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DEPARTMENT OF
WATER RESOURCES

Orr Affidavit

Exhibit 19

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DEPT. OF WATER RESOURCES

Letter from attorney John A. Rosholt to Norman
C. Young, Administrator of the Resource
Administration Division of the Idaho
Department of Water Resources (Oct. 12, 1988);
and
Idaho Power Company's Memorandum
in Support of Motion to Re-Consider
and Amend Summary Judgment
(*Idaho Power Co. v. State*, Case No. 62237)
(Fourth Jud. Dist., Ada County) (Feb. 19, 1980)

NELSON, RSHOLT, ROBERTSON, TOLMAN & TUCKER
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OCT 13 1988

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Department of Water Resources

October 12, 1988

Norman C. Young, Administrator
Resource Administration Division
Idaho Department of Water Resources
1301 N. Orchard, Statehouse Mail
Boise ID 83720

RE: Draft Policy and Implementation Plan -- Swan Falls
Area Water Rights Processing

Dear Mr. Young:

Please include this letter as written comments on the above referenced policy and plan of the Department dated September 1, 1988. The comments are submitted on behalf of the Twin Falls Canal Company ("TFCC"), the North Side Canal Company ("NSCC") and the American Falls Reservoir District ("AFRD").

The Department is aware of petitions jointly filed by TFCC, NSCC and AFRD. One petition seeks the enlargement of Water District 01 so as to effect conjunctive management of ground and surface water diversions. The other is a petition seeking a moratorium on the development of some 400 applications for consumptive uses in the non-trust water area where the groundwater is tributary to the Snake River between Blackfoot and Milner Dam.

The Department's comments at page 9 of the document indicate that it is the present intention of the Department to deny the petition to expand Water District 01. That page also suggests that the Department would apply a moratorium in the non-trust water area, but that the moratorium would not provide an absolute prohibition against further consumptive use, but would only provide for persons potentially affected to protest and provide information concerning the effect of the development. The subparagraphs thereunder suggest that anyone who had developed by March 10, 1988, would not be further reviewed. As we understand the "window" provided in the moratorium, other filings would not be authorized unless "the

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Resource Administration Division
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director issues a permit allowing the project under conditions the director determines necessary to protect prior rights and the public interest."

Oral comments at the October 5, 1988, hearing in Twin Falls indicate that it would be the Department's intention to require a protestant to prove direct interference by each individual applicant, rather than considering the cumulative effect of the 400 applications which pend.

While I recognize the state's dilemma in following the constitutional mandate of "the right to appropriate shall never be denied . . .", the Swan Falls dilemma has pointed up some realities for Idaho. One is that water resources of the State of Idaho are finite. The other is that ground and surface water are interdependent.

TFCC and NSCC have been diverting under state water rights since near the turn of the century. They have developed and established irrigation systems and communities and their shareholders have consistently paid their taxes and their dues for over 80 years within the State of Idaho. In our judgment, the Idaho Department of Water Resources should be more concerned about protecting the economy that is already established, under water rights with early priorities. In essence, the September 1 document suggests that the people who have prior rights to non-trust water must now venture into the administrative arena of protests and petitions to protect their rights against 400 to 800 applicants who seek the appropriation of non-trust water from groundwater sources which are tributary to the Snake River below Blackfoot. Should not the Idaho Department of Water Resources make an independent investigation to determine whether or not the development of any applications could adversely impact existing water rights as opposed to requiring those with the existing and prior water rights to come forth and prove those impacts? Not one positive thing is accomplished by the implementation of the proposal if the eventual and net result is the drying of one acre in Magic Valley for the benefit of an irrigated acre above Blackfoot.

To say that so long as water flows past Milner Dam, the upper Snake Basin is not fully developed is not realistic. The water that flows past Milner in ordinary years is either not storable in a reservoir for existing rights holders or comes during flood stage in the early spring on a regulated river. In either case, the water is not practically available for new groundwater or surface water development for new irrigated acres until a new reservoir is constructed. The fact

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is that if the Department determines that a new applicant can divert 10 cubic feet of water to develop new ground, then he should only be able to divert it at a time that the impact of his pumping will only decrease the flows past Milner at a time that the prior water right holders are not impacted. To require a payback in storage water merely changes the nature of the prior water right without permission.

