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BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

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| IN THE MATTER OF LICENSING WATER RIGHT PERMIT NO. 01-7011 IN THE NAME OF TWIN FALLS CANAL COMPANY AND NORTH SIDE CANAL COMPANY | **UPPER SNAKE WATER USERS' AND GROUND WATER DISTRICTS' REPLY TO CANAL COMPANIES' MEMORANDUM IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT** |

Mud Lake Water Users, Independent Water Users, Jefferson Canal Company, Monteview Canal Company, Producer's Canal Company, Fremont-Madison Irrigation District and the Aberdeen-Springfield Canal Company (collectively, the "Upper Snake Water Users"), and Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Clark-Jefferson Ground Water District, and Madison Ground Water District (collectively, the "Ground Water Districts"), acting for and in behalf of their member water users, submit this *Reply to Canal Companies' Memorandum in Opposition to Motion for Summary Judgment.* This Memorandum in reply to the *Canal Companies' Memorandum in Opposition to Idaho Water Resource Board, Upper Snake Water Users' and Ground Water Districts' Motion for Summary Judgment* (hereinafter "Response Brief") filed on March 5, 2010.

## I. SUMMARY OF CANAL COMPANIES' ARGUMENT.

The arguments raised in the Canal Companies' response to the movants'[1] motions for summary judgment can be summarized as follows:

1. Despite the absence of a statute mandating a time period in which the Idaho Department of Water Resources must issue a license after proof of beneficial use is submitted for a permit, and despite a prior holding from Judge Melanson holding that a **hydropower** water right vests upon issuance of a license from the Department, the Canal Companies argue that they obtained a protectable and compensable vested interest for their **hydropower** permit once they completed its project, and submitted proof of beneficial use to the Department.

2. While Director Higginson properly exercised his authority under Idaho Code § 42-203B(6) while including conditions for Permit No. 01-7011, Director Tuthill exceeded his discretionary ability exercising that same authority upon issuance of a license for 01-7011.

3. Despite the fact that water diverted for the Milner Hydroelectric Project ends up back in the Snake River Canyon just over a mile below Milner Dam after its diversion into the Twin Falls Canal without being used for any other purpose, the Canal Companies argue that 01-

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1The Upper Snake Water Users, the Ground Water Districts, and the Idaho Water Resource Board.

7011 is no different than any other Basin 01 water right, and that 01-7011 has always and continues to comply with Idaho law and the zero flow at Milner principle.

4. Despite a clear distinction between federal and state jurisdiction and authority, the Canal Companies argue that the Federal Energy Regulatory Commission's exclusive licensing authority as it relates to the **hydropower project subordination condition** precludes the Department from adding the new subordination provision to the **State of Idaho water right license**.

5. Despite the Director's clear finding that he did not consider comments filed by interested parties, the Canal Companies assert that the Department employed unlawful procedure when it reopened the Milner License for new comment and objection and ultimately changed the terms of the vested Milner Hydroelectric water right.

As the hearing officer is aware, the licensing of Water Right No. 01-7011 (the "Milner License") is at issue in this matter. The Milner License was issued by the Idaho Department of Water Resources ("IDWR" or "Department") to the permit holders–Twin Falls Canal Company and North Side Canal Company (the "Canal Companies")–on October 20, 2008. One of the conditions included by IDWR that is of substantial import to the Upper Snake Water Users and the Ground Water Districts is Condition No. 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 hydropower, within the Snake River Basin of the state of Idaho that are initiated later in time than the priority of this 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]

The Upper Snake Water Users, the Ground Water Districts, and Idaho Water Resource Board moved for summary judgment prior to the February 12, 2010 deadline; and after the parties agreed to extend the dates for responsive briefing, the Canal Companies submitted their *Memorandum in*

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2 *Final Order* at 14-15.

*Opposition to Idaho Water Resource Board, Upper Snake Water Users' and Ground Water Districts' Motion for Summary Judgment* on March 5, 2010.

For the reasons set forth below, the assertions made by the Canal Companies have not raised genuine issues of material fact that warrant a hearing on this matter, nor have they presented sufficient persuasive authority that would preclude the hearing officer from granting the movants' motions for summary judgment.

## II. STATEMENT OF UNDISPUTED FACTS

The Upper Snake Water Users and Ground Water Districts agree with and incorporate herein by reference the facts and procedural background set forth in the *Memorandum in Support of IWRB's Motion for Summary Judgment* on file herein.[3]

## III. ARGUMENT

### A. Legal Standards

Summary judgment is proper when "the pleadings, depositions, 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."[4] "All disputed facts are to be construed liberally in favor of the non-moving party, and all reasonable inferences that can be drawn from the records are to be drawn in favor of the non-moving party."[5] Yet, to withstand a motion for summary

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3 We should note that with regard to the history set forth in the Canal Companies Response Brief regarding the history of the Milner Hydroelectric Facility, we do not completely agree with the recounting of history set forth in that brief.

4 I.R.C.P. 56(c).

5 *Robert Comstock LLC v. Keybank Nat'l Assn.*, 142 Idaho 568, 130 P.3d 1106 (2006).

judgment, the opposing party's case must be anchored in something more solid than speculation. A mere scintilla of evidence is insufficient to create a genuine issue of material fact.

**B. As held by Judge Melanson in the Mandamus Order[6] issued prior in this matter, which is not dicta, but is the law of this case, a hydropower water right vests upon issuance of the license, not upon the submission of proof of beneficial use.**

Despite the absence of a statute mandating a time period in which the Department must issue a license after proof of beneficial use is submitted for a permit, and despite a prior holding from Judge Melanson[7] holding that a hydropower water right vests upon issuance of a license from the Department, the Canal Companies argue that they obtained a protectable and compensable vested interest for their hydropower permit once they completed their project, and submitted proof of beneficial use to the Department.[8]

In making this argument, the Canal Companies ignore the holding from Judge Melanson and Judge Wood–the then current and former presiding judges in the SRBA–specifically regarding the Milner License that a hydropower right vests upon issuance of the license. Judge Wood held that "the water right vested at the time the license was issued."[9] Further, in their arguments to the contrary, the Canal Companies blur the issue by changing the focus of the issue from a *legal* analysis to a *fairness* analysis.

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6 *North Side Canal Co. and Twin Falls Canal Co.* v. Tuthill, Case No. CV 2007-1093 (2008). In this decision, Judge Melanson dismissed the request for a writ of mandate in his Order Granting Motion to Dismiss Petitioners Write of Mandate (hereinafter, "Mandamus Order"). This decision is attached at Exhibit A to the *Affidavit of Luke H. Marchant in Support of Upper Snake Water Users' and Ground Water Districts' Motion for Summary Judgment.*

7 *Id.*

8 *Response Brief* at 38.

