

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF	)	
WATER RIGHT NOS. 02-0100,	)	FINAL ORDER REGARDING
02-2001A, 02-2001B, 02-2032A,	)	INSTRUCTIONS TO WATER
02-2032B, 02-2036, 02-2056, 02-2057,	)	DISTRICT 02 WATERMASTER
02-2059, 02-2060, 02-2064, 02-2065,	)	AND WATER DISTRICT 130
02-4000A, 02-4000B, 02-4001A,	)	WATERMASTER
02-4001B, 02-10135, 37-2128,	)	
37-2471, 37-2472, 37-20709,	)	
AND 37-20710	)	
_____	)	

Idaho Power Company (“IPC”) operates the Twin Falls, Shoshone Falls, Upper Salmon Falls, Lower Salmon Falls, Bliss and Swan Falls hydropower projects located on the Snake River between Milner Dam and the Murphy gaging station, and the Upper Malad Gorge and Lower Malad Gorge projects located on the Malad River, which is tributary to the Snake River between Milner Dam and the Murphy gaging station. Each of these projects includes a small impoundment or pond. The capacity of the impoundment or pond at each facility is less than the volume of water that may be diverted in a twenty-four (24) hour period under the maximum diversion rates authorized in the hydropower water rights. Historically, the impoundments or ponds have been used to regulate flow for load following purposes; however, the partial decrees for these projects do not reference this practice. Therefore, it is necessary for the Director to issue instructions for the administration of the hydropower water rights for these projects.

ANALYSIS

The 1984 Swan Falls Settlement (“Settlement”) addressed, among other things, the hydropower water rights claimed by IPC for six of its hydropower projects on the Snake River below Milner Dam and above the Murphy gaging station: the Twin Falls project, the Shoshone Falls project, the Upper Salmon Falls Project, the Lower Salmon Falls project, the Bliss project, and the Swan Falls project. The Settlement also addressed the hydropower water rights claimed by IPC for its Upper Malad Gorge project and Lower Malad Gorge project.¹ Partial decrees for these hydropower water rights were entered in the SRBA in January 2012, and included conditions or provisions implementing elements of the Settlement, including but not limited to provisions addressing ownership, the trust, subordination, and Milner Dam.² The water rights are listed as follows:

¹ See *Memorandum Decision And Order On Cross-Motions For Summary Judgment, SRBA Consolidated Subcase No. 00-92023 (92-23)* (Apr. 18, 2008), at 9 (“The Swan Falls Agreement is attached hereto as Exhibit 1”) & Exhibit 1 ¶¶ 7A, 7B.

² This order does not address administration of the ownership, trust, subordination, and Milner Dam provisions. This order also does not address administration of the “average daily flows” of 3,900 cfs from April 1 to October 31, and 5,600 cfs from November 1 to March 31, as measured at the Murphy gaging station under the partial decrees’

Water Right No. ³	Project	Quantity (cfs) ⁴
02-0100	Swan Falls	2,150
02-2001A	Lower Salmon	1,700
02-2001B	Lower Salmon	1,300
02-2032A	Swan Falls	150 (November 1 – March 31 only)
02-2032B	Swan Falls	2,950 (April 1 – October 31)
02-2036	Shoshone Falls	1,000
02-2056	Twin Falls	1,050
02-2057	Upper Salmon	6,500
02-2059	Lower Salmon	250
02-2060	Lower Salmon	14,000
02-2064	Bliss	12,000
02-2065	Bliss	3,000
		2,800 (November 1 – March 31)
02-4000A	Swan Falls	1,840 (November 1 – March 31)
		1,750 (April 1 – October 31)
02-4000B	Swan Falls	90 (April 1 – October 31 only)
02-4001A	Swan Falls	1,460 (November 1 – March 31 only)
02-4001B	Swan Falls	1,460 (November 1 – March 31 only)
02-10135	Bliss	1,100
37-2128	Lower Malad	700
37-2471	Upper Malad	900
37-2472	Lower Malad	650
37-20709	Upper Malad	100
37-20710	Lower Malad	150

