

Orr Affidavit

Exhibit 81

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DEPARTMENT OF
WATER RESOURCES

Letter from Assistant Secretary of the Interior
Kenneth Holum to Joseph C. Swidler,
Chairman, Federal Power Commission
(Aug. 30 1962)

Fourth Orr Affidavit
Exhibit 15:

**Letter from Assistant Secretary of the
Interior Kenneth Holum to the Honorable
Joseph C. Swidler, Chairman, Federal
Power Commission (Aug. 30, 1962)**



UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON 25, D. C.

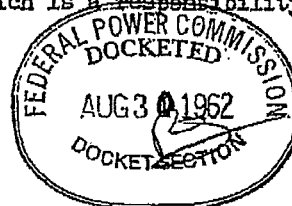
AUG 30 1962

Dear Mr. Swidler:

As indicated in previous correspondence, this Department has had under consideration the preparation of suitable comments and recommendations with respect to the application of the Idaho Power Company for a license under Project No. 2258 for the facilities heretofore constructed by the power company on the Snake River in Idaho at American Falls, at Shoshone Falls, and at Upper Salmon Falls, together with certain described transmission facilities. The time permitted the Department to look into this matter, which involves a history of complicated arrangements with the Idaho Power Company prior to and including the time of the first enactment of the Federal Water Power Act in 1920, is appreciated.

The hydroelectric installations sought to be licensed by the Idaho Power Company under Project No. 2258 are located in part on Federal lands reserved for use in connection with Federal reclamation projects which are the responsibility of this Department. Specifically, the hydroelectric plant at American Falls is located in part on public lands and on lands acquired by the Department for the construction of the American Falls Reservoir, a feature of the Minidoka Federal Reclamation Project, and water stored in that project for project uses is infringed upon by the installation proposed to be licensed by the Idaho Power Company. The hydroelectric stations at Shoshone Falls and at Upper Salmon Falls as shown on the drawing submitted by the Idaho Power Company's application as being lands owned by the company include public lands of the United States. Descriptions of the public lands involved will be transmitted at an early date. No authorization has been given for occupancy of the Federal lands in question.

The American Falls installation of the Idaho Power Company is immediately downstream from the American Falls storage project of the United States which was constructed in 1926. The impoundment of the water in the forebay of the Idaho Power Company's plant backs up to and infringes upon the downstream toe of the American Falls Dam of the United States. To evacuate all the stored water from the active storage capacity of American Falls Reservoir of the United States requires the lowering of the forebay elevation of water in the plant constructed by the Idaho Power Company. In these circumstances, to protect the integrity of operation of the Federal reclamation project which is a responsibility



[REDACTED]

of this Department, it is essential that the license contain appropriate provisions with respect to the requirements of the Idaho Power Company in connection with its operation of the American Falls plant constructed by it.

It is therefore the view of this Department that the Idaho Power Company as a condition to the issuance of the license be directed to obtain from this Department with respect to the American Falls powerplant an appropriate operating agreement which should include the following:

1. The company shall operate its facilities at American Falls in such a manner as not to interfere with the release of water by the Government at American Falls Dam, and when required by the United States, acting through this Department, the company shall draw down the elevation of water in its forebay pool sufficiently to permit the waters to flow from the Government's American Falls Dam into the forebay of the power company's installation at rates of flow required for irrigation operations as determined by this Department.

2. The power company shall agree for itself, its successors and assigns, that all rights for the use of water for power purposes heretofore or hereafter acquired for the development of power at the company's site, shall be held and considered at all times inferior and subordinate to all rights heretofore or hereafter acquired by the United States or other parties for irrigation or other beneficial uses.

3. The company shall cooperate with the United States Department of the Interior, Bureau of Reclamation, in making the maximum justifiable development of the power resources of the site. Such cooperation shall include: (a) the use of the company's water entitlements together with other water releases at American Falls Dam for operation of the authorized Government powerplant, or (b) the use of Government and other water releases together with the company's water entitlements for operation of the company's plant at American Falls Dam in whatever combinations from time to time as will maximize the production of electricity at this site. Under such arrangement the company would receive the same amount of energy from the combined