9 *Mandamus Order* at 11.

As a general principle, we presume that water rights users are all frustrated with the time it takes for the Department to issue licenses once proof of beneficial use is submitted for a water right permit. For example, counsel for the Upper Valley Water Users was and is involved in SRBA proceedings where the court is waiting on IDWR to issue licenses so that the water rights can receive a partial decree in the Snake River Basin Adjudication. Proof of beneficial use for these rights was submitted prior to 1987, some more than a decade before proof of beneficial use was submitted by the Canal Companies for Permit No. 01-7011.

For example, Water Right No. 21-7133 was finally licensed on January 21, 2008. A partial decree was entered just over a year later on February 19, 2009, which was amended to fix a clerical error on April 1, 2009. The original permit for this water right was filed on July 18, 1977, and proof of beneficial use was submitted on November 23, 1979. On July 19, 1987, IDWR conducted a field examination, complete with recommendations for issuance of the license. Nevertheless, the license was not issued until over twenty (20) years after the field examination was done, and over thirty (30) years since the application for permit was filed. A related water right, Water Right No. 21-7190, which is used in conjunction with Water Right No. 21-7133, was likewise finally licensed at the same time and likewise had proof of beneficial use submitted prior to 1987.

Without doubt there are many other permits waiting to be licensed by IDWR, and most would agree that waiting for the issuance of such a license for an extended period of time is unfair, but it is not illegal nor does it change the statutory authority of the Director to include conditions on the license in accordance with Idaho law.[10] Stated another way, the issue before the hearing officer is

10 We should further note that there is no evidence that the Milner License was intentionally singled out and not issued. Given the backlog of licensing that IDWR currently has, the license was treated just as any other license.

not to rule on the *fairness* of a delay for issuance of a license, or the priority that IDWR should place on its many duties. Rather, it is to rule on what is *legally required or permitted* under Idaho law regarding **hydropower** permits or licenses. The legal analysis demands an answer to the question of whether there is a statutory time period in which IDWR must license a permit.

**1. There is no statutory time period within which the Department must issue a license once proof of beneficial use is submitted.**

As held in the Mandamus Order, Idaho Code § 42-219 does not contain a time period in which a license must be issued after proof of beneficial use is submitted.[11] Yet despite the absence of such a requirement, the Canal Companies insist that a water right vests once proof of beneficial use is submitted, which is entirely contrary to Idaho's statutory scheme.

Statutorily, the Canal Companies have not explained how their argument can be consistent with existing statutes. Idaho Code § 42-219(3) requires the license to include the "date when proof of beneficial use of such water was made, . . ." If a license vested when proof of beneficial use was submitted, why would the license then require a notation of when proof was submitted? Such an inclusion would be superfluous because the license would vest on the date proof was submitted. Indeed, it appears that issuance of license would likewise be superfluous if the right vested based upon what was alleged in a proof of beneficial use filing made by the water right user.

It examining the Canal Companies' arguments, two critical distinctions must be made. First, the Milner License is a hydropower license, and as set forth below, is a unique secondary class of water rights subject to unique regulation and limitation.[12] Therefore, while a discussion in the

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11 Affidavit of Luke Marchant at Exhibit A, p. 12 (emphasis added) (*Order Granting Motion to Dismiss Petition for Writ of Mandate*, Jerome County Case No. CV-2007-1093, hereinafter "Mandamus Order").

12 *See* Section C below.

abstract regarding when a water rights vests for all other permits is instructive and persuasive, it is not exactly on point. The unique situation presented with a hydropower permit or license, and the constitutional and statutory authority allowing for regulation and limitation of hydropower permits and licenses, is exactly on point.

Second, in discussing the vesting issue in the abstract, it is important to remember that proof of beneficial use is not the end of the permitting process, as the Department must often still conduct a field examination to confirm proof of beneficial use. Only after such a field examination can a license be issued.[13] This necessary step illustrates the flaws in the Canal Companies' position.

Suppose that a water right holder submits proof of beneficial use for 100 acres of irrigated land, and suppose further that the Department's field examination is conducted five (5) years later, and shows only 80 acres of irrigation. Under the Canal Companies' argument, the water right would have vested once proof was submitted for 100 acres, even though only 80 acres were actually developed. Thus, the follow up field examination is necessary to confirm the permit holders' use, which may be different than the proof submitted. If the process were otherwise, permit holders could overstate the amount of water put to beneficial use, and develop acres decades later under this kind of "water right" to the detriment of other water users. Clearly there must be a time period within which the Director of IDWR can examine the proof of beneficial use, conduct a field examination, and ensure that the permit complies with the law prior to issuance of the license.

Nevertheless, the Canal Companies' insist that the water right vests upon submission of proof of beneficial use. In addition to the *Idaho Power* case discussed below, the Canal Companies'

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13 The "Beneficial Use Examination Rules" are found at IDAPA 37.03.02.

attempt to distinguish the Idaho Supreme Court cases of *Hidden Springs Trout Ranch v. Allred*, *A&B Irrigation District v. Aberdeen American Falls Ground Water District*, and *Hardy v. Higginson* because they did not involve cases where proof of beneficial use had been submitted. Rather, they are cases where permits were still "pending."[14]

The Canal Companies' attempts to distinguish the above cases are unpersuasive. The Canal Companies even quote the explicit language from these cases holding that a water right permit holder holds an inchoate right only. Nevertheless, the Canal Companies argue that these cases illustrate that there is a difference between a permit holder who has not submitted proof of beneficial use (and therefore only has an inchoate right), and a permit holder who has submitted proof of beneficial use (and therefore has a vested right), even though in both instances the permit holder still only has a permit. The *Hidden Springs Trout Ranch, A & B Irrigation District*, and *Hardy* cases do not make the distinction the Canal Companies argue they do. The Canal Companies have merely attempted to read facts into the decision, and attempt to distinguish the facts of this matter and those in the cases. What the Canal Companies fail to do is provide any legal analysis, or quote from any language in those cases which would indicate a differing treatment by the Supreme Court for those that have a permit and have submitted proof and those that have a permit and have not submitted proof. In both instances, the water right permittee holds a permit only: "water permits only give him an inchoate or contingent right to put the water to a beneficial use, . . ."[15]

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14 *Response Brief* at 41.

