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DEPARTMENT OF
WATER RESOURCES

Orr Affidavit

Exhibit 18

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DEPT. OF WATER RESOURCES

Memoranda from Norm Young of IDWR
to Director Ken Dunn regarding water
appropriation rules
(1985-86)

Fourth Orr Affidavit
Exhibit 91:

**Memoranda from Norm Young to Ken
Dunn (June 14, 1985; January 21, 1986;
February 5, 1986)**

MEMORANDUM

The foregoing is a true and certified copy of the document on file at the department of Water Resources

Signed this 15th day of May, 2008
Cary Sheehan

TO: Ken Dunn
FROM: Norm Young *NY*
DATE: June 14, 1985
SUBJ: Legal Issues Associated with Senate Bill 1008

Drafting rules and regulations for water right processing will require addressing or avoiding several issues associated with S1008 and the Snake River Water Rights agreement. This memo is intended to identify and briefly describe these issues, discuss alternatives and suggest the alternative that will be chosen as the rules are adopted. It is not now my intention to ask for a legal opinion on any of these issues unless you believe it is necessary.

Issue 1 - Are flows at hydropower dams previously subordinated by conditions on permits or licenses issued prior to the effective date considered to be trust waters and are applications proposing to appropriate these waters to be processed under the public interest criteria of 42-203C?

This issue arises because of the language in 42-203C(1) which requires that "If an applicant intends to appropriate water which is or may be available for appropriation by reason of a subordination condition" (emphasis added). This language could be considered as also referring to subordination conditions attached to hydropower permits and licenses issued prior to passage of S1008 and would thus require a public interest review for applications upstream from those hydroplants.

However, the Idaho Supreme Court recognized the validity of subordination conditions attached to permits and licenses in its November 19, 1982 decision on Swan Falls. The legislature in its statement of intent on S1008 made no reference to broadening the scope of the reviews to require public interest reviews for previously subordinated flows.

Alternatives:

- 1) Draft rules with a provision recognizing that the public interest reviews apply to flows through all hydropower facilities.
- 2) Do not address the issue.
- 3) Draft rules stating that previously subordinated hydro flows are not subject to public interest reviews.

I propose to draft rules using alternative 3. I believe the issue needs to be addressed and it can be clarified in this matter if the legislative committees concur.

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Issue 2 - Are the flows passing Milner Dam exempt from the trust water provisions?

The adopted minimum flow of zero cfs at Milner has been construed by some as exempting any water passing Milner from the trust water provisions. This interpretation would mean that the flows of the Thousand Springs and other sources entering below Milner would have to be relied upon to supply the flow in the main stem Snake River hydropower facilities. A simple reading of S1008 (Section 42-203b(2)) indicates that all waters in excess of an established minimum flow up to the amount of the established hydropower right are to be considered trust waters. Actually, the zero minimum flow at Milner could have the opposite effect of increasing the flows that are to be considered trust waters rather than to exempt the flows from public interest considerations. The unsubordinated hydropower permit held by Twin Falls Southside for diversion at Milner also could establish a trust situation without regard to the Snake River Water Rights agreement.

Alternatives:

- 1) Assume all flows passing Milner as surface water are not trust waters.
- 2) Assume all surface flows, but not groundwater inflow, entering above Milner are not trust waters.
- 3) Assume all flows passing Milner as surface water are trust waters.
- 4) Do not address issue in the rules.

I propose to draft the rules recognizing all flows tributary to Snake River above Swan Falls including water passing Milner as trust waters unless the main hydro rights at Swan Falls and all other hydropower facilities up to Milner (with the exception of C.J. Strike) are satisfied.

Issue 3 - Are applications filed on developments completed prior to October 1, 1984 to be processed for trust water using the public interest criteria of 42-203C?

Assuming that the Snake River Water Rights agreement is ratified and paragraph 7 becomes effective, Idaho Power Co. will have subordinated the rights at its hydro plants to any development diverting and beneficially using water prior to October 1, 1984 if a claim or application is filed prior to June 30, 1985 (see paragraph 7d of the agreement).

