

Orr Affidavit

Exhibit 20

Letter from John Rosholt to
IDWR Director Ken Dunn
(Oct. 30, 1985)

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DEPARTMENT OF
WATER RESOURCES

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Fourth Orr Affidavit
Exhibit 69:

**Letter from John A. Rosholt to Kenneth
Dunn, Director, Idaho Department of
Water Resources (Oct. 30, 1985)**

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Department of Water Resources

TERRY T. UHLING
LAIRD B. STONE
GARY D. SLETTE

October 30, 1985

Mr. Kenneth Dunn
Director
Department of Water Resources
Statehouse
Boise, ID 83724

RE: Proposed Rules

Dear Ken:

You have asked for comments by November 8th, on the draft rules which were published in the October, 1985 issue of "Currents".

While I recognize that Norm Young's comment at the Burley Public Hearing was that the numbering system was required by law, it seems to me generally incomprehensible. First of all, I am not certain what law requires the numbering system. Secondly, even if it is required by some other administrative agency of the State government, it seems to me it could be made more usable by different indentation, darker numbers as opposed to lighter numbers for differentiation, and perhaps indentation of different parts of the rule itself when it is supposed to be in outline form.

Trust Water. Under the Swan Falls Agreement, and the statutes and regulations, it's been my understanding all along that trust water flows can only exist between the Swan Falls Dam and the Milner Dam. We have always thought that subterranean flows which come to the surface and surface flows above Milner which are tributary to the river above Milner cannot be within the definition of trust water for the reason that the minimum stream flow at Milner is zero. Subterranean flows above Milner, which are tributary to the river below Milner are within the definition of trust water. Reflecting this limitation in the definition of trust water flows found in 1, 5, 1, 1. would clear up 90% of the present questions about trust water.

Non-Consumptive Uses. At the recent hearings, the Director indicated that in his opinion there was no such thing

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
Cheryl Jackson

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as a true non-consumptive use because every use facilitated some consumption, e. g., an impoundment behind a hydropower facility that provides more surface area for evaporation, etc. Yet in promulgating rules as to existing permits under 4, 2, 3., the Department is willing to exempt from rehearing permits which are non-consumptive or insignificant water uses in the context of the river basin. I submit that non-consumptive uses such as hydropower and fish propagation ought to be included as excepted under Rule 4, 2, 3, 2, 2. as well as " permits for DCMI uses." Such an exception would also then eliminate consideration of those permits from the provision of Idaho Code §42-203c.

Subordination. Since all hydropower permits will hereafter be subordinated in accordance with state policy, the state's and public's interest is generally protected. It seems unnecessary to both require and allow the Department of Water Resources to become the protector of the streambed, the zoning authority, the water quality authority, air quality authority, the economic development agency, and the employment office. To allow this type of subjective evaluation could result in another tier of bureaucracy being thrown up against an applicant. The person seeking permission to build a hydropower plant and use Idaho's water non-consumptively, must obtain permission from the Federal Energy Regulatory Commission. All of the criteria laid out in Rule 5.2, and 5.3, are really accomplished and determined in the federal proceeding, whether it be for license or for exemption. To superimpose another layer of questions means that an applicant is going to end up arguing at the local, state and federal level as to what the public interest really is when in fact it must be the same at all levels of government.

Public Interest - Groundwater Recharge Upstream From Milner Dam. I have trouble with the exemption to the public interest criteria of proposed Rule 5, 3, 7. as to groundwater recharge. Proposed groundwater recharges in the State of Idaho for the most part benefit only spring flows in the Hagerman Valley which supply the trout industry and directly benefit the power plants which lie below the Hagerman spring inflows on the Snake River.

Proposed Rule 5, 3, 7. places groundwater recharge on a plateau which is far above most other water uses in Idaho. In a physical sense, this preference would operate to prefer

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Lower Snake River hydropower as opposed to Upper Snake River hydropower. It would also prefer the non-consumptive use of water for trout propagation as opposed to irrigation when you contrast Rule 5, 3, 7. with 5, 3, 9.. The latter rule would prohibit irrigation diversion within four miles of the Snake River between Milner Dam and Swan Falls, even though recharge would have benefitted the water table. At the same time, we place a preferred status around trout facilities by reason of their very location. The irrigator who also participates in financing a groundwater recharge district who has land within four miles of the Snake River between Milner and Swan Falls is paying assessments to benefit the trout industry, but he cannot partake of the benefits.

Review of Permits for Non-Consumptive Uses. The blame cannot be laid upon the Department of Water Resources for the passage of Idaho Code §42-203D, which mandates a review of all permits whether or not they involve "trust water." The logical and sensible answer would have been to review only undeveloped permits which contemplate a consumptive use of trust water, and then only if the original permit was not issued under the pre-1985 public interest criteria of Idaho Code §42-203. Perhaps this should be accomplished by regulation. If the reason for not excluding non-consumptive uses from the re-evaluation process of Idaho Code §42-203D is so as to insure that a subordination provision and a limitation of water right provision were imposed upon hydropower permits, it seems to me that it may still be consistent to do that without a re-evaluation of permit under the authority granted in Idaho Code §42-203B. However, any such limitation should conform directly to any similar limitations imposed by existing federal law or federal law agency both for licensed hydropower projects and exempt hydropower projects. To have dissimilar rights from FERC and DWR may well cause consternation for permit holders in both the financing and operation of large and small hydro projects in the future.

Review of Reservoir Permits. Several permits for major projects are presently outstanding. Two are held by the United States Bureau of Reclamation for the Teton Project and for the Lynn Crandall Dam Project. It is my hope that proposed Rule 5, 3, 7. will facilitate an automatic order continuing the permit. Re-evaluation becomes totally unnecessary for Teton and Crandall if the rules limited re-evaluation to only those consumptive permits involving trust water, since there can be

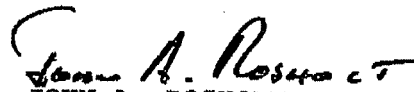
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no surface trust water above Milner Dam. Re-evaluating Salmon Falls and other federal projects may rock the boat somewhat. I think Rule 5, 3, 7. should also be expanded to include non-consumptive permits. If it is not, then it belongs in 4, 2, 3, 1. as part of the exemption.

General. I commend the Department for their effort in attempting to deal with a very complex subject in a very comprehensive manner. We appreciate the proposed definitive rules as to application requirements, public notice requirements, and all of the general information which has always existed but never has been written down.

We would appreciate the opportunity to talk with you further about our comments, if you have any questions.

Respectfully submitted,


JOHN A. ROSHOLT

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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