15 Hardy v. Higginson, 123 Idaho 485, 491, 849 P.2d 946, 952 (1993). While the Supreme Court did not make the narrow distinction that the Canal Companies read into the decision, Judge Wood did make it clear in the River Grove SRBA case that there is no distinction: "It is clear from this statutory scheme that it is the intent of the legislature that all of the steps – **including issuance of the license** – be completed before the water right vests, and until such time the right to use of water remains an inchoate right. Because I.C. § 42-219(6) gives IDWR the responsibility to find the facts as to whether the permit conditions were complied with, it is untenable to assert that a

Additionally, the Canal Companies cite to the 1998 case of *Riley v. Rowan* which they allege is later than the *Mandamus Order* and the 2000 *River Grove* SRBA case decided by Judge Wood. This appears to be an error in the text of the *Response Brief*, as the *River Grove* case is more recent. Regardless, a careful examination of the footnotes included by the Canal Companies' reveals what appears to be an incorrect analysis of the *Riley* case.

After citing to the Supreme Court decision of *Riley v. Rowan*, found at 131 Idaho 831, 965 P.2d 191 (1998), the Canal Companies state "the SRBA court, Honorable Daniel C. Hurlbutt, Jr. concluded . . ." With this language, the Canal Companies give the impression that the Supreme Court decision adopted Judge Hurlbutt's district court analysis, which was that "'the failure of IDWR to perform its statutory duty to issue the license in a reasonable time requires the finding that Water Permit 22-7280 became a license by operation of law,' on the date the applicant submitted proof of beneficial use."[16] This is a misstatement of what the Supreme Court held in *Riley*.

In *Riley*, the issue on appeal was a determination of who owned a water right permit that was jointly issued to a landowner and a deceased mother as owners of the property. While the Supreme Court affirmed the decision of Judge Hurlbutt, it did not adopt his rationale regarding the licensing of a permit, which is directly contrary to the Canal Companies' assertion that the authority cited in the Mandamus Order was "contradicted by later . . . district court decisions . . ."[17]

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water right may vest prior to this step in the permit and licensing process." *Mandamus Order* at 11-12 (empahsis in original).

16 *Response Brief* at 42.

17 *Id.*

The Supreme Court stated that "having determined that Jim Howe and Rowan were tenants in common, each owning a one-half interest in water license No. 22-07280, we decline to address whether the IDWR breached its statutory duty by delaying the issuance of the license. Regardless of when the IDWR issued the license, Jim Howe and Rowan each owned a one-half interest prior to Jim Howe subsequently selling his interest to the Rileys." Further, the Supreme Court's conclusion was as follows:

> Although we conclude that the district court was incorrect in determining that Jim Howe and Rowan held vested remainders when the permit was applied for, we nevertheless affirm the district court's conclusions. Thus, for the above stated reasons, we affirm the SRBA district court's decision that each of the parties is entitled to a one-half interest in water license 22-07280.[18]

The Supreme Court did not address Judge Hurlbutt's analysis regarding the water right permit issues, as it determined that the analysis was unnecessary. Additionally, however, this case centered around an ownership dispute, not a dispute over the inclusion of conditions in the licensing of the water right made by IDWR. Notably, IDWR was not a party to this case. The case is therefore distinguishable from the cases cited by Judge Melanson in the *Mandamus Order*.

Also, the Canal Companies' arguments are unpersuasive when compared to the *Mandamus Order*, which discussed more recent cases than *Riley* that actually involve hydropower water rights and Idaho Code § 42-203B(6). As discussed in detail below, hydropower rights are subject to additional regulation and restrictions.

Further, the Canal Companies suggest that the Director would impose more sinister provisions or conditions under Idaho law to the Milner License. However, this further attempts to

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18 Riley v. Rowan, 131 Idaho 831, 834, 965 P.2d 191, 194 (1998).

distract the hearing officer from the issue served up on summary judgment, which is the subordination condition only. The issue before the hearing officer is not to flesh out the spectrum of what regulations and conditions could be imposed by the Director–a parade of horribles argument–but it is very narrowly whether Director Tuthill could, as a matter of law, subordinate the Milner Hydropower Permit.

In the *Mandamus Order*, Judge Melanson acknowledged his concern that it had taken some time to issue the Milner License, but importantly, this did not divert Judge Melanson from performing an appropriate legal analysis where he answered the statutory question posed above:

> This Court holds that following the beneficial use examination the issuance of the license is not a ministerial act. The Department must first make a determination whether the use complies with the law and the terms of the permit. While the Court does have some concern with the length of time it takes for IDWR to complete its final determination and issue the license **the statute [Idaho Code § 42-219] does not provide for a time limit**.[19]

Without a express statutory time limit within which the Department must issue a license, a permit remains a permit regardless of whether proof of beneficial use has been submitted, and a permit does not become a vested right by operation of law due to the passing of a specified time period.

### 2. Judge Melanson's decision in the *Mandamus Order* is not dicta.

Not surprisingly, Judge Melanson's Mandamus Order is barely discussed in the Canal Companies' response briefing and dismissed as "dicta,"[20] despite the fact that the decision is from a district court case from a long-time SRBA judge ruling on a mandamus action in the very matter now before the hearing officer (licensing of the Milner Permit). The extent of the Canal Companies'

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19 *Mandamus Order* at 12 (emphasis added). (Affidavit of Luke Marchant, at Exhibit C (*Order Granting Motion to Dismiss Petition for Writ of Mandate*, Jerome County Case No. CV-2007-1093)

20 *Response Brief* at 42.

analysis of the *Mandamus Order* in their forty-six (46) page brief is a single sentence: "However, what they are citing is mere dicta by the court, which has been contradicted by later SRBA district court decisions as discussed below."

Judge Melanson's decision is hardly dicta. Dicta is defined as "an observation or remark made by a judge in pronouncing an opinion upon a cause, concerning some rule, principle, or application of law, or the solution of a question suggested by the case at bar, but not necessarily involved in the case or essential to its determination; any statement of the law enunciated by the court merely by way of illustration, argument, analogy, or suggestion."[21] Stated another way, dicta is defined as "[a] judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential."[22]

Notably, claiming that a certain portion of a prior decision is a dicta is generally made when language from a previous case does not involve the same parties or involve the exact matter before a subsequent tribunal. Langauge from an opinion is dicta if it is "not necessarily involved in the case or essential to its determination," or is merely "a judicial comment." Judge Melanson's decision in the *Mandamus Order* is not a "judicial comment" in this proceeding. It was necessary in the determination of the mandamus action, and addressed issues that are now squarely before the hearing officer.

