho State Water Plan.

23. In sum, the Director is authorized, by the Legislature’s statutory implementation of the State’s constitutional authority to regulate and limit water rights for power purposes, to subordinate a license for a hydropower water right. While the Director has discretion in exercising this authority, such discretion must be exercised by the Director consistent with his statutory obligation to ensure that the license complies with the applicable law and is consistent with the Idaho State Water Plan. As discussed above, the Idaho Legislature and the Idaho Water

⁸ *See* 1997 Idaho Sess. Laws 71 (“The exercise of water rights above Milner Dam has and may reduce the flow at the dam to zero.”).

⁹ This conclusion is further supported by the fact that sections 42-234(2) and 42-4201A(2) provide that the recharge water rights shall be secondary to the hydropower water rights covered by the Swan Falls Agreement (“those water rights for power purposes that may otherwise be subordinated by contract entered into by the governor and Idaho power company on October 25, 1984”) but do not make the recharge water rights secondary to the Milner hydropower water right, which had been permitted seven years earlier, in 1977. Thus, with respect to hydropower water rights—a special class of water rights that the State is constitutionally authorized to “regulate and limit”—normal rules of statutory construction would limit the application of sections 42-234(2) and 42-4201A(2) to the hydropower water rights covered by the Swan Falls agreement. *See Twin Falls County v. Cities of Twin Falls and Filer*, 143 Idaho 398, 402, 146 P.3d 664, 668 (2006) (“Idaho has recognized the rule of *expressio unius est exclusio alterius*—‘where a constitution or statute specifies certain things, the designation of such things excludes all others.’”).

Resource Board have expressly addressed and conclusively decided the policy matters raised by the question of the form of the subordination condition for the license for water right no. 01-7011. Thus, this question is controlled by affirmative enactments of the Idaho Legislature and the policies of the Idaho State Water Plan as ratified by the Idaho Legislature. In short, while the Director has discretion with respect to exercising his authority to subordinate a hydropower water right license under Idaho Code § 42-203B(6), the Director does not have discretion to ignore clear statutory language and provisions of the Idaho State Water Plan, or to approve subordination limitations that are directly contrary to them. For the reasons discussed above, the subordination condition in the Milner Permit is irreconcilably at odds with the cited statutes and policies of the Idaho State Water Plan. Accordingly, the Director concludes that the subordination condition for the license for water right no. 01-7011 should provide that the water right is subordinate to all subsequent upstream beneficial depletionary uses, other than hydropower, within the Snake River Basin of the state of Idaho and does not give rise to any claim against, or right to interfere with, any such junior-priority upstream rights established pursuant to state law. Idaho Code § 42-203B(6); Idaho State Water Plan at 14 (“Comment” to Policy 4D). The reference to “subsequent upstream beneficial depletionary uses” in the subordination condition includes uses for managed recharge which may deplete flows in the Snake River at Milner Dam.

24. The argument of the Canal Companies that their rights to the use of water under the Milner Permit vested upon the submission of proof of beneficial use to the Department in 1993 was rejected by the district court.¹⁰

ORDER

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

Source:	Snake River
Beneficial Use:	Power
Period of Use:	01/01 to 12/31
Diversion Rate:	5,714.70 cfs
Diversion Volume:	2,390,000.0 AF
Points of Diversion:	NW1/4SW1/4 Sec. 28, Twp 10S, Rge 21E, B.M. L8 (NE1/4SE1/4) Sec. 29, Twp 10S, Rge 21E, B.M.
Places of Use:	NE1/4SE1/4 Sec. 29, Twp 10S, Rge 21E, B.M. L8 (SW1/4NE1/4) Sec. 30, Twp 10S, Rge 21E, B.M.

Conditions of Approval:

1. The diversion and use of water for hydropower purposes under this water right shall be subordinate to all subsequent upstream beneficial depletionary uses, other than

¹⁰ *Writ Dismissal Order* at 11-12 (Holding that following the beneficial use examination the issuance of the license is not a ministerial act and citing a series of Idaho cases holding that “a right to use the waters of this state remains inchoate until a license is actually issued by IDWR.”)

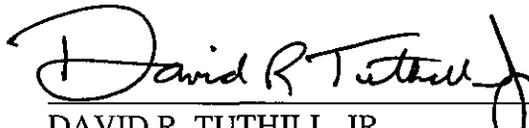
hydropower, within the Snake River Basin of the state of Idaho that are initiated later in time than the priority of this water right and shall not give rise to any right or claim against any junior-priority rights for the depletionary or consumptive beneficial use of water, other than hydropower, within the Snake River Basin of the state of Idaho initiated later in time than the priority of water right no. 01-7011.

2. A measuring device of a type approved by the Department shall be permanently installed and maintained as part of the diverting works.
3. Use of water under this right shall be non-consumptive.
4. This right does not constitute Idaho Public Utilities Commission or Federal Energy Regulatory Commission approval that may be required.
5. The diversion and use of water for hydropower purposes under this water right is subject to review by the Director after the date of expiration of Milner Project License No. 2899 (11/30/2038) issued by the Federal Energy Regulatory Commission. Upon appropriate findings relative to the interest of the public, the Director may cancel all or any part of the use authorized herein and may revise, delete or add conditions under which the right may be exercised.

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

IT IS FURTHER ORDERED that any person aggrieved by this decision shall be entitled to a hearing before the Director to contest the action taken provided the person files with the Director, within fifteen (15) days after receipt of written notice of the order, or receipt of actual notice, a written petition stating the grounds for contesting the action and requesting a hearing. Any hearing conducted shall be in accordance with the provisions of chapter 52, title 67, Idaho Code, and the Rules of Procedure of the Department, IDAPA 37.01.01. Judicial review of any final order of the Director issued following the hearing may be had pursuant to Idaho Code § 42-1701A(4).

DATED this 20th day of October 2008.



DAVID R. TUTHILL, JR.
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of October 2008, I caused a true and correct copy of the foregoing Order to be sent by U.S. Mail, postage paid to the following:

John A. Rosholt, Esq.
Travis L. Thompson, Esq.
Barker Rosholt & Simpson LLP
113 Main Avenue West, Suite 303
P.O. Box 485
Twin Falls, ID 83303-00485

John K. Simpson, Esq.
Barker Rosholt & Simpson LLP
1010 W. Jefferson, Suite 102
P.O. Box 2139
Boise, ID 83701-2139

Courtesy Copies

Randall C. Budge, Esq.
Racine Olson Nye Budge & Bailey
201 East Center Street
P.O. Box 1391
Pocatello, Idaho 83204-1391

Robert L. Harris, Esq.
1000 Riverwalk Dr. Suite 200
P.O. Box 50130
Idaho Falls, Idaho 83405

Craig B. Evans, Chairman
Bingham Ground Water District
1725 Riverton Road
P.O. Box 1268
Blackfoot, Idaho 83221

Lyle Swank, Manager
Department of Water Resources
Eastern Regional Office
900 North Skyline Dr., Ste A
Idaho Falls, ID 83402-1718

Allen D. Merritt, Manager
Department of Water Resources
Southern Regional Office
1341 Fillmore Street, Suite 200
Twin Falls, ID 83301-3380



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