John K. Simpson, ISB No. 4242
Travis L. Thompson, ISB No. 6168
Shelley M. Davis, ISB No. 6788
Scott A. Magnuson, ISB No. 7916
BARKER ROSHOLT & SIMPSON LLP
1010 W. Jefferson St., Ste. 102
P.O. Box 2139
Boise, Idaho 83701-2139
(208) 336-0700 – Telephone
(208) 344-6034 – Facsimile

Attorneys for North Side Canal Company and Twin Falls Canal Company

RECEIVED
MAR 05 2010
DEPARTMENT OF
WATER RESOURCES

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR PERMIT & LICENSE NO. 01-07011 APPLICANT: Twin Falls Canal Company & North Side Canal Company	**AFFIDAVIT OF SHELLEY M. DAVIS IN SUPPORT OF CANAL COMPANIES' MEMORANDUM IN OPPOSITION TO IDAHO WATER RESOURCE BOARD, UPPER SNAKE WATER USERS' AND GROUND WATER DISTRICTS' MOTIONS FOR SUMMARY JUDGMENT**

STATE OF IDAHO)
) ss.
County of Ada)

SHELLEY M. DAVIS, being first duly sworn upon oath, deposes and says:

1. I am an attorney in the firm Barker Rosholt & Simpson LLP providing legal representation to the Participants North Side and Twin Falls Canal Companies (hereinafter "Canal Companies") in the above captioned matter. I am over the age of 18 and have knowledge of the documents and legal proceedings pertinent to this matter, and I make this affidavit based upon personal knowledge.

2. Attached hereto as Exhibit 1 is a true and correct copy of a January 7, 1977 letter from Stephen Allred to John Rosholt.

3. Attached hereto as Exhibit 2 is a true and correct copy of the Joint Statement of the Twin Falls and North Side Canal Companies on House Bill 459, dated February 4, 1984.

4. Attached hereto as Exhibit 3 is a true and correct copy of the Application for Permit for water right no. 01-7011 including amendments, and attaching the letter approving application.

5. Attached hereto as Exhibit 4 is a true and correct copy of the Complaint filed in Ada County Case No. 62237, dated October 21, 1977.

6. Attached hereto as Exhibit 5 is a true and correct copy of the Memorandum Decision and Order issued in Ada County Case No. 62237, dated December 10, 1979.

7. Attached hereto as Exhibit 6 is a true and correct copy of the Idaho Supreme Court opinion in appeal no. 13794, dated November 19, 1982.

8. Attached hereto as Exhibit 7 is a true and correct copy of the May 3, 1982, letter from John Rosholt to Reed Hansen, Chairman of the Idaho Water Resource Board.

9. Attached hereto as Exhibit 8 is a true and correct copy of the July 6, 1982, memorandum from Phil Rassier to Norm Young and Wayne Haas regarding the Milner Project.

10. Attached hereto as Exhibit 9 is a true and correct copy of the November 18, 1987 letter from Director R. Keith Higginson to John Rosholt regarding Permit No. 01-7011 request for extension of time.

11. Attached hereto as Exhibit 10 is a true and correct copy of excerpted portions of the Federal Energy Regulatory Commission Application for Initial License: Project No. 2899-002, Milner Hydroelectric Project, dated July 1984.

12. Attached hereto as Exhibit 11 is a true and correct copy of the Idaho Department of Water Resources Motion to Intervene in the FERC licensing of Milner Hydroelectric Project dated September 23, 1985.

13. Attached hereto as Exhibit 12 is a true and correct copy the FERC Order Issuing License for Project No. 2899-003, dated December 15, 1988.

14. Attached hereto as Exhibit 13 is a true and correct copy of the Beneficial Use Field Report submitted for the Milner Hydroelectric Project, dated October 29, 1993.

15. Attached hereto as Exhibit 14 is a true and correct copy of the Swan Falls Agreement executed October 25, 1984.

16. Attached hereto as Exhibit 15 is a true and correct copy of the July 27, 2006 letter to Senator Charles Coiner from Director of the Idaho Department of Water Resources Karl Dreher.

17. Attached hereto as Exhibit 16 is a true and correct copy of the text of House Bill 800 introduced in the Idaho Legislature 2006 session.

18. Attached hereto as Exhibit 17 is a true and correct copy of the text of Senate Bill 1185 introduced in the Idaho Legislature 2009 session.

19. Attached hereto as Exhibit 18 is a true and correct copy of the April 11, 2006, agreement between the State of Idaho and Idaho Power Company regarding Idaho Power Company's subordination to recharge permit nos. 01-7054 and 37-7842.

20. Attached hereto as Exhibit 19 is a true and correct copy of the Idaho Department of Water Resources and Water Supply Bank records for recharge permit nos. 01-7054 and 37-7842.

21. Attached hereto as Exhibit 20 is a true and correct copy of the Notice of Intent to Issue License for water right no. 01-7011 dated September 5, 2007.

22. Attached hereto as Exhibit 21 is a true and correct copy of the January 9, 2007, letter from Bingham Ground Water Users, the February 5, 2007, letter from Randy Budge, and the April 13, 2007, letter from Rob Harris, all to the Idaho Department of Water Resources regarding Milner water right permit no. 01-7011.