In the drought years, water will not be available in the water bank. Is it fair to lull a new developer into a situation where he can irrigate except in drought years? Until all pumpers are brought into a water district that provides for conjunctive management of the water and the effects of more development are known, there is no one to police the new pumper. Consequently, the prior right holder can't call up the watermaster and ask for relief. He can call the Department of Water Resources that is undermanned, underfunded and overwhelmed, and obtain no immediate relief. Once again the burden falls upon the prior right holder to go forward and to seek judicial relief to protect a senior applicant from injury from a right that should not have been granted in the first place.

In our opinion, the same mistake is made by the IWRB in seeking the allocation of water in federal reservoirs to the state. These reservoirs were constructed by the United States for the benefit of the lands in the Minidoka Project. The purpose was not to insure flows at Swan Falls so as to allow the development of groundwater in a trust water area. The Congress of the United States did not put the water in federal reservoirs in the upper Snake Basin to benefit an irrigator at Mud Lake. Water in upper Snake Basin reservoirs is here for the benefit of the area and is not a panacea for the solution of the state's water administration problems. In fact, the same water may well be necessary to satisfy Indian and federal claims within the Minidoka Project so as to preserve the status quo for the entryman who bought and paid for those benefits. Does the state have a greater interest in land development at Mud Lake than it has in protecting the status quo in the upper Snake Basin?

In our view, the whole document is slanted toward facilitating new applications for new development at the expense of existing development and prior water rights. There is absolutely no benefit to be gained by the owner of an existing irrigated acre from the development from any more irrigated acres in Idaho at this point and time.

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In a state where thousands of farm foreclosures have occurred and approximately 10 percent of the previously irrigated acres are now in foreclosure or set aside programs, it seems folly to facilitate the development of new irrigated acres. Anyone interested in farming an irrigated farm should stop by the Federal Land Bank or the Production Credit Association and select the area of the state in which he wants to live and he can acquire a farm with the water right. In this case the price would be substantially less than that paid for the development of a new acre. It seems to us that the state should exert their efforts in attempting to better understand the interrelationships of ground and surface water in Idaho and develop a method of predicting impacts which can be specifically measured. There is no great crisis to get more irrigated land into production so as to facilitate existing farm surpluses. Let's know what the impacts are of granting an application for permit before we consider the same. For all practical purposes, the upper Snake Basin above Milner Dam is totally appropriated. No one can make a crop from utilization of the flows past Milner unless they construct an upper basin reservoir, which at this point in history appears not only unrealistic, but impossible.

In our view the Department's primary responsibility is to protect and administer the rights already in place. Idaho does not need a Robin Hood administration that takes from the rich to give to the poor. What's wrong with our state the way it is now?

Respectfully submitted,



JOHN A. ROSHOLT

Attorney for TFCC, NSCC & AFRD

JAR:dcb
00741

Fourth Orr Affidavit
Exhibit 24:

**Plaintiff's Memorandum in Support of
Motion to Re-Consider and Amend
Summary Judgment," *Idaho Power Co. v.*
State, Case no. 62237 (Fourth Jud. Dist.,
Ada County) (Feb. 19, 1980)**

1 John A. Rosholt
NELSON, ROSHOLT, ROBERTSON,
2 WALKER, TOLMAN & TUCKER
P. O. Box 1906
3 Twin Falls, Idaho 83301
Telephone: (208) 734-0700
4
5
6
7
8

9 IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
10 STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

11 * * * * *

12 IDAHO POWER COMPANY,	)	Case No. 62237
	)	
13 Plaintiff,	)	
	)	
14 vs.	)	<u>PLAINTIFF'S MEMORANDUM IN</u>
	)	<u>SUPPORT OF MOTION TO RE-</u>
15 STATE OF IDAHO, acting by and	)	<u>CONSIDER AND AMEND SUMMARY</u>
through the Department of	)	<u>JUDGMENT</u>
16 Water Resources, et al.,	)	
	)	
17 Defendants.	)	

