

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

**In Re SRBA** ) **Subcase No. 02-200**  
 )  
**Case No. 39576** ) **MEMORANDUM DECISION AND ORDER**  
 ) **ON CHALLENGE**  
 )  
 ) **FINAL ORDER DISALLOWING WATER**  
 ) **RIGHT CLAIM**

**Holding:** The ruling of the Special Master is **reversed**.

**Appearances:**

Michael C. Orr, Deputy Attorney General of the State of Idaho, Natural Resources Division, Boise, Idaho, attorney for the Idaho Water Resource Board.

Shelley M. Davis, Barker Rosholt & Simpson, LLP, Boise, Idaho, attorneys for the Idaho Power Company.

Josephine P. Beeman, Beeman & Associates, P.C., Boise, Idaho, attorneys for the City of Pocatello.

Candice M. McHugh, Racine Olson Nye Budge & Bailey, Chartered, Boise, Idaho, attorneys for the American Falls-Aberdeen Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Clark-Jefferson Groundwater District, Fremont-Madison Ground Water District, Magic Valley Ground Water District and North Snake Ground Water District.

Andrea L. Courtney, Deputy Attorney General of the State of Idaho, Idaho Department of Water Resources, Boise, Idaho, attorney for the Idaho Department of Water Resources.

## I.

### FACTS AND PROCEDURAL BACKGROUND

1. This matter concerns a claim filed in the Snake River Basin Adjudication ("SRBA") by the Idaho Water Resource Board ("Board") seeking a water right for a zero cfs minimum stream flow on the Snake River at the Milner Dam gaging station.

2. In his December 29, 2006, *Director's Report for Irrigation & Other Uses, Reporting Area Basin 02*, the Director of the Idaho Department Water Resources ("IDWR" or "Department") recommended the claim be decreed as water right no. 02-200 in the name of the Board. The right was recommended by the Director as a year-round minimum stream flow water right with a December 29, 1976, priority. The quantity was recommended as follows: "The quantity of this right is the average daily flow of zero (0) cfs measured by the Milner Dam gaging station at river mile 638.7 downstream."

3. The Idaho Power Company filed an *Objection* to the recommendation asserting that the water right should not exist. Among other things, Idaho Power's *Objection* argued that the Board failed to follow the statutory procedures required to acquire a water right under Idaho law.

4. *Objections* to the recommendation were also filed by the Idaho Ground Water Appropriators, Inc., the American Falls-Aberdeen Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Clark-Jefferson Groundwater District, Fremont-Madison Ground Water District, Magic Valley Ground Water District and North Snake Ground Water District (collectively, "IGWA"), asserting among other things that the water right should be decreed as a Basin 01 water right as opposed to a Basin 02 water right.

5. *Responses* to the *Objections* were subsequently filed by the Idaho Power Company, the United States Bureau of Reclamation, the City of Pocatello, the State of Idaho, and the Twin Falls and North Side Canal Companies.

6. On October 7, 2011, the Board filed a *Motion for Summary Judgment*, asserting that the above-captioned water right claim should be decreed as recommended by the Director as a matter of law.

7. On that same date, *Motions for Summary Judgment* were also filed by the Idaho Power Company and the City of Pocatello. The Idaho Power Company moved the Court to decree the claim as disallowed on the grounds that (1) the Board failed to follow the statutory

procedures required to acquire a water right under Idaho law, and (2) that a water right that does not appropriate any water is contrary to Idaho water law. The City of Pocatello's *Motion* moved the Court to renumber the claim as 01-200 and/or condition the claim to clarify that it is administered within Water District 01 as a matter of law, asserting that the point of minimum flow for water right 02-200 (the north abutment of Milner Dam) is physically located in Water District 01.

8. In his *Order on Motions for Summary Judgment and Special Master Report and Recommendation* ("Order on Summary Judgment"), the Special Master granted summary judgment in favor of the Board, and denied the *Motions for Summary Judgment* filed by the Idaho Power Company and the City of Pocatello.

9. On July 2, 2012, the Special Master entered an *Order* denying the *Motions to Alter or Amend* filed by the Idaho Power Company and the City of Pocatello.

10. Timely *Notices of Challenge* were filed by the Idaho Power Company and the City of Pocatello, challenging the Special Master's *Order on Summary Judgment* as well as his *Order Denying Motions to Alter or Amend*.