operations as it could have produced at its own plant (without using the water developed by the Government) as determined by the Secretary of the Interior. The arrangements should include provision that prior to the construction and operation of the authorized Government powerplant at American Falls Dam, the company, upon the request of the Secretary of the Interior, shall generate for the United States electrical energy using the water entitlements of the United States provided in the contract made between the Government and the company in June of 1923 (a copy of that contract is attached). The electric energy so produced for the United States should be furnished to the United States at a nominal voltage of 46 kilovolts or such other voltage as may be agreed upon by the Secretary of the Interior and the company at the American Falls substation of the company or at the Michaud Flats pumping plant substation of the United States in the following amounts: (a) during the period April 1 to October 31 for operation of the irrigation pumping installations up to a maximum rate of delivery of 19,000 kilowatts, and (b) during the period November 1 to March 31 for purposes described in articles 19 and 23 of the contract of June 1923 up to a maximum rate of delivery of 10,000 kilowatts. The arrangement would contain provisions for reimbursement to the company for the use of its generating facilities at a rate per kilowatt-hour which would cover a ratable portion of the company's hydroelectric production expenses prescribed and recorded under the Federal Power Commission uniform system of accounts, accounts Nos. 535 to 545, inclusive.

The foregoing provisions of an operating agreement with the Idaho Power Company are the minimum essentials needed to protect the operating integrity and financial investment of the United States in the existing American Falls Reservoir Federal Reclamation Project upon which the Idaho Power Company has located its constructed American Falls plant. The costs of the project include not only \$1,000,000 which was paid to the Idaho Power Company by the United States for interference with the Company's alleged power rights at American Falls, but also includes the cost of providing special penstocks through the dam for the company's use in developing the capabilities of the power site at American Falls. The company, without consulting with this Department, or so far as is known, with the Federal Power Commission, determined on its own motion not to utilize these specially constructed penstocks, but the company proceeded to build the plant for which it is now required to have a license. The Government's project at American Falls from its authoriza-

tion in 1920 has included a power installation which powerplant was reauthorized by the Congress in 1950 (64 Stat. 1083). Under items 1 and 2 above, the company would be required to provide a return to the United States of the energy from the water rights which were purportedly sold to the United States by the company under the 1923 agreement. Also, it would provide a commitment by the company to subordinate its entitlements at American Falls to the principal purpose for which the storage reservoir at American Falls was constructed, that is, for the irrigation of arid lands in the State of Idaho. Supporting details concerning the provisions of the 1923 contract and the engineering facts concerning the water entitlements involved will be provided in a supplemental communication.

The Shoshone Falls plant of the Idaho Power Company proposed to be licensed under Application No. 225B is immediately downstream from the Twin Falls plant of the company which was licensed under Project No. 18. The Twin Falls plant, like the Shoshone Falls plant, involves the utilization of public lands of the United States. The Shoshone plant is located downstream from Milner Dam, the control point for the utilization of the waters of the Snake River for development of public lands of the United States through irrigation. The Idaho Power Company officials have been repeatedly advised, beginning with the early negotiations concerning the development of stored water for irrigation at American Falls, that the best development of the waters of the Snake River require there be no power developments below Milner Dam which rely upon flows of water past Milner Dam for power production. The United States, acting through this Department, has constructed upstream from Milner a reservoir system in excess of 4,500,000 acre-feet, all of which is operated with the objective of conserving the water to minimize spills past Milner Dam. This matter was the subject of extended negotiations with the Idaho Power Company in connection with the issuance of the license under Project No. 18 at the Twin Falls site. In view of this long history of the obvious need for the conservation of water above Milner Dam, and in view of the many public statements of the officials of the Idaho Power Company, including those made to your Commission in connection with the issuance of the license in the Hells Canyon reach of the Snake River, there should be no objection, and it is in the public interest, that the license for the Shoshone Falls plant should clearly subordinate the water supply for that plant to the use of water for development of irrigated areas upstream. Accordingly, it is recommended that any license contain provisions along these lines:

"The power company shall agree for itself, its successors and assigns, that all rights for the use of water for power purposes heretofore or

hereafter acquired for the development of power at the company's site, shall be held and considered at all times inferior and subordinate to all rights heretofore or hereafter acquired by the United States or other parties for irrigation or other beneficial uses."

The Upper Salmon Falls development is also located downstream from the Milner Dam and its water supply should also be clearly subordinate to upstream irrigation development. This Department has underway an extensive program of investigations and project proposals which will provide further multiple purpose storage and irrigation development in the Snake River Basin above Milner Dam. These include, of course, the Burns Creek Project, the Fremont Project, and others. We are prepared to provide the Commission with detailed information concerning these presently recommended and potential irrigation developments.