23. Attached hereto as Exhibit 22 is a true and correct copy of *North Side Canal Company and Twin Falls Canal Company v. Tuthill* Petition for Preemptory Write of Mandate, Fifth Judicial District Court, in and for the State of Idaho, case no. 2007-1093.

24. Attached hereto as Exhibit 23 is a true and correct copy of the Final Order of the Director of the Idaho Department Resources Issuing Water Right License No. 01-7011 and license.

25. Attached hereto as Exhibit 24 is a true and correct copy of North Side and Twin Falls Canal Company's Protest and Petition for Hearing for water right no. 01-7011.

26. Attached hereto as Exhibit 25 is a true and correct copy of plans for the Milner Hydroelectric Facility depicting the point of diversion above Milner Dam, and drawings depicting the places of use for irrigation water rights for Twin Falls and North Side Canal Companies.

27. Attached hereto as Exhibit 26 is a true and correct copy of the Petitions to Intervene of Idaho Water Resource Board, the Upper Snake Water Users, and the Ground Water Districts, as well as the Amended Petition to Intervene of the Idaho Water Resource Board.

28. Attached hereto as Exhibit 27 is a true and correct copy of the June 23, 2007, Memorandum of Director Karl Dreher to Senator Laird Noh and Representative Dell Raybould.

29. Attached hereto as Exhibit 28 is a true and correct copy of excerpts of the 1992 Idaho State Water Plan.

30. Attached hereto as Exhibit 29 is a true and correct copy of excerpts of the 1986 Idaho State Water Plan.

31. Attached hereto as Exhibit 30 is a true and correct copy of excerpts of the 1996 Idaho State Water Plan.

32. Attached hereto as Exhibit 31 is a true and correct copy of the 2009 Draft Resolutions of Water District 1.

33. Attached hereto as Exhibit 32 is a true and correct copy of examples of the Partial Decrees submitted to the Snake River Basin Adjudication Court pursuant to the Swan Falls Reaffirmation Agreement.

34. Attached hereto as Exhibit 33 is a true and correct copy of the State of Idaho's Motion for Summary Judgment in SRBA sub-case no. 02-200, *et seq*.

35. Attached hereto as Exhibit 34 is a true and correct copy of the April 9, 1987, memorandum from L. Glenn Saxton to File for water right no. 01-7011.

36. Attached hereto as Exhibit 35 is a true and correct copy of the April 13, 1987, letter from L. Glenn Saxton to John Rosholt.

37. Attached hereto as Exhibit 36 is a true and correct copy of the May 8, 1987, letter from John Rosholt to L. Glenn Saxton.

38. Attached hereto as Exhibit 37 is a true and correct copy of September 1, 1985, letter from L. Glenn Saxton to the Canal Companies.

39. Attached hereto as Exhibit 38 is a true and correct copy of the Memorandum Decision and Order of the Fifth Judicial District Court in and for the State of Idaho in *Riley v. Rowan*, case no. 94-00012, dated August 28, 1997.

40. Attached hereto as Exhibit 39 is a true and correct copy of the Memorandum Decision and Order on Appeal in the Third Judicial District Court in and for the State of Idaho in *Idaho Power Co. v. Idaho Department of Water Resources*, case no. CV 09-1883, dated January 13, 2010.

Dated this 5th day of March, 2010.

BARKER ROSHOLT & SIMPSON LLP

John K. Simpson, ISB No. 4242
Travis L. Thompson, ISB No. 6168
Shelley M. Davis, ISB No. 6788
Scott A. Magnuson, ISB No. 7916
BARKER ROSHOLT & SIMPSON LLP
205 North Tenth Street, Suite 520
P.O. Box 2139
Boise, ID 83701-2139

Attorneys for North Side Canal Company and Twin Falls Canal Company

SUBSCRIBED AND SWORN to before me this 5th day of November, 2009.

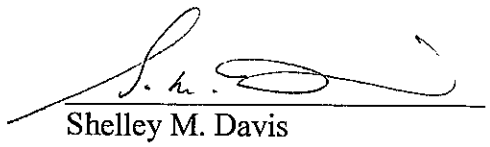
HEATHER REMM
NOTARY PUBLIC
STATE OF IDAHO

Notary Public for Idaho
Residing at: Boise
Commission Expires: 12/10/2015

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of March, 2010, I served a true and correct copy of the foregoing **AFFIDAVIT OF SHELLEY M. DAVIS IN SUPPORT OF CANAL COMPANIES' MEMORANDUM IN OPPOSITION TO IDAHO WATER RESOURCE BOARD, UPPER SNAKE WATER USERS' AND GROUND WATER DISTRICTS' MOTIONS FOR SUMMARY JUDGMENT** upon the following persons via the method indication below:

Interim Dir., Gary Spackman Idaho Department of Water Resources 322 E. Front St. Boise, Idaho 83720-0098	____ U.S. Mail, Postage Prepaid __X_ Hand Delivered ____ Overnight Mail ___ Facsimile
Randall C. Budge Candice M. McHugh Racine Olson Nye Budge & Bailey, Chtd. P.O. Box 1391 Pocatello, ID 83204-1391 Fax No. (208)232-6109	____ U.S. Mail, Postage Prepaid __X_ Hand Delivered ____ Overnight Mail ___ Facsimile
Robert L. Harris, Esq. HOLDEN KIDWELL HAHN & CRAPO, PLLC P.O. Box 50130 1000 Riverwalk Dr., Ste. 200 Idaho Falls, ID 83405 Fax No. (208)523-9518	__X_ U.S. Mail, Postage Prepaid ____ Hand Delivered ____ Overnight Mail ___ Facsimile __X_ E-Mail
Lawrence Wasden Steven L. Olsen Michael S. Gilmore Idaho Atty. Gen. Office P.O. Box 83720 Boise, ID 83720-0010 Fax No. (208) 854-8073	____ U.S. Mail, Postage Prepaid __X_ Hand Delivered ____ Overnight Mail ___ Facsimile



Shelley M. Davis

Exhibit 1

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

Cecil D. Andrus
Governor

R. Keith Higginson
Director

Statehouse
Boise, Idaho 83720
(208) 384-2215

January 7, 1977

Mr. John A. Rosholt
Idaho Director
National Water Resources Association
P.O. Box 525
Twin Falls, Idaho 83301

Dear John:

Pursuant to our telephone discussion, I am including information we have developed with regard to the installation of power facilities at Milner and Jackson Reservoirs. You should realize that the information is approximate and based on data that we have available here in this office. The flows that were analyzed are the flows that actually occurred under past and present operations. It appears to us that there is a potential for the installation of power at these facilities.

We would be glad to work with your clients if they wish to pursue the matter further.

Sincerely,

C. STEPHEN ALLRED
Administrator, Investigations Division

CSA:lm
Encl.

BRSM006421

DRAFT JRF:mar 1-6-77

MEMORANDUM

TO: C. Stephen Allred

FROM: John Bessaw & John Ferebauer

SUBJECT: Maximum Investment Calculations for Milner and Jackson Plants

The follwing calculations are the maximum investment for the two plants using 7% 40 year financing, with a capitol recovery factor of .075.

Milner Plant - 58,600,000 KWH per year

Gross Annual Power Sales at 20 mills	$ 1,172,000
Less: O & M	248,820
Net Return	923,180
Maximum investment ($923,180 ÷ .075)	$12,309,067
Gross Annual Power Sales at 25 mills	$ 1,465,000
Less: O & M	248,820
Net Return	1,216,180
Maximum investment ($1,216,180 ÷ .075)	$16,215,733
Gross Annual Power Sales at 30 mills	$ 1,758,000
Less: O & M	248,820
Net Return	1,509,180
Maximum investment ($1,509,180 ÷ .075)	$20,122,400

BRSM006422

Jackson Lake Plant - 25,000,000 KWH per year

Gross Annual Power Sales at 20 mills	$ 500,000
Less: O & M	158,800
Net Return	341,200
Maximum investment ($341,200 ÷ .075)	$ 4,549,333
Gross Annual Power Sales at 25 mills	$ 625,000
Less: O & M	158,800
Net Return	466,200
Maximum Investment ($466,200 ÷ .075)	$ 6,216,000
Gross Annual Power Sales at 30 mills	$ 750,000
Less: O & M	158,800
Net Return	591,200
Maximum Investment ($591,200 ÷ .075)	$ 7,882,667

Operation and maintenance were calculated for a manual operation hydroelectric plant using Table 37, page 87 of Hydroelectric Power Evaluation 1968 published by the Federal Power Commission. These costs were indexed to July, 1976 using the U.S. Bureau of Reclamation composite index. For the Milner Plant an installed capacity of 30,000 kilowatts was used to estimate operation and maintenance. For the Jackson Plant an installed capacity of 10,000 kilowatts was used to estimate operation and maintenance. The figures above could be refined further by accounting for replacement, insurance, taxes, financing costs, and miscellaneous, which would further reduce the maximum investment by as much as 15 %.

BRSM006423

Exhibit 2

JOINT STATEMENT OF
TWIN FALLS CANAL COMPANY AND
NORTH SIDE CANAL COMPANY ON
HOUSE BILL 459

February 4, 1984

Chairman Walter Little
State Affairs Committee
House of Representatives
Idaho Legislature
Statehouse
Boise, Idaho 83702

RE: House Bill 459

Dear Chairman Little:

We the Presidents of the Twin Falls Canal Company and North Side Canal Company submit this letter for inclusion in the record of your proposed February 7th hearing on House Bill 459.

Twin Falls and North Side Canal Companies jointly provide irrigation water for approximately 370,000 acres of land in Magic Valley. We jointly own Milner Dam which is a diversion dam located on the Snake River east of Murtaugh. The dam facilitates diversions to another 120,000 acres of land in addition to those irrigated by our companies.

There were many rumors in 1976 and 1977 that Milner Dam might well be a feasible power site. We attach hereto, marked as Exhibit "A", a letter dated January 7, 1977, from the State of Idaho Department of Water Resources by which Stephen Allred, then the Administrator of the Investigations Division for the Department, advised our counsel that Milner had potential as a power project. The boards of directors of the canal companies decided that if a power plant was to be located at Milner, it should benefit the stockholders of Twin Falls and North Side for the reason that they put up the money for the construction of the dam, and had operated and maintained it since 1905.