18 * * * * *

19 I. THE COURT SHOULD DECIDE THE ISSUES PRESENTED RELATIVE TO
20 CHAPTER 3 OF TITLE 61, IDAHO CODE.

21 The Court has declined to rule on issues relating to
22 the applicability of §§ 61-327, 61-328 and 61-329 to this
23 case, deferring to the Public Utilities Commission under the
24 doctrine of primary jurisdiction. Plaintiff respectfully
25 suggests that the primary jurisdiction doctrine is inapplic-
26 able for the following reasons:

27 A. The Administrative Agency Involved Seeks The Declar-
28 atory Judgment.

29 In this case, the Public Utilities Commission itself
30 seeks the decision of the Court on a matter of statutory
31 interpretation. The PUC here seeks judicial guidance on a
32 matter of first impression. The request of the agency
effected for a ruling would seem to fulfill the basic purpose

11-83

1 of the primary jurisdiction doctrine, to determine whether
2 the courts or the agency should take the initial action. The
3 PUC has here requested that the court take initial jurisdiction
4 of the issue.

5 B. The Doctrine of Primary Jurisdiction Has No Applica-
6 tion Where The Issue Is A Wholly Legal One.

7 The rule is thus stated in 2 Am.Jur.2d Administra-
8 tive Law §793, pages 696-697.

9 "The primary jurisdiction doctrine has no applica-
10 tion where only a question of law is involved. That
11 is, the doctrine does not apply in relation to a
12 question which, while properly determinable by an
13 administrative tribunal, does not involve a question
14 of fact, but one of pure law, is determinable apart
15 from the exercise of administrative discretion, and
16 the requisite uniformity of determination is attain-
17 able otherwise than by confining determination of
18 the question to the administrative tribunal."

19 The issue presented by the PUC falls squarely within
20 this statement. Only a legal question is involved, no admin-
21 istrative expertise or discretion is required, and there is
22 no risk of non-uniformity since the agency itself seeks the
23 ruling.

24 C. The Court Should Decide The Issue, Since the PUC Has
25 Already Taken A Position.

26 The Court quoted from Grever v. Idaho Telephone
27 Company, 94 Idaho 900, 499 P.2d 1256 at page 45 of the Memo-
28 randum Decision. As noted in that case, the doctrine "is not
29 an inflexible mandate but rather is predicated on an attitude
30 of judicial self-restraint..." In this case, Plaintiff
31 believes that deferring the decision to the PUC will put both
32 Plaintiff and the PUC in an awkward, if not untenable, posi-
tion. The PUC has stated its position on the interpretation
to be given the statute in question. If the Court defers the
interpretation to the PUC, it seems obvious how the PUC would
be inclined to rule, and just as obvious that an appeal would
be taken by Plaintiff. The Court's decision in this case is

1 clearly destined for the Supreme Court. Since the case is
2 going there anyway, considerations of basic fairness and
3 judicial economy would seem to dictate that Plaintiff get a
4 decision from a tribunal which has not taken an adversary
5 position on the matter, and that the PUC not be put in the
6 position of having to try to decide an issue on which it has
7 taken a position. Bifurcation of the issue brought forward
8 by the PUC also presents a potential for an incomplete reso-
9 lution of the appeal by the Supreme Court, or a delay while a
10 PUC decision can be obtained, appealed and consolidated with
11 the appeal of this case.

12 The Court has everything before it which it needs to
13 decide the issue concerning the applicability of §§ 61-327
14 through 329 to this case. Plaintiff strongly urges the Court
15 to decide that issue and believes, on the basis of conversa-
16 tions with counsel for the PUC, that the PUC agrees that the
17 Court should decide the issue.

18 This issue was briefed by Plaintiff at pages 26-37
19 of the August 30, 1979 Response Brief.

20 II. THE SUBORDINATION ISSUE SET OUT IN PARAGRAPH 3 OF THE
21 SUMMARY JUDGMENT ORDER DOES NOT SUBORDINATE IDAHO POWER
22 COMPANY TO NON-IRRIGATION DIVERSIONS TO OFFSTREAM STORAGE
23 FOR IRRIGATION PURPOSES.