The records available to this Department indicate that the projects of the Idaho Power Company described in Project No. 2258 were in existence at American Falls and Shoshone Falls prior to 1920 and the Upper Salmon Falls installation was undertaken in 1937. As these projects involve the unauthorized use of the public lands of the United States, it is appropriate to comment with respect to the term of license. It is recommended that the license as issued not exceed the 50-year period from the time of first enactment of the Federal Water Power Act or from the beginning of construction by the company, whichever is later. This recommendation is particularly appropriate in order to discourage further unauthorized entry on public lands for the construction of hydro-electric stations and not to give advantage to companies which do so. Our records indicate that the Idaho Power Company had notice of the existence of the applicability of the provisions of the Federal Power Act in connection with these specific projects. An application for a preliminary permit at Upper Salmon Falls was made to the Federal Power Commission on June 17, 1920 (Project No. 19). Also, the 1923 contract which was negotiated with the Idaho Power Company officials during 1919 and 1920 contains a specific article (Article 36) which provides that the execution of the contract was not to relieve the Idaho Power Company of its responsibility to comply with the provisions of the Federal Water Power Act with respect to obtaining licenses at the American Falls site and downstream sites on the Snake River. Article 36 reads as follows:

"No waiver of rights of Federal Power Commission or State. The execution of this contract shall not be construed as waiving any authority, jurisdiction or control which the Federal Power Commission may have over the Company or its assigns at American Falls or elsewhere, and the

approval of this contract by W. G. Swendsen Rec. Comm. Representing the State of Idaho shall not be construed as waiving or abridging any lawful jurisdiction, authority, or control which such officer or the State of Idaho may have over the waters of the State or the Issuing of permits, certificates or licenses thereto."

The transmission lines included in this project are an essential part of the major transmission grid for which this Department has made arrangements to wheel power, through a relatively recent contract with the Idaho Power Company. We therefore request that any license that might be issued recognize and protect the basic elements of these wheeling arrangements, and provide that the applicant will, during the term of the license, make its transmission facilities available for the wheeling of Government power on such terms and conditions as may be mutually satisfactory to the applicants and the Department of the Interior.

Fish resources of the development areas are resident species, principally rainbow trout, which are supplemented with stocked fish released by local, State, and Federal fish hatcheries. A good trout fishery occurs below the diversion dams at Upper Salmon Falls, and below Shoshone Falls and American Falls. Sturgeon inhabit the river below Shoshone Falls, and bass and bluegills have been introduced in the pool above the falls. Species of fish which compete to the detriment of game fish are numerous throughout this reach of Snake River. There are no anadromous fish associated with the three developments. Except for a short section of the river below American Falls Dam, the stream is open to fishing throughout the year and is well utilized by fishermen.

Existing fish facilities include ladders at the two diversion dams at the Upper Salmon Falls development. The ladder at the downstream diversion provides access for rainbow trout to spawning grounds in the section of river between the diversion and the upstream powerhouse. The ladder at the upper diversion receives little use.

Peak-power releases of upstream developments result in increases of streamflow which are not all passed through the reject spillway at the Upper Salmon Falls development. This causes an increase in flow over the upper diversion dam, excessive flow through the fish ladder, and side-spills from the canal leading to the upper powerhouse. In addition to being a hazard to fishermen, such flows adversely affect fish and wildlife habitat by creating unstable water conditions. Emergency closure of gates controlling flows to generator penstocks creates similar conditions, although the reject spillway at the powerhouse releases most of these flows. The hazard to fishermen is greatest below this

point because of the large volume of water that is released. The channel below the spillway has been fenced to exclude fishermen from this section. Signs warning fishermen that a sudden increase in water levels in the river may occur unexpectedly have also been installed along the river by the company.

Fish and wildlife resources would benefit if surplus upstream releases, which overflow facilities associated with the upper powerhouse, could be diverted through one or two outlets into one river channel. This could be accomplished by either enlarging the reject spillway and passing additional flows through the present structure, or by releasing flows through a gate in the canal near the diversion dam. To prevent side-spills from the canal, the wall for about one-half mile upstream from the powerhouse would have to be increased in height by about 12 inches to match the remaining portion upstream.

Snake River streamflow in the Shoshone Falls development area is affected by heavy irrigation diversion at Milner Dam, about 24 miles upstream from Shoshone Falls. Springs and irrigation return flows contribute significant amounts, and there is a sizable streamflow at Shoshone Falls. During normal flows, all water is diverted through the powerhouse at the Shoshone Falls development. Discharge from the powerplant is made directly into the Snake River channel and is adequate to maintain fish in this portion of the river. When facility repairs are being made at Shoshone Falls, upstream reservoirs are operated to store water and none is released through the powerplant to the river below the falls. If repairs were continued for extended periods, adverse effects on the fishery below Shoshone Falls development would result. To avoid such losses, an outlet structure should be provided to release unused water into the river channel for fish. At no time should this flow be interrupted for a period longer than six hours. Construction of roads to the powerhouse has improved the access for fishing in this section of Snake River.