The above-listed hydropower projects historically have been considered to be “run-of-the-river” projects. Each project includes an incidental on-stream impoundment or pond that has been used as a short-term flow regulation structure. The impoundments or ponds allow IPC to fluctuate water levels at the projects, and thus “shape” flows for hydropower production purposes. The hydropower water rights for the facilities are subordinated in accordance with the Swan Falls Settlement, and the hydropower use of the water temporarily stored in the project impoundments is non-consumptive.

provision addressing these flows, “actual flow conditions,” and “fluctuations resulting from the operation of Idaho Power Company facilities.”

³ Idaho Power Company is listed as the owner of water right nos. 02-0100, 02-4000A, 02-4001A, and 02-02032A. The remaining water rights are held in trust by the State of Idaho. While the decreed period of use for most of the listed hydropower water rights is January 1 to December 31, the Swan Falls project water rights were decreed with two periods of use (April 1 to October 31, and November 1 to March 31), to effectuate certain elements of the Settlement.

⁴ The “Quantity” listed for each water right is the authorized diversion rate stated in the “Quantity” element of each right. As previously noted, each water right also includes provisions effectuating the subordination and the Murphy “average daily flow” elements of the Settlement. These provisions are not addressed in this order.

The above-listed hydropower water rights have been partially decreed in the SRBA. There are no storage water rights for these projects because the Adjudication Rules do not require a separate SRBA storage claim to be filed for a pond or impoundment if its capacity can be filled within twenty-four (24) hours under the diversion rate of the water right(s) authorizing the particular use that the impoundment supports. Rule 60.02 of the Adjudication Rules provides, in part: “Detention of water in a holding pond that can be filled in less than twenty-four (24) hours at the claimed diversion rate is not required to be claimed as storage.” IDAPA 37.03.01.060.02.f.ii. This standard is sometimes referred to as “the 24-hour fill allowance.”⁵

The table below shows that the impoundment capacity for each project is less than the volume of water that can be diverted in twenty-four (24) hours under the authorized diversion rate(s) of the applicable water right(s):

<u>Project</u>	<u>Authorized Diversions (cfs)⁶</u>	<u>24-Hour Fill Allowance (AF)⁷</u>	<u>Impoundment Capacity (AF)</u>
Twin Falls	1,050	2,079	1,000
Shoshone	1,000	1,980	1,500
Upper Salmon	6,500	12,870	600
Lower Salmon	17,250	34,155	10,900
Bliss	16,100	31,878	11,100
Swan Falls	8,400 ⁸	16,632	7,425
Upper Malad	1,000	1,980	10
Lower Malad	1,500	2,970	10

The fact that no separate storage water rights were decreed for the above-listed projects does not prevent or preclude IPC from continuing to store water in the incidental on-stream impoundments for the above-listed projects, and from continuing to fluctuate the levels of the impoundments to “shape” flows for power use under the hydropower water rights.

⁵ Historic utilization of the “24-hour fill allowance” came about as recognition that many diversion structures will incidentally impound a certain amount of water to either raise the water level or otherwise facilitate diversion into a canal or other conveyance or distribution system, or to provide for short-term detention (24-hours) to facilitate operation of the distribution system for the purpose of use authorized under the water right. The “24-hour fill allowance” is also recognized as a guidance standard in permitting and licensing, and in transfer processing. See *Administrator’s Memorandum – Application Processing No. 73, Licensing No. 12, Transfer Processing No. 28, Re: Utilization Of The 24-Hour Fill Allowance For Impoundments* (Apr. 18, 2013); *Administrator’s Memorandum – Application Processing No. 67, Re: Permitting Requirements For Ponds* (Feb. 28, 2003).

⁶ “Authorized Diversions” is the diversion rate recited in the “Quantity” element of the hydropower water right for the project, or the sum of the diversion rates if the project has more than one hydropower water right.