24 Since this action was instituted, several proposals
25 have surfaced in Idaho for the irrigation season diversion to
26 offstream storage for irrigation season use of water that
27 otherwise flows down Snake River in the winter time. Most
28 recent of these proposals is that of the Idaho Water Resource
29 Board which filed an application on behalf of the Bruneau
30 Plateau project for diversion at Milner Dam in the nonirriga-
31 tion season. The project contemplates the offstream storage
32 of 1,738,000 acre feet. Although the application for permit
does not designate a facility for conveyance of the water in
the off season, it does state that up to 1,738,000 acre feet

1 can be stored between January 1st and December 31st of each
2 year and used between March 15th and November 15th. See
3 Exhibit "A" hereto.

4 Proposals for other than irrigation exist to skim
5 waters as available from Snake River and deprive Plaintiff of
6 wintertime power generation. Other than for late spring
7 flood flows, the river is generally dry at Milner Dam during
8 the irrigation season. Proposals now exist to form re-charge
9 districts in accordance with statutory authority given by the
10 1978 Idaho Legislature through Idaho Code §42-232 and §42-
11 234. Those sections would enable the diversion of flows that
12 would otherwise be available for power generation. The water
13 would be spilled onto the Snake plain and presumably would
14 percolate to re-charge the aquifer. While the purpose is to
15 continue to enhance the groundwater table throughout all of
16 the Snake plain as well as enhance the spring flows in Hager-
17 man Valley, much is unknown about the immediate effects of
18 such a re-charge proposal. It is possible and likely that
19 re-charge in some areas would take years to be felt in the
20 spring flows in Hagerman which constitute the primary water
21 supply for the hydro plants of Idaho Power located between
22 Upper Salmon and Hells Canyon on the Snake River.

23 Hydrologic records would show that on the average an
24 excess of a million acre feet goes past Milner Dam. That
25 winter water supply is critical to winter power generation
26 within Idaho Power's service area and for storage at the
27 Hells Canyon project for meeting peak summer demands. The
28 loss of this water, or other wintertime diversions below
29 Milner Dam to offstream storage were not contemplated at the
30 time of the subordination provisions. While the subordina-
31 tion provisions suggest that Plaintiff may not object to
32 diversions for consumptive uses in the Snake River watershed,

1 it is likely that Idaho Power's position would have been
2 different in the Hells Canyon proceedings had winter diver-
3 sion for summer irrigation purposes been then contemplated.
4 The practical fact was then that all the surface water above
5 Milner Dam was essentially appropriated during the irrigation
6 season and there was no flow below that point. The practical
7 fact also was that in the early 1950s there were but two
8 remaining feasible reservoir storage sites in the Upper Snake
9 basin that could be constructed "on stream" to further
10 deprive Idaho Power of wintertime flows.

11 Because of these recent events and the likelihood
12 that future conflicts will develop in regard to nonirrigation
13 season diversions to off-stream storage, we ask this Court to
14 limit its decision herein, so as to leave open for specific
15 decision in an adversary proceeding involving the parties
16 proposing an off-stream storage project, the question of the
17 applicability of the subordination to that project.

18 DATED this 19 day of FEB, 1980.

19 NELSON, ROSHOLT, ROBERTSON,
20 WALKER, TOLMAN & TUCKER

21 By: James A. Rosholt
22 John A. Rosholt
23
24
25
26
27
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29
30
31
32

CERTIFICATE OF MAILING

I hereby certify that on the 19 day of Feb,
1980, I served a copy of the foregoing PLAINTIFF'S MEMORANDUM
IN SUPPORT OF MOTION TO RECONSIDER AND AMEND SUMMARY JUDG-
MENT, by depositing same in the United States mail, postage
prepaid, in an envelope, addressed to the following:

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Anderson, Kaufman, Anderson
& Ringert
503 Idaho Building
Boise, Idaho 83702

Barry Wood
Richard Eismann
P. O. Box 56
Homedale, Idaho 83628

David H. Leroy and
Josephine P. Beeman
Office of Attorney General
Statehouse
Boise, Idaho 83720