## II.

### MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument on Challenge was heard before this Court on October 9, 2012. The parties did not request additional briefing, nor does the Court require any. The matter is therefore deemed fully submitted the following business day, or October 10, 2012.

## III.

### STANDARD OF REVIEW

#### A. Challenge.

A district court is required to adopt a special master's findings of fact unless they are clearly erroneous. I.R.C.P. 53(e)(2); *Rodriguez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 377, 816 P.2d 326, 333 (1991). In determining whether findings of fact are clearly erroneous, a reviewing court "inquires whether the findings of fact are supported by substantial and competent evidence." *Gill v. Viebrock*, 125 Idaho 948, 951, 877 P.2d 919, 922 (1994). The party challenging the findings of fact has the burden of showing error, and a reviewing court will

review the evidence in the light most favorable to the prevailing party. *SRBA Springs & Fountains Memorandum Decision & Order on Challenge*, Subcase No. 67-13701 (July 28, 2006), p. 18.

The special master's conclusions of law, however, are not binding upon a reviewing court, although they are expected to be persuasive. *Higley v. Woodard*, 124 Idaho 531, 534, 861 P.2d 101, 104 (Ct. App. 1993). This permits the district court to adopt the master's conclusions of law only to the extent they correctly state the law. *Id.* Accordingly, a reviewing court's standard of review of the special master's conclusions of law is one of free review. *Id.*

#### **B. Summary judgment.**

This matter comes before the Court on Challenge by way of summary judgment, and the Court is asked to review certain findings and conclusions of the Special Master made pursuant to an order on summary judgment. Summary judgment is properly granted when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." I.R.C.P. 56(c). Where the case will be tried without a jury, the district court, as the trier of fact, is entitled to draw the most probable inferences from the undisputed evidence properly before it and grant the summary judgment motion in spite of the potential of conflicting inferences. *P.O. Ventures, Inc. v. Loucks Family Irrev. Trust*, 144 Idaho 233, 237, 159 P.3d 870, 874 (2007). The burden of demonstrating the absence of a genuine issue of material fact, and that summary judgment is proper as a matter of law, is on the moving party. *McCorkle v. Northwestern Mut. Life Ins. Co.*, 141 Idaho 550, 554, 112 P.3d 838, 842 (Ct. App. 2005). The fact that the parties filed cross-motions for summary judgment does not change the applicable standard of review, and each motion must be evaluated on its own merits. *Borley v. Smith*, 149 Idaho 171, 176, 233 P.3d 102, 107 (2010).

### **IV.**

#### **ANALYSIS**

The *Challenges* filed in this matter ask this Court to consider the following: (1) whether the Board has lawfully acquired a water right for a zero cfs minimum stream flow at the Milner Dam gaging station under Idaho law; (2) whether this Court can decree a water right that does

not appropriate any water; and (3) whether the above-captioned water right should be renumbered as 01-200 to reflect that its point of minimum flow is physically located in Water District 01. Each will be addressed in turn.

**A. The Board did not appropriate a water right for a zero cfs minimum stream flow at the Milner Dam gaging station when it adopted the 1976 State Water Plan as a matter of law.**

In 1976, the Board adopted the 1976 State Water Plan. Policy 32 of the Plan addressed the Snake River Basin, and provided in pertinent part as follows:

The Idaho Water Resource Board concluded, after considering all current and potential uses of water on the main stem Snake River, that depletion of flows below that currently available in the low flow months to maintain water for production of hydropower and other main stem water uses in not in the public interest.

*Therefore, main stem Snake River flow will be protected against further appropriations and preserved to provide the following average daily flows at the following U.S. Geological Survey stream gaging stations:*

Gaging Station	Protected Flow (Average Daily)
Milner	0 cfs
Murphy	3,300 cfs
Weiser	4,750 cfs

1976 State Water Plan, p.116 (italics in original). The Special Master agreed with the Board's position that when it adopted the above-quoted language in Policy 32 it appropriated, pursuant to its constitutional power, a water right for a zero cfs minimum stream flow at the Milner Dam gaging station. This Court disagrees.

**i. The Idaho Legislature has limited the methods and means by which the Board may exercise its constitutional right to appropriate water.**

The origins of the Board, and the powers vested in it, trace back to 1964 when the Idaho Constitution was amended with the addition of Article 15, § 7. At all times pertinent to this proceeding, the amendment read as follows:<sup>1</sup>

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<sup>1</sup> Article 15, § 7 was amended in 1984 to read as it now appears.