The argument asserted by the Canal Companies in this matter is that they obtained a vested water right when proof of beneficial use was submitted for the Milner Permit. The argument made by the Canal Companies in the mandamus action is the same substantive argument they now make

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21 BLACK'S LAW DICTIONARY at 454 (definition of "dictum").

22 *Dessart v. Burak*, 252 Mich.App 490, 496 n.5, 652 NW.2d 669 (2002).

to the hearing offer. The mandamus action sought a writ of mandamus against the Director of IDWR compelling him to "void the Director's September 5, 2007, Order; to close any protest or comment period; and to issue a license to the Petitioners in accordance with Respondent's statutory duties as defined by Idaho Code § 42-219."[23]

In support of its third request for relief in the mandamus action, the Canal Companies' argued "that following the proof of beneficial use examination the issuance of the license is simply a ministerial act."[24] In other words, the Canal Companies asserted that they had a vested right when proof of beneficial use was submitted, and therefore, the Director has no further discretion regarding issuance of the license–the issuance of the license was robotic, devoid of any ability to exercise discretion.

Judge Melanson, rejected the argument that the "issuance of a license is more of a formality,"[25] and instead held that a water right does not vest until the license is issued after the Director has exercised discretion to ensure that the proof of beneficial use is satisfactory and that the permit complies with the law. This "vesting" argument is the same argument now raised by the Canal Companies in response to the motions for summary judgment.

### 3. A water right does not vest upon submission of proof of beneficial use. A water right vests when a license is issued.

Judge Melanson squarely addressed the Canal Companies' argument in the mandamus action, recognizing that until the license was issued, the permit represented an "inchoate" right and that the

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23 *Mandamus Order* at 1.

24 *Id.* at 10.

25 *Id.* at 11.

water right did not vest until issuance of the license.[26] The Director still had discretion before issuance of the license, and therefore, submission of proof of beneficial use did not vest the Canal Companies with a protectable and compensable vested interest. In the words of Judge Melanson, "[t]his Court holds that following the beneficial use examination the issuance of the license is not a ministerial act."[27] The court therefore granted IDWR's motion to dismiss on grounds that were central to the issues raised in the mandamus action.

Furthermore, Judge Melanson's *Mandamus Order* is the "law of the case" regarding the Milner License, and cannot be disregarding so readily by the Canal Companies. In the context of an appeal to the Supreme Court, "[t]he "law of the case" doctrine provides that when 'the Supreme Court, in deciding a case presented states in its opinion a principle or rule of law necessary to the decision, such pronouncement becomes the law of the case, and must be adhered to throughout its subsequent progress, both in the trial court and upon subsequent appeal.'"[28] It is significant to note that the Supreme Court stated that a prior decision in a case must be adhered to throughout its **subsequent** progress. While the matter before the hearing officer is not a appeal of the *Mandamus Order*, the same law of the case principle applies as the matter now before the hearing officer is one such "subsequent" proceeding involving the Milner License, and as such, the decision of Judge Melanson is the law of this case on this issue.

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26 *Id.* at 12.

27 *Id.* at 12.

28 *Spur Products Corp. v. Stoel Rives LLP*, 143 Idaho 812, 816, 153 P.3d 1158, 1162 (Idaho,2007) (quoting Swanson v. Swanson, 134 Idaho 512, 515, P.3d 973, 976 (2000).

Because the *Mandamus Order* is the law of the case, it must be addressed by the Canal Companies, and it simply has not. Instead, rather than address the law of the case, the Canal Companies have argued that another district court decision and prior Supreme Court cases support their position. As set forth in the following section, the authority discussed by the Canal Companies is unpersuasive.

Because of the clarity the *Mandamus Order* provides on the "vesting" issue, it appears that the Canal Companies have made a concerted effort to draw attention away from a legal analysis on this issue, and turn the analysis into one of perceived fairness. This attempted diversion mirrors arguments successfully made by the Idaho Power Company in the case of *Idaho Power Company v Idaho Department of Water Resources, in the Matter of Licensed Water Right No. 03-7018 in the Name of Idaho Power Company.*[29] The case was decided before a district judge without the benefit of experience in water rights matters that Judge Melanson had gained by from presiding over the SRBA. In reviewing the *Idaho Power* case, it is apparent that the district judge in that case issued a decision based on perceived unfairness, not the law. Nowhere in the district judge's opinion is there any citation to a statute with a time period in which a license must be issued once proof of beneficial use is submitted, nor was there any discussion of the unique nature of hydropower rights as a secondary class of water rights in Idaho subject to regulation and limitation. Instead, the district judge focused on fairness, stating:

> [T]he Court cannot accept the Department's contention that Idaho Power, in this case, holds only an inchoate right or the hope of a right, and is stuck in that legal limbo for as many decades as it may take the Department to complete the largely ministerial task of issuing the license. By completing a $39,000,000 project and

29 Washington County Case No. CV-2009-1883

> beneficially appropriating water under that permit for 27 years, Idaho Power clearly holds something more than the mere hope of a water right.[30]

Note that the court used the phrase "largely ministerial," which reveals the court's opinion that the issuance of a license is an automatic step–a mere formality. This directly contradicts the holding by Judge Melanson in the *Mandamus Order*. Compare the *Idaho Power* language with the language from the *Mandamus Order*, where Judge Melanson discussed Idaho law and a 2000 SRBA case decided by Judge Wood:

> Once the license is issued, I.C. § 42-220 states that "[s]uch license shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein, and shall be prima facie evidence as to such right . . .." It is clear from this statutory scheme that it is the intent of the legislature that all of the steps – **including issuance of the license** – be completed before the water right vests, and until such time the right to use of water remains an inchoate right. Because I.C. § 42-219(6) gives IDWR the responsibility to find the facts as to whether the permit conditions were complied with, it is untenable to assert that a water right may vest prior to this step in the permit and licensing process.
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> *River Grove Farms* at 24-25. Although the decision was never appealed from, this Court finds it to be on point and persuasive.
>
> This Court holds that following the beneficial use examination the issuance of the license is **not a ministerial act**. The Department must first make a determination whether the use complies with the law and the terms of the permit.[31]

At best, the *Idaho Power* decision is contrary to the law of the case established by the *Mandamus Order*, and presents the hearing officer with conflicting decisions. Given the direct applicability of

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30 Affidavit of Shelley M. Davis in Support of Canal Companies' Memorandum in Opposition to Motions for Summary Judgment (hereainfter, "Davis Affidavit") at Exhibit 39, p. 12.