After we received Stephen Allred's letter, we made some additional investigations. On March 30, 1977, the companies jointly filed an application for a water permit to develop hydro potential at Milner Dam or by using the canals to convey the water to a point down the canal where it could be

dropped back into the Snake River to obtain more head. The permit was issued by the Idaho Department of Water Resources on June 29, 1977 without a subordination clause or condition. The permit had since been amended and extended and is in good standing, (Exhibit "B" hereto).

Thereafter the companies pursued a joint application for a preliminary permit from the Federal Energy Regulatory Commission (Exhibit "C" attached hereto) to study the alternative sites for generation to develop the Milner Dam hydro electric potential. There were three other competing applicants. On August 12, 1981, the Commission issued a preliminary permit to the companies to the exclusion of Cook Electric Company, Idaho Water Power Company, and the Bailey family.

We recognized early on that the project may cost in excess of $50 million dollars and that our stockholders would not be willing to mortgage their lands to raise the money. We approached the Idaho Power Company and entered an agreement whereby we would jointly develop the project and the companies would receive increasing royalties over a 50 year period. We also entered into an agreement between the companies that would change the participation ratios depending upon which canal (if any) would be used in the project. As it turned out, the site selected will utilize 1.3 miles of the Twin Falls Canal and consequently the participation share of Twin Falls is larger than that of North Side.

The shareholders were nervous about the Governments' right to recapture the dam as part of the project at the end of the 50 year license. We obtained passage of a Federal law by which the U.S. is precluded from recapturing the dam, reservoir and canal.

Since the preliminary permit was issued, we have made the studies required by the permit and have obtained a one year extention on the permit. We plan to file an application for a FERC license before August 1, 1984. Between the Idaho Power Company and the canal companies, approximately $1 million dollars has been expended to date in doing the preliminary studies, purchasing land, and preparing the data to file the application for license.

We authorized our counsel to send a letter to the Idaho Water Resource Board (Exhibit "D" attached hereto) and to appear before them to discuss the subordination issue for the Milner project even though the water right had not been subordinated when issued. We knew that to undertake the preparation of an application for license would require an expenditure of substantial monies, and we wanted an advance opinion from the water board as to whether or not they would seek subordination as a part of the FERC licensing proceeding since the Department of Water Resources had not attempted to assert a subordination provision on the water permit. Counsel met with the Idaho Water Resource Board in the summer of 1982 prior to the reversal of the District Court's opinion in the Swan Falls case. The water board had made no decision concerning subordination by November of 1982 when the Supreme Court decision was issued.

Please understand that at the same time our companies were involved in efforts pursuing the privileges to construct a power plant, that the Twin Falls Canal company was defending the historic Canyon View case and was resisting the efforts by other groups to condem a right-of-way for joint use of the Twin Falls main canal for the conveyance of waters to the Bruneau Desert. That case was decided against TFCC and since that time, in coordination with their master plan studies, TFCC has co-operated with the "expansion groups" in studying a possible expansion in joint use of the Twin Falls main canal. At the present time, only the United States (on behalf of the Salmon Falls Division project) and the Canyon View Irrigation Company have indicated an interest to go forward in planning for the possible joint use of the canal. The two entities that have agreed to go forward, will take Snake River water for use in the summertime and essentially not interfere with the operation of the Milner Power Plant, since river flows available at Milner would be available for late 1970 priority water rights only at such times during the irrigation season as flood waters are passing over Milner Dam.

In the context of House Bill 459, the Milner subordination issue is a complicated one for us. The irrigation water rights of our companies are not impacted by the Swan Falls decision. We have also sought to protect the power right at Milner for the joint benefit of all of the Twin Falls and North Side stockholders. We do have stockholders within our companies who are impacted by the Swan Falls'

decision. Some stockholders have lands that are not served by canal water and they individually seek to expand and have applied for applications and permits.

If House Bill 408 passes and is signed into law, all uses of water in Idaho for irrigation and other uses that are presently being made will be validated. Only future uses are the concern of House Bill 459.

Our Companies do not oppose future irrigation development in Idaho just because we have ours, whether or not the addition of more irrigated acres at this time is in our personal interest. At last week's board of director's meeting of the Idaho Water Users, our company's representatives supported the passage of House Bill 408 and 459 because the same are not inconsistent. On the other hand, if House Bill 459 is passed, it may well impact the construction of the Milner Hydro Electric Plant. Section 2 of the Bill would require a re-evaluation of the water permit after $1 million dollars has been expended. We have also attached hereto as Exhibit "E", Memorandum that lists all of the water permits that are prior to and junior to the Milner Power Permit if our water power permit is not subordinated by the enactment of House Bill 459.

We offer this statement for the record as an attempt to clarify actions to date concerning the construction of the power plant at Milner Dam. As directors, we have been working for the best interest of the stockholders.