There shall be constituted a Water Resource Agency, composed as the Legislature may now or hereafter prescribe, **which shall have power to formulate and implement a state water plan for optimum development of water resources in the public interest**; to construct and operate water projects; to issue bonds, without state obligation, to be repaid from revenues of projects; to generate and wholesale hydroelectric power at the site of production; **to appropriate public waters as trustee for Agency projects**; to acquire, transfer and encumber title to real property for water projects and to have control and administrative authority over state lands required for water projects; **all under such laws as may be prescribed by the Legislature.**

Idaho Const., Art. 15, § 7 (1964) (emphasis added). In 1965, the Board was legislatively created to act as the "Water Resource Agency" referred to in Article 15, § 7. 1965 Idaho Sess. Laws Ch. 320, pp.901-911.

The plain language of Article 15, § 7 grants the Board two separate and distinct constitutional powers at issue here. First, it grants the Board the authority to "to formulate and implement a state water plan." Second, it grants the Board the authority "to appropriate public waters as trustee for Agency projects." That the Board has the constitutional authority to appropriate public waters is unquestioned. However, its authority in this respect is not unbridled. The plain language of Article 15, § 7 itself provides that the Board may only exercise its authority "under such laws as may be prescribed by the legislature." And in this case the Legislature has enacted laws to regulate the method and means by which the Board may exercise its constitutional right to appropriate water.

In 1965 the Legislature enacted Idaho Code § 42-1734 to govern the powers and duties of the Board. 1965 Idaho Sess. Laws, Ch. 320, § 4. At the time of the 1976 State Water Plan's adoption, that section provided the following with respect to the Board's authority to appropriate water:

POWERS AND DUTIES. The board shall have the following powers and duties:

...

(g) To file applications and obtain permits in the name of the board, to appropriate, store, or use the unappropriated waters of any body, stream, or other surface or underground source of water for specific water projects. **Such filings and appropriations by the board, or any water rights owned or claimed by the board, shall be made in the same manner and subject to all of the state laws relating to appropriation of water, with the exception that the board will not be required to pay any fees required by the law of this state for its appropriations. The filings and appropriations by the board shall be subject to contest or legal action the same as any other filing and appropriation . . . .**

I.C. § 42-1734(g) (1974)<sup>2</sup> (emphasis added). The above-quoted statute, which the Idaho Supreme Court has held is “consistent with the provisions of Art. 15, § 7 of the Constitution,”<sup>3</sup> recognized the Board’s constitutional authority to appropriate water. However, it specifically limited the method and means by which the Board may exercise its right by providing that such appropriations “shall be made in the same manner and subject to all of the state laws relating to appropriation of water” and “shall be subject to contest or legal action the same as any other filing and appropriation.” I.C. § 42-1734(g) (1974).

When the 1976 State Water Plan was adopted, “state laws relating to the appropriation of water” mandated that the application, permit and license procedures set forth in Title 42 of the Idaho Code be followed with respect to all appropriations of water within the state, unless specifically excepted:

The right to the use of the unappropriated waters of rivers, streams, lakes, springs, and of subterranean waters or other sources within this state shall hereafter be acquired only by appropriation under the application, permit and license procedure as provided for in this title, unless hereinafter in this title excepted.<sup>4</sup>

I.C. § 42-103; *See also, State, Dept. of Parks v. Idaho Dept. of Water Administration*, 96 Idaho 440, 445, 530 P.2d 924, 929 (1974) (providing “[t]he Idaho legislature in 1971 made compliance with the statutory permit procedure mandatory”). Under the application, permit and license procedure, once an application for appropriation was submitted to the Department, it was subject to written protest by those who objected to the application’s approval, as well as a hearing before the Department. I.C. § 42-203 (1976).<sup>5</sup> Furthermore, the decision of the Director was subject to judicial review. *Id.*; I.C. § 42-237(e) (1976).<sup>6</sup>

It is undisputed that the Board did not follow the application, permit and license procedures with respect to the above-captioned claim. The record establishes that no application

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<sup>2</sup> 1974 Idaho Sess. Laws, Ch. 20, §23. Idaho Code § 42-1734(g) (1974) is presently codified as Idaho Code § 42-1734(6).