Because Idaho Power Co.'s rights will then be subordinated to these uses, the applications could be considered as not seeking trust water and would not be subject to the additional public interest criterion of 42-203C. However, the new provisions of

42-203C do not provide an exception for such applications and if the appropriation doctrine of first in time is to be followed, the subordination could perhaps be considered as attaching to undeveloped but earlier in priority applications and permits. Obviously this would be technically impossible to administer.

This issue is further compounded by HB71 which allows expanded development associated with existing rights to be claimed as part of the existing water right in a basin wide adjudication.

Alternatives:

- 1) Draft rules requiring all applications whether for developed or undeveloped projects to be subject to review under 42-203C.
- 2) Draft rules requiring only those projects not developed prior to October 1, 1984 are to be reviewed under the requirements of 42-203C. This exempts projects developed prior to October 1, 1984 as long as an application or claim was filed prior to June 30, 1985.

I believe this procedural matter must be addressed and clarified in the rules. I also believe both Idaho Power Co. and the legislature intended to recognize all existing uses. For these reasons, I propose to incorporate alternative 2 into the draft rules. However, distribution of water in times of scarcity should be simply by priority.

Issue 4 - Does Section 42-203D require reprocessing of all undeveloped permits including those not on trust waters?

Section 42-203D requires all permits to the extent they have not been developed prior to June 30, 1985 to be reprocessed under the provisions of Chapter 2, Title 42, Idaho Code. This could be interpreted as requiring permits in all areas of the state to be reviewed and reprocessed. However, such a requirement would be meaningless if the criteria for evaluating the permits had not been revised. Since the criteria has only been revised for filings proposing to take trust water, it would be redundant to reprocess other permits.

Alternatives:

- 1) Do not address issues in the rules.
- 2) Draft rules requiring all undeveloped permits to be reprocessed.
- 3) Draft rules requiring reprocessing only for undeveloped permits proposing to use trust waters.

I propose to draft rules using alternative 3.

The foregoing is a true and certified copy of the document on file at the department of Water Resources.

Signed this 15th day of May, 2008
Gay Spackman

Issue 5 - Must the trust waters be reallocated by priority of application?

All pending applications and undeveloped permits needing to be reprocessed were filed for unappropriated water recognizing first in time - first in right. However, the trust waters are actually appropriated flows that are being reallocated. The Snake River Water Rights agreement cuts across the appropriation doctrine by recognizing all existing uses whether a legal water right had been obtained or not. Thus the reallocation of trust water may not require processing and approving rights by priority of filing.

This is an issue for which we are seeking public input before the rules and regulations are drafted. There are obviously many possible alternatives for the order of processing. My thinking at this time is that priority must be a principle criterion; however, the rules must also allow timely processing of recently filed applications for non-trust waters, non-consumptive uses on any water source and for expedited processing of those applications meeting the contrast definition of DCMI. In addition, applications for projects developed prior to October 1, 1984 should also be processed out of sequence.

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the document on file at the department of
Water Resources.

Signed this 15th day of May, 2008

Chris Spalding

MEMORANDUM

TO: Ken Dunn

FROM: Norm Young

DATE: January 21, 1986

RE: Issues Raised in Hearings on Water Allocation Rules

1. Trust water should not extend above Milner, especially surface water. Concern that high water use above Milner could be affected by trust water determination.

2. "Greater" public interest standard must not undo first in time.

3. Longer irrigation season in Mud Lake - Hamer - Dubois area.

4. Appeal procedure should be detailed in rules.

5. Constitutional preference for agriculture should not be reversed by DCMI presumed to be in public interest.

6. Rules refer to mitigation--not the intent of legislature. Intent was to make significant water readily available for irrigation.

7. Burden of proof has been reversed from legislative intent; i.e.,

- a. Significant reduction--"significant" is not defined.
- b. Ground water above Murphy tributary to Milner.
- c. Presumption of not in public interest to pump direct from river and from tributaries within four miles (arbitrary and capricious).

8. Ground water above Milner should not be tributary -- IPCo. demarcation line was just east of Minidoka.

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9. Economic impacts are considered more than once in the evaluation criteria--(Too much emphasis on economics in rules).