31 *Mandamus Order* at 10-12 (First emphases in original, second emphasis added).

the *Mandamus Order*, however, a decision which is supported by Idaho case law and statutes, the analysis set forth in that order must govern.

In understanding the *Idaho Power* case, it is also critical to note that there is no discussion by the district judge of hydropower rights in general, and their unique classification under Idaho law. This is essential for a thorough and thoughtful analysis under Idaho law and facts of this case.

**C. The Director has the authority to place changed conditions on a hydropower license because the Director has constitutional and statutory authority to do so. Furthermore, to the extent any "agreement" existed between the Canal Companies and IDWR regarding the subordination condition, it was for the initial financing period only, which has now passed.**

The Director had authority to subordinate the Milner License as he did because it is a hydropower water right. Beginning with the Idaho Constitution, there has long been a concern with hydropower rights in Idaho. Article XV § 3 of the Idaho Constitution states that "[t]he 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**." With this constitutional edict, Idaho policy has consistently been to treat hydropower rights as a separate class of water rights, subject to additional control and regulation from the State of Idaho. This is evident in the statutory scheme set forth in Title 42 of the Idaho Code.

Beginning with Idaho Code § 42-101, which was enacted in 1900 and is entitled "Nature of property in water," it reads in pertinent part:

> Water being essential to the industrial prosperity of the state, and all agricultural development throughout the greater portion of the state depending upon its just apportionment to, and economical use by, those making a beneficial application of the same, its control shall be in the state, which, in providing for its use, **shall equally guard all the various interests involved**. All the waters of the state, when

> flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same therefrom for any beneficial purpose, and the right to the use of any of the waters of the state for useful or beneficial purposes is recognized and confirmed; . . [32]

Guarding all various interests in 1900 surely included limits on hydropower, given the express constitutional language articulated a few years previous.

In 1971, the state adopted the permitting system of appropriating water rights from surface water sources. Idaho Code § 42-219 sets forth the procedure for issuance of a license. Subpart 1 of this statute states the general procedure: "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."[33] The "if" in this statute is critical, as it provides the director with authority to ensure that the permit holder has complied with the law prior to issuance of the license.

If the law has not been complied with, then subpart 8 of this code section states that "[i]n the event that the department shall find that the applicant has not fully complied with the law and the conditions of the permit, it **may** issue a license for that portion of the use which is in accordance with the permit, or **may** refuse issuance of a license and void the permit."[34] Again, the "may" language

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32 Emphasis added.

33 IDAHO CODE § 42-219(1) (emphasis added).

34 IDAHO CODE § 42-219(8).

emphasizes the discretion afforded the Director by statute to ensure that the permit at licensing complies with the law. If not, the permit upon issuance of the license may be amended to comply with the law, or may be voided altogether.

Presuming that a license is issued, Idaho Code § 42-220 explains the effect of that license. The first portion of this statute provides the following:

> Such license shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein, and shall be prima facie evidence as to such right; and all rights to water confirmed under the provisions of this chapter, or by any decree of court, shall become appurtenant to, and shall pass with a conveyance of, the land for which the right of use is granted. The **right to continue the beneficial use of such waters shall never be denied** nor prevented for any cause other than the failure, on the part of the user or holder of such right, to pay the ordinary charges or assessments which may be made or levied to cover the expenses for the delivery or distribution of such water, **or for other reasons set forth in this title**. . .[35]

Note the similarity between the first highlighted statutory language above and Article XV § 3 of the Idaho Constitution. Both state that the use of water in Idaho "shall never be denied." In the constitutional provision, this statement is directly followed by the "regulate and limit" caveat for hydropower rights. In Idaho Code § 42-220, after the denied language, it uses the term "other than," and then states that use under a water right may be prevented "for other reasons set forth in this title." The question then becomes, in the context of hydropower rights, how can a hydropower right be limited? The answer is found in Idaho Code § 42-203B(6).

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35 *Id.* § 42-220 (emphasis added).

In very direct language, Idaho Code § 42-203B(6), which was enacted prior to 1993 when the Canal Companies submitted proof of beneficial use for the Milner Permit, states: "The director shall have the authority to subordinate the rights granted in a **permit or license** for power purposes to subsequent upstream beneficial uses." This statutory provision is consistent with the constitutional and statutory provisions outlined above, and it is critical to recognize the emphasized language of a "permit or license." Note that there is no qualifier on the term "license." The statute does not limit amendment of a hydropower license to only when it is initially issued, nor does it provide a time limit after which the director's ability to subordinate the hydropower right ends. Based upon the plain language of the statute, IDWR could even amend an issued hydropower license years after it is issued.

In interpreting this provision of Idaho Code § 42-203B, the "objective of statutory interpretation is to give effect to the legislative intent," and the "best guide to legislative intent is the statutory language itself, therefore the interpretation must begin with the literal words of the statute."[36] Further, "[w]here the statutory language is unambiguous, the Court does not construe it but simply follows the law as written. The statutory words must be given their plain, usual, and ordinary meaning, and statute must be construed as a whole."[37]

In interpreting Idaho Code § 42-203B, the statute as a whole begins with "[t]he legislature finds and declares that it is in the public interest to specifically implement the state's power to

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36 Cowan v. Bd. of Comm'rs of Fremont County, 43 Idaho 501, 511, 148 P.3d 1247, 1257 (2006).

37 *Id.*

**regulate and limit** the use of water for power purposes . . ."[38] Note the use of the constitutional language once again to "regulate and limit" hydropower rights, which regulation and limitation includes authority to subordinate a "permit or license."

In the matter now before the hearing officer, the subordination language at issue was included at the licensing stage of the permit, while the permit was still "inchoate," not years after it was issued. Idaho Code § 42-203B(6) was in place for seven years prior to when the Canal Companies submitted proof of beneficial use, and therefore the Canal Companies went into their hydropower project fully aware of the State of Idaho's power and authority to "regulate and limit" this class of water rights–hydropower water rights. No such similar authority to regulate and limit other types of water right licenses is found in Title 42 of the Idaho Code.