<sup>3</sup> *Idaho Power Company v. State, Dept. of Water Resources*, 104 Idaho 570, 573, 661 P.2d 736, 739 (1983) (emphasis in original). In that case the Idaho Supreme Court held that the final phrase in Article 15, § 7, providing “all under such laws as may be prescribed by the legislature” applies to procedural matters, and not to the specific, substantive grants of power enumerated in Article 15, § 7. *Id.* It further held that “I.C. §§ 42-1731 through 42-1735 provide for organization and operation of the Water Resource Board consistent with the provisions of Art. 15, § 7 of the Constitution. *Id.* (emphasis in original).

<sup>4</sup> The Court notes that none of the exceptions set forth in Title 42 in 1976 applied to the Board’s alleged appropriation of water.

<sup>5</sup> 1969 Idaho Sess. Laws, Ch. 469, § 1.

<sup>6</sup> 1953 Idaho Sess. Laws, Ch. 182, § 19.

for permit was filed with the Department, nor has a license ever been issued by the Department with respect to the claim. Although the Constitution grants the Board the right to appropriate water, it does not excuse the Board from complying with state law regarding the appropriation of water.

The procedural limitations placed on the Board's constitutional authority to appropriate water by Idaho Code § 42-1734(g) (1974) and Idaho Code § 42-103 do not unconstitutionally deny the Board's right to appropriate water. Rather, they regulate the method and means by which the Board may perfect a right to water in a constitutionally permissible way. The Idaho Supreme Court has already recognized that the imposition of the mandatory application, permit and license procedure is in accord with the constitutional right to appropriate water set forth in Article 15, § 3 of the Idaho Constitution. In *State Ex. Rel. Tappen v. Smith*, 92 Idaho 451, 456, 444 P.2d 412, 417 (1968), the Idaho Supreme Court determined that Idaho Code § 42-229, which requires appropriators of groundwater to follow the application, permit and license procedure, "does not deny the right to appropriate ground water, but regulates the method and means by which one may perfect a right to the use of such water." *Id.* at 456, 444 P.2d at 417. As a result, the Court upheld the mandatory application, permit and license procedure set forth in Idaho Code § 42-229 as being "in accord with Article 15, Section 1 and 3, of Idaho's Constitution." *Id.* The circumstances presented in this case are no different. Since the Board did not comply with applicable state law regarding the appropriation of water, this Court finds that it did not lawfully appropriate a water right for a zero cfs minimum stream flow at the Milner Dam gaging station when it adopted Policy 32 as a matter of law.

- ii. **The plain language of Policy 32 of 1976 State Water Plan did not create a water right for a zero cfs minimum stream flow at the Milner Dam gaging station as a matter of law.**

Even if the Board had the authority to appropriate water without regard to state laws relating to the appropriation of water, this Court finds that the plain and unambiguous language of Policy 32 of did not create a water right for a zero cfs minimum stream flow at the Milner Dam gaging station. When interpreting a document, the Court begins with the document's language. *Cristo Viene Pentecostal Church v. Paz*, 144 Idaho 304, 308, 160 P.3d 743, 747 (2007). If the language of the document is unambiguous, then its meaning and legal effect must



be determined from its words. *Shawver v. Huckleberry Estates, LLC*, 140 Idaho 354, 361, 93 P.3d 685, 692 (2004). The language in Policy 32 relied upon by the Board to evidence the appropriation of a water right in 1976 provided:

*Therefore, main stem Snake River flow will be protected against further appropriations and preserved to provide the following average daily flows at the following U.S. Geological Survey stream gaging stations:*

Gaging Station	Protected Flow (Average Daily)
Milner	0 cfs
Murphy	3,300 cfs
Weiser	4,750 cfs