Respectfully Submitted,

Maurice Klaas
President
Twin Falls Canal Company

C. J. Marshall
President
North Side Canal Company

cc: T.W. Stivers
Twin Falls, Jerome and Gooding County Legislators

February 4, 1984

Milner Subordination

By letter dated May 3, 1983, Twin Falls Canal Company (hereinafter TFCC) and North Side Canal Company (hereinafter NSCC) officially asked the Idaho Water Resource Board (hereinafter IWRB) to officially consider the adoption of a policy position that IWRB would not seek subordination of TFCC and NSCC Water Permit No. 01-7011 or ask for subordination of the Federal Energy Regulatory Commission License which will be sought by the companies. Water Permit No 01-7011 was not subordinated by the Department of Water Resources when issued to TFCC and NSCC in 1977.

If the State Water Permit or the FERC License for the Milner Project are not subordinated, then based on priority, there are only nine prior pending permits that could take ahead of Permit 01-7011. (There is no unappropriated water at Milner during the irrigation season except flood waters.) If Milner is subordinated to pending and future depletions for irrigation or other consumptive purposes, then there are several additional pending permits plus all future water permits which would be treated as prior to the Milner permit and could possibly deprive the plant of all water. Obviously this would block financing of the Milner Power Project.

The pending permits ahead of Milner power without subordination are:

Priority 7/8/60 No. R-36723 1072	United States for Teton Dam 315,00 A/F of storage, year around diversion
Priority 9/8/64 No. 01-2069	United States for Salmon Falls Diversion Project, 1,140 C/F/S, year around diversion
Priority 7/7/69 No. 01-7002	United States for Lynn Crandall Dam 1,500,000 A/F of storage, year around diversion
Priority 7/18/72 No. 02-7100	Canyon View Irrigation Company, (Part of Bruneau Project), 399 C/F/S, 80,000 A/F total
Priority 8/13/72 No. 02-7101	Tuana Mutual Irrigation Company, (Part of Bruneau Project), 200 C/F/S

Priority 6/18/74 No. 02-7143A	Narrows 72.3 C/F/S March 30 - October 15
Priority 1975 No. 02-7193	Narrows 51.60 C/F/S March 30 - October 15
Priority 2/6/76 No. 02-7216	Narrows 1.6 C/F/S March 30 - October 15
Priority 3/31/76 No. 02-7223	Big Valley, 1437.6 C/F/S January - December
Priority 3/30/77 No. 01-7011	TFCC - NSCC, Milner Power, 12,000 C/F/S

A lender will likely agree that the Lynn Crandall Project and a reconstructed Teton are remote. The Salmon Falls Project and the Narrows Permits would only take from the Milner Power Plant during spring floods because there is no off-stream storage available for project diversions and the Narrows Permit are all March - October, and the Big Valley Permit is not to off-stream storage. Canyon View and Tuana are then realistically the only major prior permits that would impact the Milner Power Project. If 01-7011 is subordinated, all of the above permits of Narrows and Big Valley as well as the following pending permits for diversion during the annual flood, or winter diversion to off-stream storage would impact the project:

Priority 2/10/76 No. 02-7220	Enterprize Acres, 500 C/F/S, 19,000 acres
Priority 5/22/78 No. 02-7265	Grindstone Butte, 227,500 A/F 86,223 acres
Priority 6/7/78 No. 01-7021	IWRB, Bruneau, 1,378,000 A/F 327,140 acres
Priority 7/28/78 No. 02-7270	Dove Springs, 416 C/F/S March 30 - October 15
Priority 6/30/80 No. 01-7054	Groundwater Recharge District 1,200 C/F/S,
Priority 12/24/80 No. 02-7314	Dove Springs, 64 C/F/S March 15 - November 15
Priority 12/10/81 No. 01-7068	Dove Springs, 90,000 A/F and Narrows off-spring storage

Consequently, all of the 1.4 million acre feet average annual flow past Milner could possibly be diverted to off-stream storage and deprive the Milner plant if subordination of Milner occurred and all presently contemplated diversions were made.

The TFCC and NSCC would earn approximatley $48 million over 50 years in energy royalties and approximately $5 million that would be available in a reserve fund if the Milner Power Project is not subordinated.

Exhibit 3

Power of Attorney

AMENDED

Identification No. RECEIVED

Application No. 07-7011

STATE OF IDAHO

DEPARTMENT OF WATER ADMINISTRATION

APPLICATION FOR PERMIT

Department of Water Resources Central Office APPROVED

To Appropriate the Public Waters of the State of Idaho

(TYPE OR PRINT IN INK)

North Side Canal Company, 921 N. Lincoln Ave., Jerome, ID 83338

1. Name of applicant Twin Falls Canal Company, P. O. Box 326, Twin Falls, ID 83301

post office address

2. Source of water supply Snake River which is a tributary of Columbia River

3. a. Location of point of diversion is * NE NW SW SE (Lot 8) ¼ of SW (Lot 6) NW (Lot 5) ¼ of Section 29 28 28 Township 10 S.