This very clear classification of hydropower rights as one that is continually subject to additional future regulation and limitation, even after a license is issued, demonstrates that hydropower rights occupy a secondary status apart from other types of water rights that authorize, for example, irrigation or municipal uses. The secondary status of hydropower water rights is ignored in the authority cited by the Canal Companies in their *Response Brief.*

Yet despite these clear *legal* provisions regarding hydropower rights, which the Canal Companies ignore, they instead attempt to appeal to the hearing officer's perceived sense of *fairness* as though they have been caught unaware of the hydropower statutes and that the secondary status

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38 IDAHO CODE § 42-203B(1).

of hydropower rights simply is not fair. This is evident when reviewing statements contained in the Canal Companies' Response Brief:

> This cannot be the policy behind the statutory permitting and licensing process and would render the process moot, as the Department would have unfettered and inequitable powers to refuse to perform its statutory duties, with drastic and unconscionable results, in the instant case subjecting the Canal Companies to fifteen plus years of possible changes in water policy and legislation.[39]
>
> In viewing the licensing pathway and lengthy process an applicant must take, it would be irrational to think that once the applicant has complied with the conditions, completed its project and submitted proof of beneficial use, the Department can sit back and do nothing, and eventually change the terms and conditions of a water right. This type of discretionary unpredictable exercise of power by the Department would create a chilling effect on water right development because an applicant would never have anything except a mere hope in perpetuity until the Department decides to eventually act, as it did in this case more than eighteen years after the Canal Companies made proof of beneficial use.[40]
>
> Under their argument, the Department could modify a permit unilaterally based upon its own internal policy or perspective, because until the Department decides otherwise an applicant has nothing.[41]
>
> To hold otherwise would condone the Department's dilatory practice of issuing licenses decades after submission of proof of beneficial use, which would allow for unpredictable future legislative interference of property rights, give the Department unfettered discretion to interfere with valuable property rights, and cause an increase in litigation.[42]

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39 Response Brief at 39.

40 *Id.* at 40.

41 *Id.*

42 *Id.* at 44-45.

As set forth in the *Mandamus Order*, the law of the case is that the Milner Permit represented an inchoate right until it received a license, and the subordination condition included by Director Tuthill was done at licensing, which was permissible. This is the clear law articulated by Judge Melanson.

On the other hand, the *Idaho Power* decision was devoid of any analysis of the above statutes which concern hydropower, and instead appears to have been based upon the district court's sense of fairness because it did not like the fact that the license for the Brownlee facility was not issued for twenty-plus years. For this reason, and the reasons set forth above, the *Idaho Power* decision is deficient, and the *Mandamus Order* must control; the hydropower water right vests when the license is issued, not when proof of beneficial use is submitted.

Additionally, while the Upper Snake Users and the Ground Water Districts dispute that there was an enforceable "agreement" between the Department and the Canal Companies, even if there was an agreement, it was specifically limited to the period of "initial financing" which has clearly passed. For this additional reason, and again presuming that the agreement was enforceable, the Director had authority to place the subordination language in the Milner License.[43]

Exhibit 7 of the Affidavit of Shelley Davis shows that the Canal Companies requested that the "Board agree to no assert subordination of the power permit **for at least the term of original financing**."[44] Further, Mr. Rassier's memo to the board assumed the Canal Companies' request was

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43 See *Memorandum in Support of IWRD's Motion for Summary Judgment*, at 13, fn. 9, for the IWRB's position on whether the so-called "agreement" was enforceable.

44 Davis Affidavit at Exhibit 7 (p.3) (emphasis added).

limited to this term: "Mr. Rosholt requests that the Board ... agree to not assert a subordination of the power permit to future upstream diversion for irrigation purposes **for at least the term of the original financing**."[45]

The question of getting original financing was what the parties were concerned about during the permitting process. Any subordination condition that was "agreed" to at that time is more appropriately limited to the time period of the original financing, leaving open to the Director other conditions when the plan was financed. Thus, even under the terms of the alleged "agreement," the Director had the ability and authority to include the Milner License's current subordination remark.

**D. Pursuant to Idaho Code § 42-220, a license is always subject to local rules, regulations, and customs adopted by the majority of users from a common supply, and the State Water Plan and the practices of Water District 01 incorporate the zero flow at Milner principle and further support ground water recharge.**

The second half of Idaho Code § 42-220 contains additional limitations on all licenses. It states that the water right license "shall always be held subject to the local or community customs, rules and regulations which may be adopted from time to time by a majority of the users from a common source of supply .... when such rules or regulations have for their object the economical use of such water." In this case, the State Water Plan and the practices of Water District 01 clearly include the zero flow at Milner principle, which demands a zero flow at Milner to guard against a water right being able to command large volumes to spill past Milner Dam. This is a bedrock

45 *Id.* at Exhibit 8 (p.1) (emphasis added).

regulatory principle that the Milner License is already subject to, but is now made express in the license.

The concept contained in Idaho Code § 42-220 is consistent with other Idaho law. Idaho's water resources are declared to be the "property of the state" and are dedicated to "public use."[46] As explained nearly a century ago by the United States Supreme Court (applying Idaho law), a water right "is not an unrestricted right, but must be exercised with some regard to the rights of the public."[47] Among those rights is the public interest in seeing "optimum development of water resources."[48] Accordingly, a water right "must be exercised with reference to the general condition of the country and the necessities of the people, and not so to deprive a whole neighborhood or community of its use and vest an absolute monopoly in a single individual."[49] This law, essentially that the exercise of a water right must be reasonable and must respect the public interest in maximizing beneficial use of the state's finite water resources, was recently confirmed by the Idaho Supreme Court in *American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 876-77, 154 P.3d 433, 447-48 (2007).

Consistent with the interests of the public, the Idaho Water Resource Board prepares a Comprehensive State Water Plan. The notes of Idaho Code § 42-1736B contain the plan prepared

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46 IDAHO CODE § 42-101; IDAHO CONST. art. XV, § 1.

47 *Schodde v. Twin Falls Water Co.*, 224 U.S. 107, 120 (1911).

48 IDAHO CONST., Art. XV, § 7.

49*Schodde*, 224 U.S. at 120 (quoting *Basey v. Gallagher*, 87 U.S. 670, 683 (1874)).

by the Idaho Water Resource Board for the optimum use of Idaho's water. Policy 32 of that plan states that it is Idaho's best interests to have a zero flow at Milner Dam. Milner Dam is a long-established dividing line in the Snake River Basin for water right administrative purposes. Above Milner is known as the Upper Snake, and below Milner is the Lower Snake. The Snake River upstream from Milner Dam is administered separately and independently of the Snake River below Milner Dam, resulting in what is commonly known as the "Two Rivers Doctrine." As set forth in Idaho Code § 42-203B(2):

> 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.[50]

The historical division of the Snake River at Milner Dam derives from the natural topography of the Snake River and the practicalities of water use. As explained in briefing filed by the State in the Snake River Basin Adjudication in Subcase No. 00-92002GP et al. , which describes the geographic divide at 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.' Thus, geography physically divides the Snake River into two sections as it arcs across southern Idaho, and this natural bifurcation dictated the progression of early irrigation development. The section downstream from Milner offered essentially no opportunities for significant agricultural development because the river was largely inaccessible in the deep

50 This critical principle was also noted in the *Final Order* at 8 (¶ 10).

> canyon. Prior to the advent of high-lift pumping, the principal use contemplated below Milner was hydropower development.[51]

This division of the Snake River at Milner is a bedrock principle that has been in place for decades. It enables the State to maximize beneficial use of its finite water resources, since relatively little beneficial use can be made of the waters of the Snake River once it enters the canyon below Milner.