1976 State Water Plan, p.116 (italics in original).

If, as argued, the Board intended to appropriate a water right for a zero cfs minimum stream flow at the Milner Dam gaging station simply by its adoption of Policy 32, the plain language of Policy 32 does not expressly reflect that intent. The terms “water right” or “appropriation” are absent from the language in Policy 32. More importantly, the plain language of Policy 32 does not identify the essential elements of a water right. Among other things it fails to set forth the priority date, purpose of use, legal description of the place of use or point of diversion, or period of use. The failure to set forth these essential elements “vitiates the existence of a legal water right.” *See State v. Idaho Conservation League*, 131 Idaho 329, 333, 955 P.2d 1108, 1112 (1998) (holding that a general provision contained in a prior general adjudication decree (i.e., the *Reynolds Creek Decree*) authorizing the use of high flows did not create legal water rights as it did not set forth the essential elements of a water right); *See also Memorandum Decision and Order on Challenge*, dated January 3, 2012, SRBA Subcase No. 74-15051, p.10 (holding that a general provision in the 1982 *Lemhi Decree* that failed to identify many of the essential elements of a water right, including the name of the claimant, the quantity, priority date, purpose of use, place of use, etc., did not create a water right). This Court holds as a matter of law that no water right was created by the Board for a zero cfs minimum stream flow at the Milner Dam gaging station due to Policy 32’s failure to identify the essential elements of a water right.<sup>7</sup>

<sup>7</sup> By comparison, Policy 6 of the 1976 State Water Plan, which addresses instream flow rights, sets forth in detail all of the basic elements of a water right that should be included in future proposed instream flow legislation.

Additionally, when interpreting the 1976 State Water Plan as a whole, the Court finds the Board's argument to be inconsistent with the plain language of Policy 6 of the Plan. *See e.g., Nordstrom v. Guidon*, 135 Idaho 343, 346, 17 P.3d 287, 290 (2000) (providing that when interpreting a document, the Court must view the entire document as a whole). Policy 6 specifically addresses water rights for instream flows. It first provides that "[w]ater rights *should* be granted for instream flow purposes." 1976 State Water Plan, p.94. (emphasis added). This language, which is plain and unambiguous, evidences the intent of the Board that water rights for instream flow purposes (which includes minimum stream flows) *should* be granted. The inclusion of such language belies the Board's position that it was appropriating a water right for a zero cfs minimum stream flow simply by adopting the language set forth in Policy 32. Policy 6 then suggests that instream flow legislation should be adopted by the legislature and sets forth the Board's position as to what basic provisions such legislation should include.<sup>8</sup> *Id.* at pp.94–95. Again, this language belies the Board's position. If the Board had the constitutional authority to unilaterally create a minimum stream flow water right without the involvement of the Legislature and/or Idaho Department of Water Resources, there would be no need for the future legislation proposed in Policy 6.<sup>9</sup>

**iii. The Board's adoption of Policy 32 created an effective and enforceable state policy which has already been memorialized in the SRBA.**

While the Board's adoption of Policy 32 of the 1976 State Water Plan did not create a water right, this Court holds that it did result in the creation of a state policy regarding stream flow in the Snake River at the Milner Dam gaging station. When the Board adopted Policy 32, it

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<sup>8</sup> Specifically, Policy 6 also provides that the "legislation should also direct that the Idaho Water Resource Board shall be the only applicant for the instream flow." 1976 State Water Plan, p.94.

<sup>9</sup> When the Legislature did pass the Minimum Stream Flow Act (I.C. § 42-1501, *et seq.*) in 1978, it required that "[w]henver the board desires to appropriate a minimum stream flow . . . it shall submit an application to the director." I.C. § 42-1503. It is questionable whether styling a water right for zero cfs as a "minimum stream flow" is appropriate or accurate. The term "minimum stream flow" is defined in the Act as "the minimum flow of water in cubic feet per second of time or minimum lake level in feet above mean sea level required to protect the fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, navigation, transportation, or water quality of a stream in the public interest." I.C. § 42-1502(f). Furthermore, when the Director considers an application under the Act, he is required to find that the desired appropriation is "necessary for the preservation of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, navigation, transportation, or water quality of the stream." I.C. § 42-1503. It is arguable whether allowing a location on a river to be dewatered to zero cfs complies with the definition of "minimum stream flow" or achieves any of the purposes the Director is required to find in order to authorize the appropriation of water for a minimum stream flow.

was exercising its constitutional authority to formulate and implement a state water plan for optimum development of water resources in the public interest. The Idaho Supreme Court has held that the 1976 State Water Plan “was effective as the date of its adoption, without any legislative action.” *Idaho Power Company v. State, Dept. of Water Resources*, 104 Idaho 570, 574, 661 P.2d 736, 7740 (1983).