Range 21 E. B.M. Twin Falls & Jerome County; additional points of diversion if any:

T.F. Canal diversion - NE¼ SE¼ (Lot 8) Sec. 29, T. 10S. R. 21 E.B.M. Twin Falls County;

N.S. Canal diversion - SW¼ NW¼ *(Lot 5) Sec. 28, T. 10s. R. 21 E.B.M. Jerome County, Idaho.

b. If water is not consumed, it will be discharged into Snake River at a point in SE ¼ of ¼ of Section 29 Township 10 S. Range 21 E. B.M. Twin Falls & Jerome Counties, Idaho.

4. Warer will be used for the following purposes:

Amount 12,000 c/f/s (cfs or acre-feet per annum) for power purpose from Jan. 1 to Dec. 31 (both dates inclusive)

Amount _____ (cfs or acre-feet per annum) for _____ purpose from _____ to _____ (both dates inclusive)

Amount _____ (cfs or acre-feet per annum) for _____ purpose from _____ to _____ (both dates inclusive)

5. Total quantity to be appropriated:

*(Corrections made as per telephone conversatio of 5/12/77) ADW

a. 12,000 c/f/s continous flow cubic feet per second and/or

b. N/A acre feet per annum.

24,000 A/F for each day 12,000 c/f/s available

6. Proposed diverting works:

a. Description of ditches, flumes, pumps, headgates, etc. Use Milner Dam, construct penstocks and powerplant below dam; if any additional point utilized, water will be dropped by penstocks from T.F. Canal or N.S. Canal to powerplant adjacent to Snake River in river canyon.

b. Height of storage dam (Milner) 44 feet, active reservoir capacity 18,000 acre feet; total reservoir capacity 18,000 acre feet, materials used in storage dam: concrete and earth fill

Period of year during which storage will occur _____ (Mo. Day) to _____ (Mo. Day) inclusive.

c. Proposed well diameter is _____ inches; proposed depth of well is _____ feet.

7. a. Time required for the completion of the works and application of the water to the proposed beneficial use is 5 years.

b. Estimated construction cost is $20,000,000.00.

8. Description of proposed uses:

a. If water is not for irrigation:

(1) Give the place of use of water: N½, & N½ S½, Sec. 29, T. 10S. R. 21, Jerome & Gooding Counties ¼ of ¼ of Section 29 Township 10 S.

Range 21 E. B.M. Alternate site is NE SE Sec. 16, T. 10S. R. 19, Twin Falls County.

(2) Amount of power to be generated: 143,000 hp under 150-200 feet of head.

Alternate additional points of use would utilize up to 400 ft. 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 _____.

If water is to be used for other purposes describe: Potential cooling for thermal power.

MICROFILMED

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

TWP.	RANGE	SEC.	NE¼				NW¼				SW¼				SE¼				TOTALS
			NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	

Total number of acres to be irrigated _____

c. Describe any other water rights used for the same purposes as described above

Applicant has none.

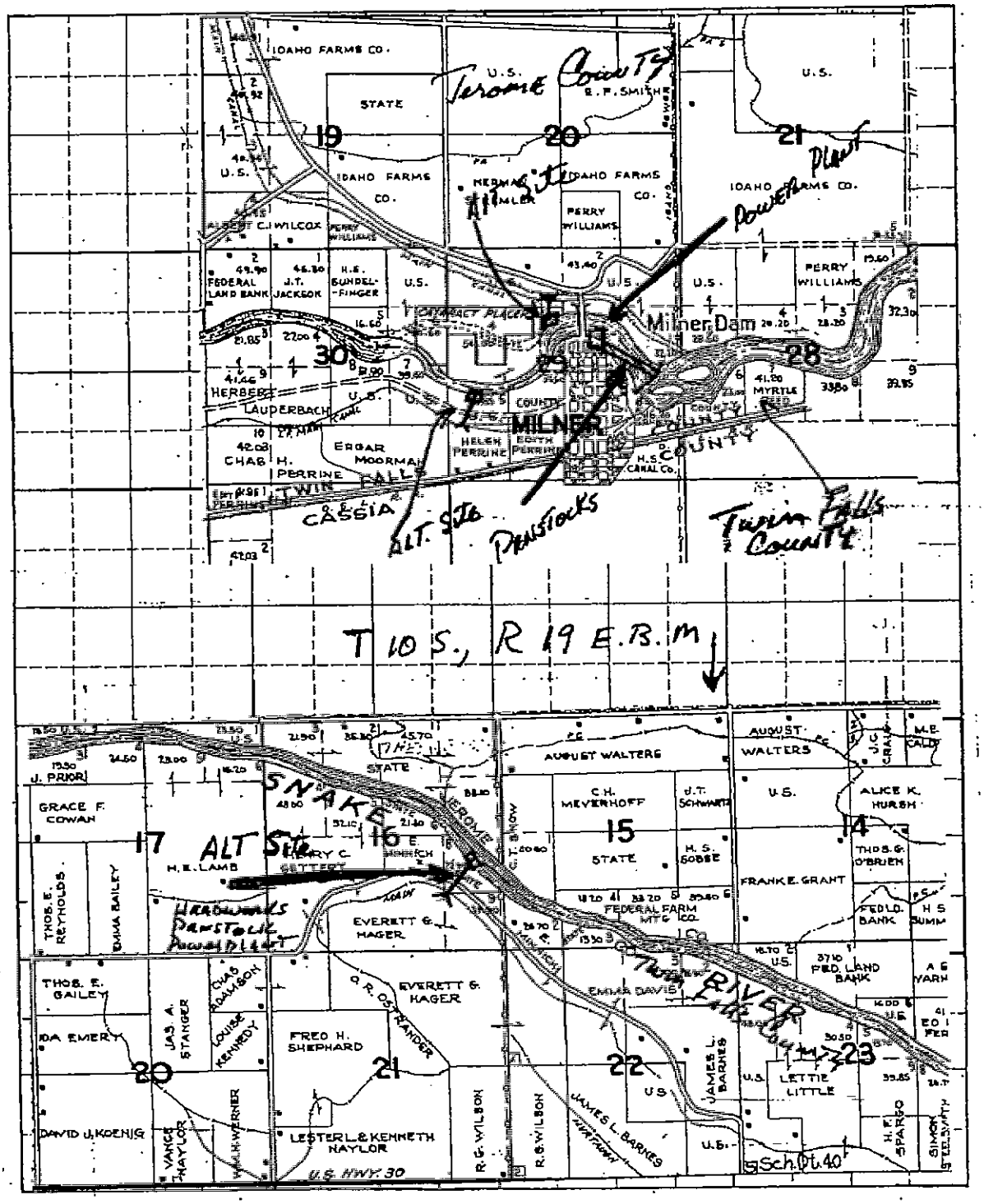
9. a. Who owns the property at the point of diversion Milner Dam owned by applicants. Bed of stream owned by State of Idaho; applicants own at alternate points of diversion.
b. Who owns the land to be irrigated or place of use Applicants own land adjacent to Milner Dam. Eventua construction would require possible permission of St. of Idaho, FPC, and BLM, or private owners.
c. If the property is owned by a person other than the applicant, describe the arrangement enabling the applicant to make this filing If site determined to be on State or Federal lands, appropriate land use permits will be sought. If private, negotiations for purchase will be undertaken.