However, the inaccessability of water below Milner is not the only reason for the Zero Flow at Milner policy. Due to the geology of the Snake River Plain, most of the water diverted out of the Snake River above Milner flows back into the Snake River below Milner through spring outlets at "Thousand Springs" and elsewhere, thereby enabling the water to be used more than once by water users.

Additionally, the water users in Water District 01 fully support ground water recharge, as evidenced by their most recent adopted resolutions supporting implementation of recharge (Resolution 27), and funding for the Comprehensive Aquifer Management Plan (CAMP), which importantly has a key recharge component (Resolution 49). Resolution 27 includes the following language:

> NOW, THEREFORE, BE IT RESOLVED that the water users of Water District 1 support continued efforts and funding to identify and implement the most effective managed aquifer recharge sites and projects, which would, replenish ground water levels and surface and spring flows.

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51 Marchant Affidavit at Exhibit C, at p. 23.

> BE IT FURTHER RESOLVED, that the water users of Water District 1 support recharge and are ready, willing and able to provide facilities to commence recharge upon clearly defined recommendations or proposals from the State of Idaho and Idaho Water Resource Board. BE IT FURTHER RESOLVED, that the water users of Water District 1 support and urge the Idaho Water Resource Board to work with the Committee of Nine, canal companies and irrigation districts on the management of the recharge component of the ESPA CAMP plan.[52]

The portion of the subordination condition that the Canal Companies' object to is the ground water recharge component of the subordination condition. Yet, the water users of Water District 01, by majority vote, evidenced by resolution, support these critical recharge activities.

In addition, Policy 1J of the Idaho State Water Plan states that "[m]anaged 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."[53] Given these directives, ground water recharge must be, and has now been, recognized by the Department in the licensing of the Milner Permit. The Department has done so consistent with the principle contained in Idaho Code § 42-220 and 42-203B.

### E. Without the inclusion of the Director's subordination language, the Milner License would not comply with Idaho law and policy.

The Canal Companies argue that the Milner Hydroelectric Facility is an "above Milner" facility with an "above Milner water right" which is "diverted above the Milner Dam" and is

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52 Second Affidavit of Luke H. Marchant, at Exhibit A. Exhibit B is the resolution language for Resolution 53.

53 *Final Order* at 11 (¶18).

therefore compliant with the zero flow at Milner principle and is consistent with the other irrigation rights diverted at Milner Dam by Twin Falls Canal Company.[54] However, this ignores how the water is used once it is diverting into the Twin Falls Canal.

Exhibit 6 attached to the Affidavit of Michael C. Orr in Support of Idaho Water Resource Board's Motion for Summary Judgment is Google map showing the Milner Dam and the Milner Hydroelectric Facility. As shown, the Twin Falls Canal was significantly enlarged below Milner Dam to allow the construction of a large forebay, where water is collected and then discharged into a penstock, which is where the electricity is generated. The water then goes straight down into the Snake River Canyon, where it goes into a section of the Snake River where it is impractical and inaccessible to divert that water for further irrigation purposes.

It is true that water diverted into the Twin Falls Canal is diverted at Milner pursuant to Basin 01 irrigation water rights. However, this irrigation water is then applied to irrigated lands, which cause return flows that are reused by other water users mostly through springs or reach gains, which are significant in the Twin Falls area. This "return" of water enables the water to be used again.

However, water diverted into the Milner Hydroelectric Facility is only used for hydropower generation and is not capable of being reused by other irrigators. Thus, the water diverted for hydropower is effectively water spilling past Milner Dam and is 100% consumptive. Based on the Google map, it appears that the distance water has to travel down the Twin Falls Canal when compared to the channel distance in the river is the same. Thus, it is the consumptive use "effect"

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54 *Response Brief* at 17-18.

of the diversion, not the technical point of diversion which the zero flow at Milner principle protects against. This was recognized by the Director in his Final Order:

> [I]f 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 thorough 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.[55]

Because the effect of the hydropower license violates the zero flow at Milner principle, the Director correctly complied with the law by incorporating the zero flow at Milner principle into the conditions of the Milner License.

### F. The Federal Energy Regulatory Commission's Licensing Authority Does Not Preclude The Department From Adding To Or Otherwise Changing the Subordination Provision In The Water Right Licensing Process.

The Canal Companies argue that the Department lacks authority to put a new subordination condition in place because "[t]he United States Supreme Court has affirmed that this area of the Milner hydroelectric license is strictly reserved to FERC" and that the subordination provision "cannot be sustained as it would constitute a veto of the project that was approved and licensed by

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55 *Final Order* at 10 (¶14).

FERC."[56] The United States Supreme Court decision[57] used by the Canal Companies to support this argument is easily distinguishable from the present case.

In *California v. FERC* the main issue before the court was whether FERC or the State of California had authority to set minimum stream flows required to protect fish below a FERC licensed powerplant. It is correct, that the Supreme Court concluded that federal law preempted California law and their ability to set minimum flow rate requirements. This does not mean, however, that federal law preempts state law in all cases related to hydropower licensing. Indeed, the Supreme Court's holding in *California v. FERC* was limited to the very narrow question above concerning minimum stream flow requirements and whether state authority to set those requirements could be derived from § 27 of the Federal Power Act. The Supreme Court stated:

> In the Federal Power Act of 1935, 49 Stat. 803, 863, Congress clearly intended a broad federal role in the development and licensing of hydroelectric power. That broad delegation of power to the predecessor of FERC, however, hardly determines the extent to which Congress intended to have the Federal Government exercise exclusive powers, or intended to pre-empt concurrent state regulation of matters affecting federally licensed hydroelectric projects. The parties' dispute regarding the latter issue turns principally on the meaning of § 27 of the FPA, which provides the clearest indication of how Congress intended to allocate the regulatory authority of the States and the Federal Government. That section provides:
>
> > "Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or

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56 *Response Brief* at 31.