Although Policy 32 did not create a “water right,” it did establish an enforceable administrative provision for the purpose of optimizing water use in the State of Idaho.<sup>10</sup> The purpose of the “right” is not for the beneficial use of the water itself but rather to affect how other water rights are administered on the system. This is made clear in the stated purpose of Policy 32, which provides:

The Idaho Water Resource Board concluded, after considering all current and potential uses of water on the main stem Snake River, *that depletion of flows below that currently available in the low flow months to maintain water for production of hydropower and other main stem water uses in not in the public interest.*

1976 State Water Plan, p.116 (emphasis added).

The Board argues that memorializing the zero cfs minimum stream flow established by Policy 32 as a water right is necessary to avoid uncertainty and confusion to water users as well as to the water master in administering rights. This Court disagrees for several reasons. As an initial matter, a number of provisions already exist which effectively memorialize and provide for the enforceability of the Policy. These include the 1976 State Water Plan itself, which the Idaho Supreme Court held became effective upon its adoption, *Idaho Power Company*, 104 Idaho at 574, 661 P.2d at 740, as well as Idaho Code § 42-203B, which with respect to the policy of zero flow at the Milner Dam provides:

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.

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<sup>10</sup> This Court recognizes that the two other minimum stream flows established by Policy 32 were partially decreed as water rights in the SRBA. *Amended Partial Decree* entered on September 30, 2011, in Subcase No. 02-201 (Murphy Gaging Station); *Amended Partial Decree* entered on September 29, 2011 in Subcase No. 03-6 (Weiser Gaging Station). However, the *Partial Decrees* entered in those subcases were the result of agreed upon stipulations between the parties made in resolution of those contested subcases. While decreeing those minimum flows as water rights may have been a convenient and agreeable method for memorializing those minimum flows in the SRBA, neither of those subcases involved the myriad of issues emanating from decreeing a zero cfs water right.

Idaho Code § 42-203B(2). There is also the Swan Falls Agreement which provides for zero flow at the Milner Dam as between the Idaho Power Company and the State of Idaho and which has been memorialized in the SRBA in both Idaho Power's hydropower water rights and the State of Idaho's trust water rights via the inclusion of the following provisions in the "other provisions" portion of those rights:

For the purposes of the determination and administration of this water right, 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. This water right may not be administered or enforced against any diversions or uses of the waters identified in this paragraph.

*See e.g., Amended Partial Decree*, subcase no. 02-100 (Jan. 12, 2012) (Idaho Power) & *Amended Partial Decree*, subcase no. 02-10135 (Jan. 12, 2012) (State of Idaho Trustee).

Last, and of the most significance to this Court, is SRBA General Provision 4 in Basin 02. When the Director issued his recommendation for the above-captioned water right claim on December 29, 2006, he also recommended that the following Basin 02 general provision, designated as General Provision 4 in Basin 02, be decreed in the SRBA:

4. The minimum daily flows at the Milner gauging station shall remain as zero cubic feet per second. The Milner gauging station is located at Latitude 42° 31'41", Longitude 114° 01'06" (revised), (NAD83), in the SW1/4 NE1/4 of section 29 in Township 10 South, Range 21 East, Boise Meridian, Twin Falls County Hydrologic Unit 17040212, on the left bank 200 ft downstream from the highway bridge at Milner, 0.4 mile downstream from Milner Dam, at mile 638.7.

*Director's Report for Irrigation & Other Uses, Reporting Area Basin 02* (December 29, 2006).

The Director's recommendation with respect to General Provision 4 appears to be an attempt to accomplish the same purpose as his recommendation for the above-captioned water right claim – memorializing the Board's policy, as set forth in Policy 32, of zero flow at the Milner Dam gauging station in the SRBA.

*Objections* to the recommendation for General Provision 4 were filed by the Idaho Power Company and IGWA in contested SRBA subcase no. 00-92002GP, and *Responses* to the *Objections* were filed by various other parties. However, the *Objections* and *Responses* were resolved via settlement. Specifically, the parties to subcase no. 00-92002GP agreed that the language recommended by the Director for General Provision 4 would be replaced by the following language:

The exercise of water rights above Milner Dam has and may reduce flow at the dam to zero. 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.

*Order Granting Petition to Appear as Amicus Curiae, Order Setting Deadline for Comments and Special Master Report and Recommendation*, Subcase No. 00-92002GP, p.4 (Nov. 20, 2009).

