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Orr Affidavit

Exhibit 21

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“News Release”
Office of the Attorney General
(Jan. 29, 1986)

Third Orr Affidavit

EXHIBIT 41



STATE OF IDAHO

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NEWS RELEASE

FOR IMMEDIATE RELEASE

JANUARY 29, 1986

BOISE. . . Attorney General Jim Jones has asked the Idaho Department of Water Resources to amend proposed water allocation rules issued under the so-called Swan Falls legislation. The department is currently developing rules designed to implement legislation passed in 1985 as part of the Swan Falls settlement agreement between the State of Idaho and Idaho Power Company. In comments submitted to the Department of Water Resources, Jones suggested 21 modifications or amendments to "improve the regulations and carry out the intent of the legislature and the parties to the settlement agreement."

As part of the Swan Falls settlement agreement, Idaho Power Company relinquished to the state any claim for Snake River flows in excess of 3900 cubic feet per second at Swan Falls during the irrigation season and 5600 cubic feet per second during the off season. Flows of water which are in excess of the new minimum stream flows but which are less than the water rights for designated hydropower generating facilities in the reach of the

Snake River from Milner Dam to Swan Falls Dam were designated as trust water flows. The appropriation of these trust waters was made subject to a review under the new allocation criteria. In one of his major comments, Jones said the definition of trust water flows under the proposed regulations is too broad.

"A review of the Swan Falls agreement indicates that the parties did not intend ground waters or surface waters tributary to the Snake River above Milner Dam to be included within the definition of trust water flows," Jones said. "The reason for this conclusion is that the parties retained the minimum streamflow at Milner Dam at zero." In explaining the submitted written comment Jones said, "one of the critical points of the negotiations was that water above Milner Dam should not be subject to the new allocation criteria. To include water above Milner as trust water is directly contrary to the intent of the negotiating parties."

Another comment of critical importance deals with the party who has the burden of proving that a proposed water allocation is not in the public interest. "It was the intent of the parties that a person protesting an application for trust waters should have the burden of proving that it was against the public interest to grant the application. In some respects the proposed rules shift that burden of proof back to the applicant, contrary to the intent of the agreement. We have asked the department to change the rules to shift the burden of proof back to the protestant."

"Another area where we asked the department to change the rules deals with what waters are subject to the new trust water

allocation rules. The rules are written to the effect that any application for waters from a trust water source should presumptively be determined to be subject to the new allocation rules. It is my belief that the department is required to make a determination in those instances to see whether the water should be classified as trust water or as unappropriated water not subject to the new allocation rules. This type of procedure would lift a tremendous burden from many applicants, particularly those who wish to secure small amounts of water, where there would be insignificant effects on waters available for hydropower flows."

"The Water Resources Department has put in a lot of hard work in preparing the new water allocation rules. However, there are some significant departures from the intent of the parties to the Swan Falls settlement agreement and I am hopeful that the department will take our comments to heart and insure that the rules reflect the spirit and intent of the settlement. While it was our desire to tighten up the allocation formula for waters freed up by the settlement agreement, we did not intend for new appropriators to face major new hurdles in attempting to put water to beneficial use. We certainly did not intend to affect the existing allocation rules with respect to waters located above Milner Dam. Hopefully, the rules can be amended to reflect this intent."

E N D

COMMENTS OF THE ATTORNEY GENERAL ON THE PROPOSED
WATER ALLOCATION RULES OF THE IDAHO DEPARTMENT
OF WATER RESOURCES

A. General Comments: The proposed regulations generally reflect a great deal of thought and consideration about some very difficult policy issues. Nonetheless, the proposed regulations include some fundamental policy determinations for which no legal or factual basis exists. These comments point out these fundamental problems. Also, some minor editorial and substantive changes would improve the regulations. These suggested changes also follow. Finally, these regulations are not broad enough in scope. The regulations do not cover in a comprehensive manner transfers, extensions of time, etc. At some point in time, the Department should adopt comprehensive regulations.