10. Remarks Cost feasibility reports being undertaken. This application is filed in recognition of all prior existing water rights.

MICROFILMED

T. 10 S., R 21 E. B. M.

11. Map of proposed project: show clearly the proposed 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.

HICKROP LINED

(Applicant) North Side Canal Company
President

(Applicant) Twin Falls Canal Company
President

Proposed Priority 3/30/77

Received by KW Date 3-30-77 Time 4:20p.
Preliminary check by ADM Fee $180.79+9.84=21/92-m
Receipted by AB Date 4/8/77 #3401, #83422 984-21
Publication prepared by AB Date 5/11/77
Published in Jerome News + North Side News
Publication dates 5/19 + 5/26/77
Publication approved Am Date 6/23/77
Priority reduced to _____ Reason _____

RECEIVED
APR 11 1977
Department of Water Resources
Southern District Office

Protests filed by: _____

Copies of protests forwarded by _____
Hearing held by _____ Date _____
Recommended for (approval) denial by _____

ACTION OF THE DIRECTOR, DEPARTMENT OF WATER ADMINISTRATION

This is to certify that I have examined Application for Permit to appropriate the public waters of the State of Idaho No. 01-7011, and said application is hereby APPROVED.

1. Approval of said application is subject to the following limitations and conditions:

   a. SUBJECT TO ALL PRIOR WATER RIGHTS.

   b. Proof of construction of works and application of water to beneficial use shall be submitted on or before June 1, 19 82.

   c. Other: A measuring device of a type approved by the Director shall be permanently installed and maintained as part of the diverting works.

2. Denial of said application is for the following reasons: _____

Witness my hand this 29 day of June 19 77.

Deputy Director

MICROFILMED

Fee: $10.00
Receipt # 9269

STATE OF IDAHO
DEPARTMENT OF WATER ADMINISTRATION

RECEIVED
SEP 14 1977
Department of Water Resources

APPLICATION FOR AMENDMENT

Permit No. 01-7011

North Side Canal Company, Ltd.
Comes now Twin Falls Canal Company of (address) _____
921 North Lincoln Avenue, Jerome, Idaho 83338
P. O. Box 326, Twin Falls, Idaho 83301, and represents to the Director of the Idaho Department of Water Administration:

That he is the owner and holder of Permit to Appropriate the Public Waters of the State of Idaho No. 01-7011, and requests that the permit and permit map be changed as follows:

1. Point of diversion: _____ ¼ _____ ¼, Sec. _____ Twp. _____ Rge. _____, B.M., County of _____. Other points of diversion:

(No Change)

2. Period and nature of use: (irrigation, domestic, stockwatering, industrial, etc.)
(No Change in period of nature of use)

Annual _____ for _____ purposes from _____ to _____ (both dates inclusive)
Annual _____ for _____ purposes from _____ to _____ (both dates inclusive)
Annual _____ for _____ purposes from _____ to _____ (both dates inclusive)
Annual _____ for _____ purposes from _____ to _____ (both dates inclusive)
(cfs or acre feet per annum)

3. Place of use or land to be irrigated:

TWP	RANGE	SEC	NE ¼				NW ¼				SW ¼				SE ¼				TOTALS
			NE ¼	NW ¼	SW ¼	SE ¼	NE ¼	NW ¼	SW ¼	SE ¼	NE ¼	NW ¼	SW ¼	SE ¼	NE ¼	NW ¼	SW ¼	SE ¼	

PURPOSE OF THIS AMENDMENT IS TO INCLUDE ADDITIONAL ALTERNATE POINTS OF BENEFICIAL USE FOR POWER PURPOSES.