57 *California v. FERC*, 495 U.S. 490, 110 S.Ct. 2024 (1990).

> distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." 16 U.S.C. § 821 (1982).[58]

The question therefore before the Supreme Court was whether California laws setting minimum stream flow requirements related to "the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." The Supreme Court answered this question, in part, by relying on a prior Supreme Court decision which "construed [§ 27] and provided the understanding of the FPA that has since guided the allocation of state and federal regulatory authority over hydroelectric projects."[59] In that decision, the Court interpreted § 27 as follows:

> The effect of § 27, in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature. It therefore has primary, if not exclusive reference to such proprietary rights. The phrase "any vested right acquired therein" further emphasizes the application of the section to property rights. There is nothing in the paragraph to suggest a broader scope unless it be the words "other uses." Those words, however, are confined to rights of the same nature as those relating to the use of water in irrigation or for municipal purposes.[60]

The Supreme Court in *California v. FERC* then went on to hold that "California's minimum stream flow requirements neither reflect nor establish 'proprietary rights' or 'rights of the same nature as those relating to the use of water in irrigation or for municipal purposes'"[61] and for that reason

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58 *Id.* at 496-497. 110 S.Ct. at 2028.

59 *Id.* at 498. 110 S.Ct. at 2029.

60 *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152, 175-176, 66 S.Ct. 906, 917 (1946).

61 *California v. FERC*, 495 U.S. at 498, 110 S.Ct. At 2029 (1990).

concluded that the California requirements for minimum in-stream flows could not be given effect and allowed to supplement the federal flow requirements.

The new subordination clause added to the Canal Companies' water right in the case at hand clearly fits within the protection from supersedure afforded by § 27of the FPA since it relates to the control, appropriation, use, or distribution of water used in irrigation. The only change made to the original permit subordination language during the licensing of water right 1-7011 is that the right is now subordinated to groundwater recharge where before it was not. Groundwater recharge is conducted for multiple reasons, one of which is to "store" water underground for agricultural uses, or to feed springs that feed existing water rights.

The Canal Companies have further pointed out, and the law clearly states, that groundwater recharge has been formally recognized as a beneficial use of water since at least 1994. Thus, the Canal Companies' reliance on *California v. FERC* to make their argument that the Department's new subordination condition "is an impermissible collateral attack on the federal licensing authority of FERC"[62] is clearly misplaced. The issuance of a FERC license authorizing a power facility is a separate and distinct issue from issuance of a state water right license.

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62 Response Brief at 29.

**H. Despite the Director's clear finding that he did not consider comments filed by interested parties, the Canal Companies assert that the Department employed unlawful procedure when it reopened the Milner License for new comment and objection and ultimately changed the terms of the vested Milner Hydroelectric water right.**

In addition to the authority and discretion provided by Idaho Code § 42-203B(6), which is quoted above, the Director's obligation is also to ensure that the issuance of such a permit or license meets the criteria set forth in Idaho Code § 42-203A, including a local public interest review. The Director is required to insure that all such criteria are satisfied "whether [the application] is protested or not protested." There is no statute or regulation which prohibits the Director from considering these criteria even after a permit has been issued. Further, there is no statute or rule that prevents the revision of permit conditions, or prohibits the imposition of additional conditions based on developments in water law and water administration, which may have occurred between the time of issuance of the permit and the granting of the license.

The Canal Companies have argued that the *Notice of Intent to Issue License* provided to a number of water users reopened the public comment period "fourteen years after proof of beneficial use had been submitted."[63] The Director has not reopened a protest period. Water users have not been solicited or authorized to file protests, nor have they been provided notice of any prehearing conferences, requests for availability of hearing dates, or anything of the sort that would be required to resolve a protest.

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63 *Id.* at 32.

What the Director did was solicit comments from the local public for input as to what the public believes would be an appropriate subordination condition in the licensing of Permit No. 01-7011. This action is in harmony with the Director's obligations under Idaho Code § 42-203A(5), particularly as to the local public interest. The Canal Companies argue that the Director's *Notice of Intent to Issue License* was an "unlawful process." However, the Canal Companies have not pointed to a statute that would prohibit the Director from doing what he has done. Without such a specific prohibition, the Director's actions would clearly be within the discretion of the Director under Idaho law. As the Idaho Supreme Court noted in *American Falls Dist. #2 v. Idaho Dept. of Water Resources*, in the context of a delivery call, the Director is entitled to some discretion in dealing with issues he faces:

> Somewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public's interest in this valuable commodity, lies an area for the exercise of discretion by the Director.[64]

The Director would obviously have a similar measure of discretion in the licensing of a water right. Without a statute or rule prohibiting the Director's *Notice of Intent to Issue License*, the Director's actions were lawful given the measure of discretion the Idaho Legislature has afforded him.

Lastly, even to the extent the *Notice of Intent to Issue License* constituted unlawful procedure, which it does not, the Director expressly stated that "[a]lthough the comments submitted are included in the agency record, they were not considered by the Director."[65] Without a showing that

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64 *American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources*, 154 P.3d 433, 451 (2007).

65 *Final Order* at 7 (Conclusion of Law ¶1).

the comments received as a result of the Notice of Intent to Issue License were actually considered the Director and resulted in prejudice to the Canal Companies, the Director's procedure was not unlawful. In order to receive relief when alleging error by an agency, the petitioner is required to show that the Director "erred in a manner specified under I.C. § 67-5279(3), and second, that a substantial right has been prejudiced."[66]

## III. CONCLUSION

For the reasons set forth above, summary judgment should be entered in favor of the Upper Snake Water Users and the Ground Water Districts to protect the currently-imposed conditions of Water Right Number 01-7011, which are so critical to the vitality of irrigated agriculture in southern Idaho and to the current and future health and management of the ESPA.

DATED this 19th day of March, 2010.

Robert L. Harris
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

Robert L. Harris
Candice M. McHugh
FOR RACINE, OLSEN, NYE, BUDGE & BAILEY, CHTD.

66 *Evans v. Teton County*, 139 Idaho 71, 75-76, 73 P.3d 84, 88-89 (2003).

## CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, a true and correct copy thereof on this 19th day of March, 2010.

**DOCUMENT SERVED:** UPPER SNAKE WATER USERS' AND GROUND WATER DISTRICTS' REPLY TO CANAL COMPANIES' MEMORANDUM IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

**INDIVIDUALS SERVED:**

| | |
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