10. Don't consider economic impact and electric rate changes because of loss of power at Hells Canyon. If Hells Canyon impacts are considered, no irrigation can show positive economic impacts.

11. Application and permit readvertisement should be at cost of department.

12. Application and information requirements are burdensome on small applicants.

13. Geologists should not be authorized to design projects.

14. Rule 5,1,1,1. appears to allow department to reduce water to existing rights if reviews show inefficient use--department has no authority to do so--could allow department to force switch to sprinklers.

15. Does Rule 5,3,9 apply only to trust water or also to unappropriated water? If only trust water, then will the significant amount of unappropriated water between Bliss and Swan Falls be subject to the ban on direct pumping.

16. Rules discourage consumptive use of water even though such uses are a benefit to state.

17. P.E. requirement is too severe.

18. Director's discretion is too great.

19. Catch 22 on rule 5,1,3,1. -- Eminent domain - vs - permit to appropriate.

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Signed this 15th day of May, 20 08

Gary Spackford

The foregoing is a true and certified copy of
the document on file at the department of
Water Resources

Signed this 15th day of October, 2008

Ray Spelman

MEMORANDUM

TO: Ken Dunn

FROM: Norm Young

DATE: February 5, 1986

RE: Additional Issues Raised in the Written Comments on the Water
Allocation Rules

My memo of January 21, 1986 listed the issues raised during the
public hearings. Since that time, six letters have been received
containing some additional issues:

1. Trust waters are created by legislation not the agreement
(Rule 1.5.1.1)

2. DWR should continue to recognize blanket protests already on
file.

3. The waiver of additional information on projects smaller than
10 cfs or 1000 acre feet (Rule .4,5,3,7) releases too many projects.

4. Family-farm presumption is too liberal--should be 300 acres
per family member.

5. Trust waters should not include water from rights abandoned in
the future.

6. Rules should create a presumption that public interest is
served by taking water from storage as well as putting it into
storage.

7. Burden of proof for local public interest should not be on
applicant.

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8. Period of time required for ground water to reach surface sources should determine whether it is tributary.
9. Don't assume applications are for trust water--(Rule 3,2,1.).
10. Farmers cannot commit to a long term rotation (Rule 4,5,3,3,2.).
11. Applicants should not be required to determine Class I equivalency (Rule 5,3,3,1.).
12. Mitigation allows some criteria to have a greater weight (5,3,3).
13. Trust waters exist only if 42-203(A) cannot be satisfied (1,4,2,2).
14. Legislature did not intend "cumulative" to be interpreted literally (1,4,2,2).
15. Ground water entering river below Milner may not be trust water.
16. 42-203(6) water is not trust water and Hells Canyon subordination is not affected.
17. Define irrigation, commercial, industrial and power uses.
18. Redefine "subordinated water right" (2,16).
19. DWR does not have authority to stop construction until application to appropriate is filed (Rule 3,1,1.).
20. Rebuttable presumption is arbitrary (Rule 3,2,4).
21. Burden of proof is ambiguous (Rule 4,4).
22. Information requirements are excessive.
23. Add diligence concept to speculation (Rule 4,5,3,3,2).
24. 42-203C criteria interpreted too broadly.
25. Cite federal regulations for Class I equivalency.
26. Rules should be more comprehensive.
27. Separate applications for hydropower projects.
28. Small irrigation projects are discriminated against relative to DCM.

Additional comments in letters subsequent to this memo:

1. Rewrite rules 1,5,4,1 through 1,5,4,4 to be readable.
2. Add to Rule 3,3,2,1. a requirement to list names and addresses of partners.
3. Add to rule 3,3,2,9. a requirement to describe project works and their cost.
4. Add to rule 4,1,1,4. a requirement that director make a written finding of fact on each criteria of 42-203 in his decision on unprotected filings.
5. Notice provisions agree with statute but are inadequate.
6. Rule numbering system is not good.

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Water Resources

Signed this 15th day of October, 2008

Gary Spadman