John Vehlow
Deputy Attorney General
Department of Fish & Game
600 South Walnut
Boise, Idaho 83706

Terry L. Crapo, Esq.
P. O. Box 129
Idaho Falls, Idaho 83401

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Michael Gilmore
Deputy Attorney General
Idaho Public Utilities Commission
Statehouse
Boise, Idaho 83720

John A. Rosholt
John A. Rosholt

Form 202
3/78

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
APPLICATION FOR PERMIT

Ident. No. 01-

To appropriate the public waters of the State of Idaho

1. Name of applicant Idaho Water Resource Board Phone 384-2275
Post office address Statehouse, Boise, ID
2. Source of water supply Snake River which is a tributary of _____
3. Location of point of diversion is SW $\frac{1}{4}$ of NW $\frac{1}{4}$ of Section 28 Township 10S
Range 21E B.M. Twin Falls County, additional points of diversion if any: _____
NW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 28, T10S, R21E (Milner Dam)
4. Water will be used for the following purposes:
1,738,000
Amount _____ for Irrigation purposes from Mar. 15 to Nov. 15 (both dates inclusive)
(K or acre-feet per annum)
Amount _____ for Storage for _____
(K or acre-feet per annum)
Amount _____ for Irrigation purposes from Jan. 1 to Dec. 31 (both dates inclusive)
(K or acre-feet per annum)
Amount _____ for _____ purposes from _____ to _____ (both dates inclusive)
(K or acre-feet per annum)
Amount _____ for _____ purposes from _____ to _____ (both dates inclusive)
(K or acre-feet per annum)
5. Total quantity to be appropriated:
a. _____ cubic feet per second and/or b. 1,738,000 acre-feet per annum.
6. Proposed diverting works:
a. Description of ditches, flumes, pumps, headgates, etc. existing Milner Dam, with gravity
flow canals to off stream storage sites.

b. Height of storage dam _____ feet, active reservoir capacity _____ acre-feet; total reservoir
capacity _____ acre-feet, materials used in storage dam: _____
Period of year when water will be diverted to storage Nov. 15 to June 15 inclusive.
(Month/Day) (Month/Day)
c. Proposed well diameter is _____ inches; proposed depth of well is _____ feet.
7. Time required for the completion of the works and application of the water to the proposed beneficial
use is 5 years (minimum 1 year — maximum 5 years).
8. Description of proposed uses: N/A
a. If water is not for irrigation:
(1) Give the place of use of water: _____ $\frac{1}{4}$ of _____ $\frac{1}{4}$ of Section _____ Township _____
Range _____ B.M.
(2) Amount of power to be generated: _____ horsepower under _____ feet of head.
(3) List number of each kind of livestock to be watered _____

(4) Name of municipality to be served _____, or number of families to be
supplied with domestic water _____
(5) If water is to be used for other purposes describe: _____

EXHIBIT "A"