The Special Master has entered a *Special Master Report and Recommendation* in subcase no. 00-92002GP, recommending that this Court order the above settlement language as General Provision 4 in Basin 02 in lieu of the language recommended by the Director. *Id.* at 5. No challenges to the Special Master's recommendation have been made, and the time for challenges has expired.<sup>11</sup> The Court finds that General Provision 4 in Basin 02, as written pursuant to the parties' settlement in subcase no. 02-92002GP, effectively memorializes and provides for the enforceability of Policy 32 as it pertains to the Milner Dam gaging station in the SRBA.

On the other hand, decreeing a zero cfs minimum stream flow as a "water right" raises a host of issues that cannot be avoided, and some of which are arguably in conflict with established principles of Idaho water law. For example, is a water right for zero cfs even an appropriation of water? Additionally, although labeled as a "minimum stream flow," will the right have to be treated as a maximum flow for purposes of enforcement?<sup>12</sup> Presumably a water right for a zero cfs minimum stream flow is always being satisfied for purposes of administrative enforcement. Can a water right be established where the water "appropriated" is not put to beneficial use, but rather is "appropriated" for purposes of administering other water rights on the system? Finally, for purposes of administration should the right be decreed in Basin 02 as argued by the Board, when it is undisputed that its minimum flow point is physically located in Water District 01? While the use of a water right may on first blush seem as a convenient means for memorializing the zero cfs minimum stream flow described in Policy 32, the Court would potentially be forced to contort Idaho water law to get there. In that regard, the Court disagrees that memorializing the zero cfs minimum stream flow at the Milner dam gaging station through decreeing a water right would eliminate confusion and uncertainty.

<sup>11</sup> The Court notes that no *Partial Decree* for the Basin 02 general provisions has been entered in the SRBA at this time due to the continuing overlapping litigation in the above-captioned subcase.

<sup>12</sup> For example, although recommended as a minimum stream flow water right on of the objections to the Director's recommendation provides that the quantity element should provide "Maximum daily flow shall be zero (0) cfs." *Standard Form 1 Objection*, subcase no. 02-200 (Dec. 5, 2007).

**B. The Court need not reach the remaining issues.**

This Court need not reach the issue of whether a water right can be decreed that appropriates no water since this Court has already determined that the Board did not lawfully appropriate a water right for a zero cfs minimum stream flow at the Milner Dam gaging station. For the same reasons, this Court need not reach the issue of whether or not the above-captioned claim should be renumbered as 01-200.

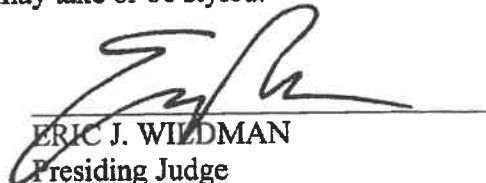
**V.**

**CONCLUSION**

**BASED ON THE FOREGOING, THE FOLLOWING ARE HEREBY ORDERED:**

1. The Special Master's Special Master's *Order on Summary Judgment* is **reversed**.
2. The above-mentioned water right claim is hereby **disallowed with prejudice** and shall not be confirmed in any partial decree or in any final decree entered in the SRBA, Case No. 39576, in whatever form that final decree may take or be styled.

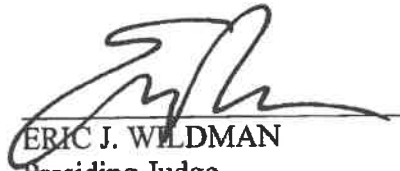
DATED: November 20, 2012

  
ERIC J. WILDMAN  
Presiding Judge  
Snake River Basin Adjudication

**RULE 54(b) CERTIFICATE**

With respect to the issues determined by the above judgment or order it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

DATED: November 20, 2012

  
ERIC J. WILDMAN  
Presiding Judge  
Snake River Basin Adjudication

**CERTIFICATE OF MAILING**

I certify that a true and correct copy of the MEMORANDUM DECISION AND ORDER ON CHALLENGE / FINAL ORDER DISALLOWING WATER RIGHT CLAIM was mailed on November 20, 2012, with sufficient first-class postage to the following:

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BONNEVILLE-JEFFERSON GROUND  
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MADISON GROUND WATER DISTRICT  
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ORDER

Page 1 11/20/12

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Deputy Clerk