B. Specific Comments:

1. Rule 1,4,2,2. Proposed Rule 1,4,2,2 contains a misstatement of law. Proposed Rule 1,4,2,2 states in part:

Second, if the proposed use satisfies the criteria of Section 42-203A, Idaho Code, then Section 42-203C, Idaho Code, requires a determination

If a proposed use satisfies the criteria of Idaho Code § 42-203A, Idaho Code, no evaluation under Idaho Code § 42-203C should ever take place! If a proposed use satisfies the criteria of Idaho Code § 203A (Supp. 1985), the Department necessarily determined that the proposed use will not reduce the quantity of water under existing water rights or in other words that unappropriated water exists in the amount and during the

season of use requested by the applicant. Accordingly, Idaho Code § 42-203C (Supp. 1985) only applies when the Department determines under Idaho Code § 42-203A (Supp. 1985) that the proposed use will reduce the quantity of water under existing water rights. If the applicant's proposed use would only reduce a hydropower use subject to appropriation under Idaho Code § 42-203C (Supp. 1985), then the Department should evaluate that use in accordance with Idaho Code § 203C (Supp. 1985) including whether the proposed use constitutes a significant reduction.

Idaho Code §§ 42-203A and 42-203C (Supp. 1985) were added to the Idaho Code to implement, in part, the Swan Falls agreement. The parties to the Swan Falls agreement intended that the substantive criteria contained in Idaho Code § 42-203C were to apply only after the department concluded the proposed use would cause a significant reduction, individually or cumulatively. The Department in proposed Rule 1,4,2,2 has focused on and interpreted literally the word "cumulative." While the Department's interpretation certainly results in a rule that promotes ease of administration, this fact does not justify a rule inconsistent with the legislative history of Idaho Code § 42-203C. The Legislature intended that Idaho Code § 42-203C allow some consumptive users of water to proceed with their project, if otherwise acceptable, without the necessity of the evidentiary demonstration required in other cases by Idaho Code § 42-203C (Supp. 1985). The Department should redraft Rule

1,4,2,2 to recognize this common understanding of Idaho Code § 42-203C (Supp. 1985).

2. Rules 1,5,1,1; 1,5,1,2; 1,5,1,3. The definition of trust water flows is too broad. A review of the Swan Falls agreement indicates that the parties did not intend ground waters or surface waters tributary to the Snake River above Milner Dam to be included within the definition of trust water flows. The reason for this conclusion is that the parties retained the minimum stream flow at Milner Dam at zero. Furthermore, the Swan Falls agreement is silent on the issue of whether ground waters tributary to the Snake River downstream of Milner Dam are trust waters. Each party took their chances on successfully litigating this issue. The Department should not predetermine this issue in the regulations adverse to ground water users but should allow a court to determine this issue as the parties originally intended.

3. Rule 1,5,3. Proposed Rule 1,5,3 states that water rights subordinated pursuant to Idaho Code § 42-203B(6) (Supp. 1985) are trust waters. This is in conflict with the Swan Falls agreement that only provided for the creation of trust waters pursuant to subsections (3) and (5) of Idaho Code § 42-203B (Supp. 1985). There was no intent to un subordinate any existing licenses, such as Hells Canyon, or to extend the concept of trust waters to newly issued subordinated permits or licenses.

4. Rule 2. Rule 2 should contain definitions of irrigation, commercial, municipal, and power uses. For example, irrigation and power uses could be defined as follows:

Irrigation use means the application of water to the production of irrigated agricultural crops or commercial nurseries.

Power use means using water for hydroelectric or hydro-mechanical power.

5. Rule 2,16. The phrase "subordinated water right," is defined too broadly. Rule 2,16 should be amended to read as follows:

Subordinated water right means a water right used for hydropower generation purposes that is subject to depletion without compensation by upstream water rights, which are initiated later in time and which are for a purpose other than hydropower generation purposes.

These amendments address two concerns. First, a subordinated water right for hydropower generation purposes should retain a priority as against water rights for other hydropower generation purposes. Second, the date of development is not the critical date. Rather, the date of initiation of the water right by filing an application is the critical date.

6. Rule 3,1,1 states in part as follows:

No person shall commence the construction of any project works . . . of the public water or trust water of the State of Idaho . . . without first having filed an application for permit to appropriate water.

While proposed Rule 3,1,1 makes good sense, the Department does not have authority to preclude construction of the project prior to filing an application for a permit under Chapter 2, Title 14,

Idaho Code. Other statutory authority of the Department may require a filing of an application for an entitlement for use, e.g., a stream channel alteration permit under the provisions of the Act of March 30, 1971, Ch. 337, 1971 Idaho Sess. Laws 1304 (codified as amended at Idaho Code §§ 42-3801 to 42-3812.