IPC014953

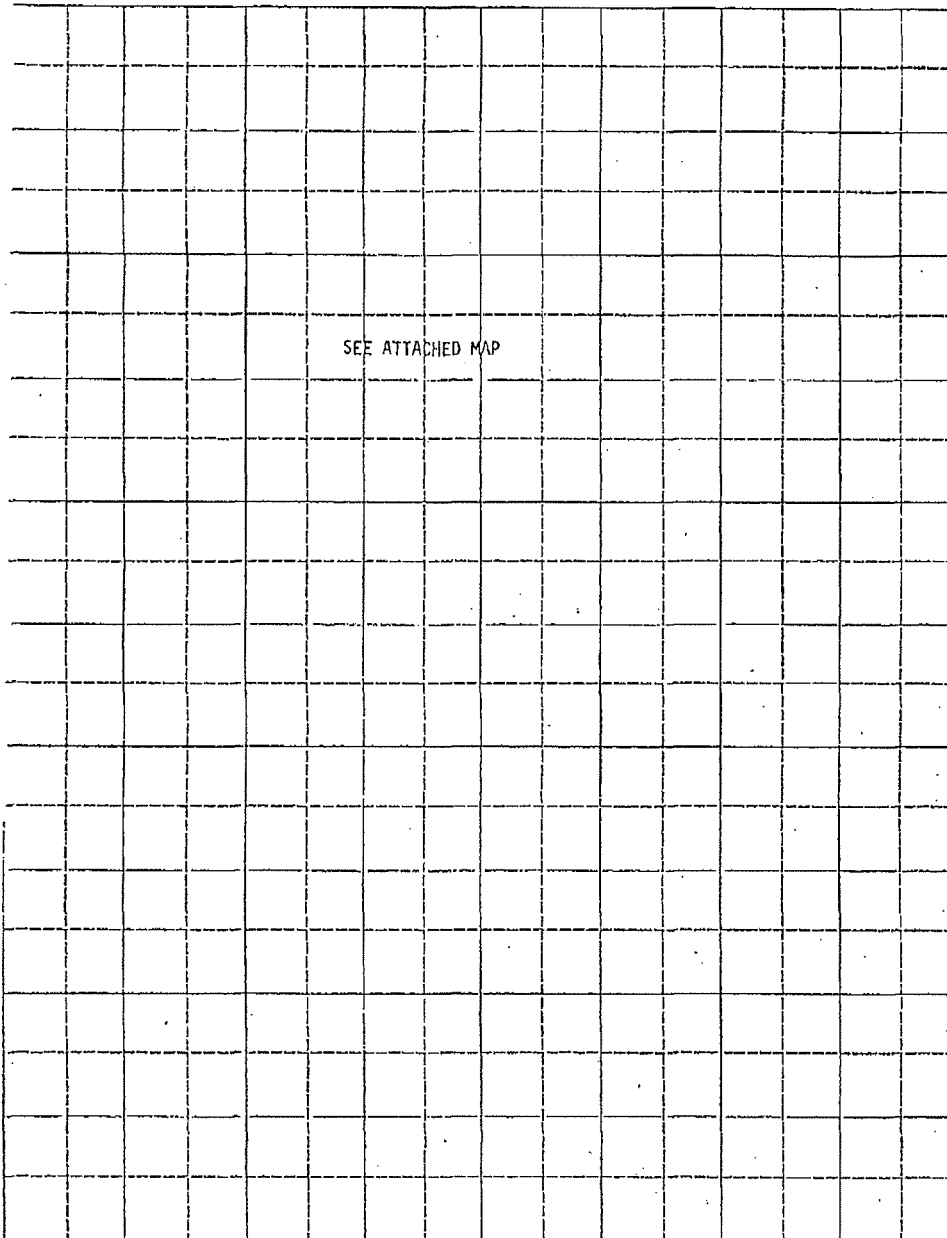
b. If water is for irrigation, indicate acreage for each subdivision in the tabulation below:

Total number of acres to be irrigated 327,140

- c. Describe any other water rights used for the same purposes as described above. None for the
new land. The land presently irrigated is with Snake River and Salmon Falls
Creek source.
9. a. Who owns the property at the point of diversion U.S. Bureau of Reclamation
b. Who owns the land to be irrigated or place of use public land and private land
c. If the property is owned by a person other than the applicant, describe the arrangement enabling the
applicant to make this filing _____

10. Remarks Off stream storage sites include Grindstone Butte site also known as
Deadman Reservoir in Sec. 36, T7S, R10E, Sailor Creek site in Sec. 7, T8S, R10E,
Rosevear Gulch Site in Sec. 8, 9, 15 & 16, T6S, R10E, and Blue Butte site in Sec.
32, T8S, R9E, and Sec. 5 & 6, T9S, R9E (Estimated total storage capacity is
approximately 2,198,000 acre feet).

11. Map of proposed project: show clearly the used point of diversion, place of use, section number, township and range number.



Scale: 2 inches equal 1 mile.

BE IT KNOWN that the undersigned hereby makes application for permit to appropriate the public waters of the State of Idaho as herein set forth.

Idaho Water Resource Board

By George R. York
(Applicant) Chairman

IPC014955