⁷ The “24-Hour Fill Allowance” is the product of the “Authorized Diversions” in cfs multiplied by a conversion factor of 1.98AF per 1 cfs per 24 hours. See *Administrator’s Memorandum – Application Processing No. 73, Licensing No. 12, Transfer Processing No. 28, Re: Utilization Of The 24-Hour Fill Allowance For Impoundments* at 2 n.2.

⁸ While the sum of the authorized diversion rates recited in the “Quantity” elements of the hydropower water rights for the Swan Falls project is 8,400 cfs, the subordination provisions in the partial decrees limits the “unsubordinated” portion of the water rights to (at most) “average daily flows” of 3,900 cfs from April 1 to October 31, and 5,600 cfs from November 1 to March 31, as measured at the Murphy gaging station under the “actual flow conditions” and “fluctuations” language of the partial decrees. The administration of this provision (and of the other subordination provisions in the partial decrees) is not addressed in this order.

CONCLUSION

IPC may continue to store water in the incidental on-stream impoundments for the above-listed projects, and may continue fluctuating the levels of those impoundments to “shape” flows for hydropower use at the projects. Such operations are incidental to the non-consumptive hydropower uses authorized by the applicable partial decrees, and are subject to all of the conditions of those decrees, including but not limited to the ownership, trust, subordination, and Milner Dam provisions.

ORDER

Based upon the foregoing, IT IS HEREBY ORDERED that the Watermaster for Water District 2 will administer water right nos. 02-0100, 02-2001A, 02-2001B, 02-2032A, 02-2032B, 02-2036, 02-2056, 02-2057, 02-2059, 02-2060, 02-2064, 02-2065, 02-4000A, 02-4000B, 02-4001A, 02-4001B, 02-10135, as allowing for the fluctuation of the level of the existing on-stream impoundments at IPC’s projects at Twin Falls, Shoshone Falls, Upper Salmon Falls, Lower Salmon Falls, Bliss, and Swan Falls for “shaping” flows for hydropower generation at said projects, subject to all of the conditions in the partial decrees, including but not limited to the ownership, trust, subordination, and Milner Dam conditions.

IT IS FURTHER ORDERED that the Watermaster for Water District 130 will administer water right nos. 37-2128, 37-2471, 37-2472, 37-20709, and 37-20710, as allowing for the fluctuation of the level of the existing on-stream impoundments at IPC’s projects at Upper Malad Gorge and Lower Malad Gorge for “shaping” flows used for hydropower generation at said projects, subject to all of the conditions in the partial decrees, including but not limited to the ownership, trust, subordination, and Milner Dam conditions.

IT IS FURTHER ORDERED that unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action. The person shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing. Idaho Code § 42-1701A(3).

IT IS FURTHER ORDERED that pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by the final order or orders previously issued by the Director in this matter may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which a hearing was held, the final agency action was taken, the party seeking review of the order resides, or the real property or personal property that was the subject of the agency action is located. The appeal must be filed within twenty-eight (28) days: (a) of the service date of the final order; (b) of an order denying petition for reconsideration; or (c) the failure within twenty-one (21) days to grant or deny a

petition for reconsideration, whichever is later. Idaho Code § 67-5273. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

Dated this 28th day of June, 2013.

A handwritten signature in cursive script, reading "Gary Sprackman", written over a horizontal line.

GARY SPRACKMAN

Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of June, 2013, a true and correct copy of the document(s) described below were served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

Document(s) Served: FINAL ORDER REGARDING INSTRUCTIONS TO WATER DISTRICT 2 WATERMASTER AND WATER DISTRICT 130 WATERMASTER and Explanatory Information to Accompany a Final Order

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EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(To be used in connection with actions when a hearing was **not** held)

(Required by Rule of Procedure 740.02)

The accompanying order is a "Final Order" issued by the department pursuant to section 67-5246, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: The petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4), Idaho Code.

REQUEST FOR HEARING

Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action. The person shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing. See section 42-1701A(3), Idaho Code. **Note: The request must be received by the Department within this fifteen (15) day period.**

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of: a) the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.