7. Rule 3,2,1. Generally, an application for permit under chapter 2, title 42, Idaho Code, is filed for the appropriation of unappropriated water. In the event unappropriated water is not available to supply the applicant, Idaho Code § 42-203A (Supp. 1985) would normally require the Department to deny the application. The enactment of Idaho Code § 42-203B (Supp. 1985) which created a trust for some water for hydropower purposes would allow the Department to approve some applications that otherwise would be denied. Only the approval of these latter applications for trust water require review under Idaho Code § 42-203C (Supp. 1985). Proposed Rule 3,2,1 attempts to reverse this process and creates a presumption that all applications from a source of trust water is an application to appropriate trust water. Again, while proposed Rule 3,2,1 promotes ease of administration, no basis exists for its adoption. The chapter 2, title 42, Idaho Code requires the department to make the determination of availability of unappropriated water under Idaho Code § 42-203A (Supp. 1985) prior to proceeding to a consideration of the requirements under Idaho Code § 42-203C (Supp. 1985). See also the comments to proposed Rule 1,4,2,2.

8. Rule 3,2,4. A rebuttable presumption may be created for a variety of reasons. See generally McCormick on Evidence § 343 (E. Cleary 1984). However, the primary reason for a presumption is that it expresses a factual relationship commonly found to be true by a judge or other adjudicatory body. For example, if proof of fact A makes more likely than not that fact B exists, then the creation of a rebuttable presumption that reflects this relationship for use in an adjudicatory proceeding may assist in promoting an efficient adjudicatory process.

Here, proposed Rule 3,2,4 concludes that if an application is assigned, the application was filed for speculative purposes. No factual basis exists for this relationship and the inclusion of such a presumption is arbitrary.

9. Rule 3,3,2,5 would allow an applicant to describe a plan of operation for filling a reservoir more than once a year and thereby more fully utilize the storage capacity of an impoundment structure. This proposed rule would change the Department's past administrative practice and is an excellent change!

10. Rule 4,4. Proposed Rule 4,4 is ambiguous and fails to state accepted rules concerning burden of proof, also commonly called the burden of persuasion, in civil actions. Generally, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that the party is asserting. See 9 Wigmore, Evidence §§ 2485-2486 (Chadbourn rev. 1981). The burden of coming forward with evidence, also commonly called the burden of

producing evidence, as to a particular fact is on the party against whom a finding on that fact would be required in the absence of further evidence. 9 Wigmore, Evidence § 2487 (Chadbourn rev. 1981). The burden of coming forward with evidence is initially on the party with the burden of persuasion as to that fact. The burden of persuasion remains the same throughout a proceeding. The burden of coming forward with evidence may shift from party to party throughout the proceeding. 9 Wigmore, Evidence §§ 2488-2489 (Chadbourn rev. 1981).

Specifically, Rule 4,4,1 states in part as follows:

first, the burden of coming forward with evidence to present a prima facie case, and second, the ultimate burden of persuasion. * * * The person who has the burden of presenting a prima facie case has the responsibility of making the initial evidentiary showing;

The problem with this rule is that it appears to equate the burden of coming forward with evidence as being a burden of presenting a prima facie case. The burden of coming forward with evidence is not so limited.

In McCormick on Evidence § 338 (E. Cleary 1984) the burden of coming forward with evidence is discussed as follows:

We have seen something of the mechanics of the process of "proceeding" or "going forward" with evidence, viewed from the point of view of the first party who is stimulated to produce proof under threat of a ruling foreclosing a finding in his favor. He may in respect to a particular issue pass through three states of judicial hospitality: (a) where if he stops he will be thrown out of court; (b) where if he stops and his adversary does nothing, his reception will be left to the jury; and (c) where if he stops

and his adversary does nothing, his victory (so far as it depends on having the inference he desires drawn) is at once proclaimed. Whenever the first producer has presented evidence sufficient to get him to the third stage and the burden of producing evidence can truly be said to have shifted, his adversary may, in turn pass through the same three states. His evidence again may be (a) insufficient to warrant a finding in his favor, (b) sufficient to warrant a finding, or (c) irresistible, if unrebutted.