Extreme fluctuations and periods of very low streamflow downstream from American Falls Dam have resulted in substantial fish losses. The company has deepened the stream channel immediately downstream from the powerplant to provide a sanctuary for fish during periods of minimum releases. The company also has installed lights near the channel to attract fish into the deeper water when low flows occur at night.

No formal negotiations regarding fish and wildlife resources associated with the developments have ever been conducted between the company and conservation agencies. The Idaho Department of Fish and Game and the Idaho Power Company have informally agreed that, in the interest

of economy, it is considered unnecessary to operate the fish ladder at the diversion dam at upper Salmon Falls during the period from March 1 to September 1 of each year. Negotiations are planned between conservation agencies and the Bureau of Reclamation in an attempt to find a method for providing sustained flows below American Falls Dam. If sustained flows could be maintained below the Idaho Power Company developments, additional benefits to fish and wildlife resources would result.

Ring-necked pheasant, valley quail, muskrat, mink, and numerous species of waterfowl inhabit the thick cover on islands and shorelines of Snake River within the project areas. Wildlife resources are not significantly affected by the company's operations except at the Upper Salmon Falls development where wildlife habitat is subject to inundation as a result of flow increases over the diversion dam. This operating procedure precludes use of the area by nesting waterfowl.

In order to protect the fish and wildlife resources affected by the project, it is recommended that, in addition to the appropriate L-form provisions, the following special conditions be included in any license issued for this project:

(1) The Licensee shall construct, maintain, and operate, or shall arrange for the construction, maintenance, and operation of such fishways, including fish traps, or other fish facilities or fish protective devices and supporting facilities for artificial propagation and shall comply with such reasonable modifications of the project structures and operations in the interest of fish life, provided that such modifications shall be reasonably consistent with the primary purpose of the project and not unduly impair the power value of the project, as may be prescribed hereafter by the Secretary of the Interior (pursuant to Section 18 of the Act) upon consultation with the Licensee, the Commission, and the Idaho Department of Fish and Game.

see below

(2) The Licensee shall construct, maintain, and operate, or shall arrange for the construction, maintenance, and operation of such protective devices (exclusive of facilities which may be prescribed by the Secretary of the Interior pursuant to Section 18 of the Act) and shall comply with such reasonable modifications of project structures and operation in the interest of fish and wildlife resources, provided that such modifications shall be reasonably consistent with the primary purpose of the project and not unduly impair the power value of the project, as may be pre-

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scribed hereafter by the Commission upon its own motion or upon the recommendation of the Secretary of the Interior or the Idaho Department of Fish and Game after notice and opportunity for hearing and upon a finding based on substantial evidence that such modifications are necessary and desirable, and consistent with the provisions of the Act.

(3) Whenever the United States shall desire, in connection with the project, to construct fish handling facilities or to improve existing fish handling facilities at its expense, the Licensee shall permit the United States or its designated agency to use, free of cost, such of Licensee's lands and interests in lands, reservoirs, waterways, and project works as may be reasonably required to complete such fish handling facilities or such improvements thereof. In addition, after notice and opportunity for hearing, the Licensee shall modify the project operation as may be prescribed by the Commission, consistent with the primary purpose of the project, in order to permit the maintenance and operation of the fish handling facilities constructed or improved by the United States under the provisions of this article. This article shall not be interpreted to place any obligation on the United States to construct or improve fish handling facilities or to relieve the Licensee of any obligation under this license.

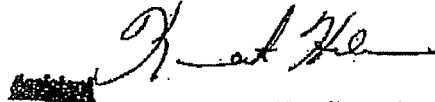
(4) The Licensee shall, at the Upper Salmon Falls development, eliminate or minimize overflows at the upper diversion dam, excessive flows through the fish ladder, and side-spills from the powerhouse canal.

(5) The Licensee shall, at the upper powerplant of Upper Salmon Falls development, provide an automatic warning device designed to alert anyone immediately downstream from the reject spillway simultaneously with increased water releases.

(6) The Licensee shall release all unused flows into the river below Shoshone Falls development during periods when facility repairs are required.

If it becomes necessary to interrupt flows,
they shall not be interrupted for a period
exceeding six hours.

Sincerely yours,



Secretary of the Interior

Hon. Joseph C. Swidler
Chairman
Federal Power Commission
Washington 25, D. C.

Enclosure