IBID, at § 338.

Accordingly, in the cited example above, the first party has the burden of coming forward with evidence sufficient to pass from subdivision (a) to subdivision (b). When this happens, neither party has the burden of coming forward with evidence. If the first party comes forward with sufficient evidence to pass from subdivision (b) to subdivision (c), then the burden of coming forward with evidence shifts to the second party. In this circumstance, the second party does not come forward with evidence regarding a prima facie case. Rather, the second party would have to come forward with enough evidence to preclude entry of a directed verdict against the second party.

While these comments are technical, the issue is an important one and the Department should be careful to adopt a regulation in conformance with accepted rules of evidence.

11. Rule 4,5, and 4,5,3,6. Proposed Rule 4,5 contains a list of detailed information that an applicant must submit for all applications, and proposed Rule 4,5,3,6 contains a second list of detailed information for applications to appropriate trust waters. A regulatory agency must balance the agency's

need for information necessary to make a reasoned decision with the cost of supplying the information by the regulated industry. The marginal benefit of the need for the information should at least equal or exceed the marginal cost of supplying the information.

Proposed Rules 4,5 and 4,5,3,6 do not achieve an equitable balance of this need and the costs of providing the requested information. For example, proposed Rules 4,5,3,6,3 and 4,5,3,6,4 would require substantial socio-economic studies be prepared by all applicants of trust water. Such studies are not needed for a small irrigation project. Such requirements preclude a small family farm from appropriating trust water because of the cost of the application process. Proposed Rule 4,5 appears to inappropriately shift the burden of proof under Idaho Code § 42-203C (Supp. 1985) to the applicant from the protestant.

The Office recommends a two-step submittal of information under both Idaho Code §§ 42-203A and 42-203C. In the first step the Department should require just enough information to allow a reconnaissance review of the proposed project. If a protest to the approval of the application is filed, then the Department should require a further submittal of information to assist in evaluating the application and the protest. This two-step procedure minimizes the cost to the applicant and yet assures sufficient information to resolve the dispute before the agency.

12. Rule 4,5,3,3,2. Rule 4,5,3,3,2 defines speculation as follows:

Speculation for the purpose of this rule is an intention to obtain a permit to appropriate water without the intention of applying the water to beneficial use.

This definition is not in accordance with applicable law.

Idaho Code § 42-203A (Supp. 1985) provides in part as follows:

[I]n all applications, whether protestant or not protestant . . . (c) where it appears to the satisfaction of the department that such application is not made in good faith, is made for delay or speculative purposes, . . . the director of the Department of Water Resources may reject such application.

The issues of good faith, delay and speculation are all interrelated. The proposed definition in Rule 4,5,3,3,2 does not recognize this interrelationship. The proposed definition should be amended by adding the phrase "with reasonable diligence" at the end of the sentence from Rule 4,5,3,3,2 quoted above.

13. Rule 5,1. This proposed rule should be limited to applications to appropriate unappropriated water and should not apply to applications to appropriate trust water. If this proposed rule remains applicable to trust water, then it contains a misstatement of law. Proposed Rule 5,1 states in part:

If the director determines that a proposed use will not comply with one or more of the criteria of Section 42-203A(5), Idaho Code, the application will be denied.

If the proposed use will reduce the quantity of water under an existing hydropower water right, the Department should not automatically deny the application. Rather, the Department should evaluate whether the application satisfies the criteria of Idaho Code § 42-203C (Supp. 1985).

14. Rule 5,2,1. Proposed Rule 5,2,1 creates a presumption that all uses of water that deplete trust water are presumed to require an evaluation under Idaho Code § 42-203C. As stated earlier, such a presumption is contrary to the legislative history of this legislation. See the comments to proposed Rule 1,4,2,2.

15. Rules 5,3 and 5,3,4,6. Idaho Code § 42-203C (Supp. 1985) constitutes a legislative determination that it is in the public interest for certain kinds of development to occur in the Snake River drainage basin above the Murphy gauge even though the proposed use depletes trust waters. The public interest criteria contained in Idaho Code § 42-203C(2) are narrow in scope. They are intended to answer the question: Is this the type of development that the legislature concluded should be allowed to deplete trust water? The public interest criteria of Idaho Code § 42-203C(2) (Supp. 1985) are much narrower than the public interest criterion of Idaho Code § 42-203A(2)(5) (Supp. 1985).

Proposed Rule 5,3 and its components do not recognize this distinction. Proposed Rule 5,3 expressly provides for a much broader evaluation than contemplated by Idaho Code § 42-203C

(Supp. 1985) by determining whether an application "will provide the greater benefit to the people of the state of Idaho." Proposed Rule 5,3,4,6 requires a review of impacts on water quality, fish, wildlife, recreation and aesthetic values, which is also much broader than contemplated by Idaho Code § 42-203C (Supp. 1985).

These comments are not intended to imply that these concerns are not important. The point is solely that such broad public interest concerns should be determined solely under Idaho Code § 42-203A. The public interest determination under Idaho Code § 42-203C (Supp. 1985) is much narrower than provided for in proposed Rule 5,3.

16. Rule 5,3,3,1. Rule 5,3,3,1 states as follows:

If the total land to be irrigated by the applicant, including currently owned and leased irrigated land and land proposed to be irrigated in the application and other applications and permits of the applicant, do not exceed 960 acres of Class 1 equivalency as defined by U.S. Bureau of Reclamation regulations; the application will be presumed to promote the family farming tradition;

Rule 5,3,3,1 purports to incorporate certain regulations of the Bureau of Reclamation, U.S. Department of the Interior. The Department should state specific code sections of the Code of Federal Regulations to be incorporated. Then the Department should assure that it follows the procedures outlined in Idaho Code § 67-5203A (1980), regarding incorporation of federal regulations.

17. Rules 5,3,2,2 and 5,3,4,2. Proposed Rules 5,3,2,2 and 5,3,4,2 both use the term mitigation. Neither the Swan Falls agreement nor the implementing legislation intended an applicant to mitigate the power reduction impacts of their applications. The only limited exception concerns the limited mitigation requirements from Exhibit 6 of the Swan Falls agreement, which was implemented in Policy 32I of the State Water Plan. Furthermore, Exhibit 6 of the Swan Falls agreement was neutral on the question of which Idaho Power Company facilities should be considered in mitigation decisions. The Department's regulations should not predetermine this issue adverse to the irrigation interests within the State of Idaho.

18. Rule 5,3,9. Idaho Code § 42-203C(2) (Supp. 1985) requires the director to balance the competing interests of new development proposing a consumptive use of water with the potential adverse impact on hydropower operations. The burden of proof is explicitly placed on a protestant. Proposed Rule 5,3,9 essentially attempts to reverse this burden of proof rule for applications with a point of diversion within four miles of the mainstem of the Snake River contrary to the provisions of Idaho Code § 42-203C(2) (Supp. 1985). Moreover, proposed Rule 5,3,9 focuses on the impact of the proposed diversion on hydropower, when that provision of law also provides that none of the criteria are entitled to greater weight.

19. Rule 6,2. The Swan Falls agreement addressed the issue of offstream storage in Exhibit 6, which was implemented

in Policy 32I of the State Water Plan. Exhibit 6 specifically provided the proposed policy was neutral on the question of which facilities of the Idaho Power Company should be considered in mitigation decisions. Here proposed Rule 6,2 would require mitigation even if the water right were already subject to a subordination provision for the benefit of upstream depletionary uses. For example, the C.J. Strike project is one such facility and the Department has no basis for removing the subordination provision for future applications by the adoption of proposed Rule 6,2.

20. The regulations should contain general applicable duties of water for different uses of water which are presently contained in an administrative memorandum on this subject. This administrative memorandum should be converted into administrative regulations.

21. Section 42-203B(6), Idaho Code, provides that the director shall also have the authority to limit a permit or license for power purposes to a specific term. While this provision is a specific grant of authority, it also operates as a limitation of authority in accordance with accepted rules of statutory construction. The Department does not have the authority to limit a permit or license for purposes other than power to a specific term.

The Department's present practice is to accept applications with a power use combined with other beneficial uses. However, the Department would not be authorized to include a general

permit condition with a specific term in any permit or license with a power use combined with other uses. If the Department desires to implement this portion of section 42-203b(6), the Department should require an application for any power use be separate from an application for other beneficial uses.