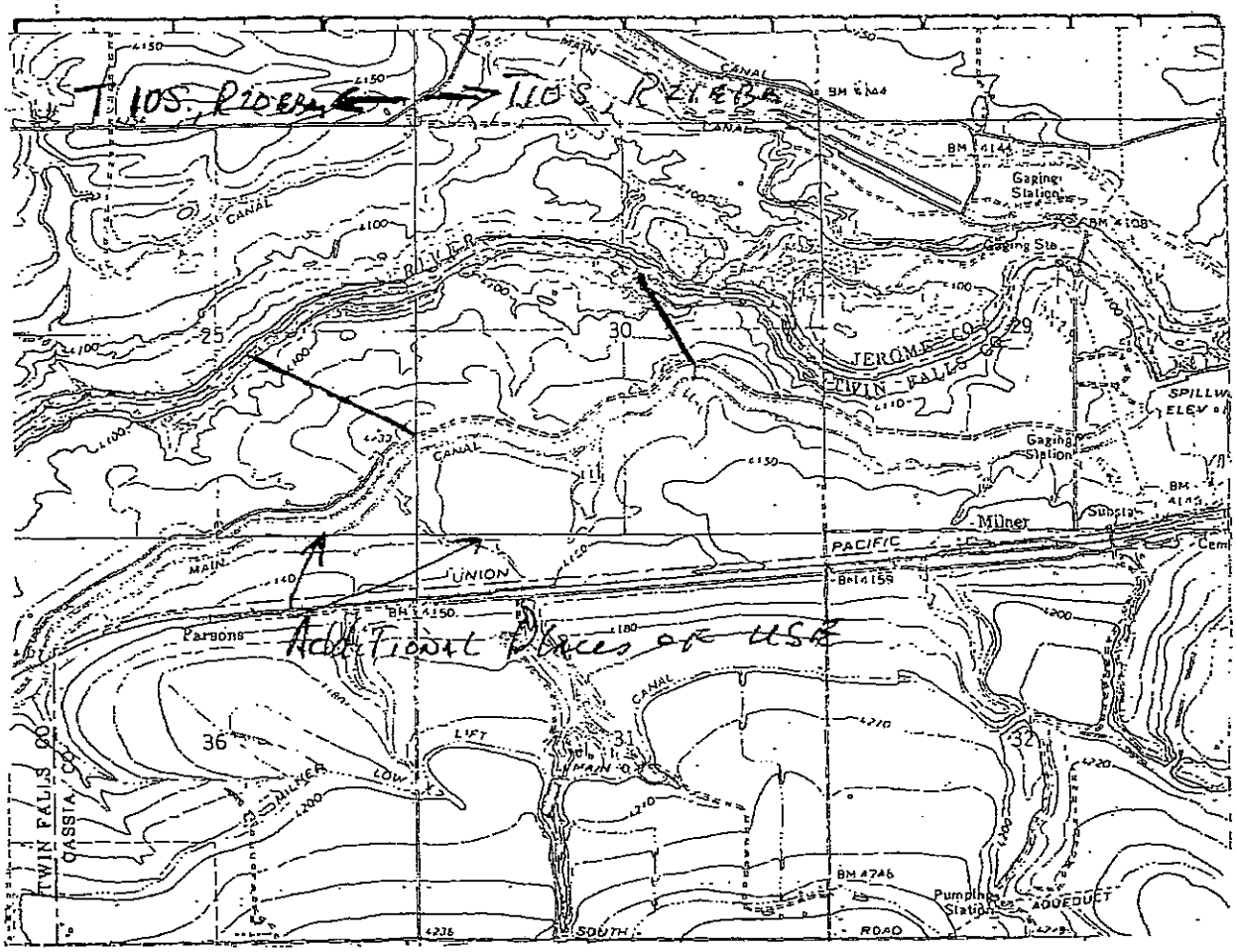
#1: Lots 3, 4, 7 & 8, Sec. 30, T. 10 S., R. 21 E.B.M.

#2: NW¼, SE¼, Sec. 25, T.10 S. R. 20 E.B.M.

BOTH IN TWIN FALLS COUNTY, IDAHO

Total number of acres to be irrigated

Complete the following map by showing land and point of diversion as proposed by this amendment. Show 10-acre subdivisions, townships, ranges and ditches.



Scale: 2 inches equal 1 mile

That no one will be injured by such change, and that such change will be made at permit holder's own risk.

Signed at Twin Falls, Idaho, this 14th day of September, 1977.

Tom A. Rosholt
(signature)
Holder of Power of Attorney
Twin Falls Canal Company and
North Side Canal Company, Ltd.

ACTION OF THE DIRECTOR, DEPARTMENT OF WATER ADMINISTRATION

Chief, Operations Bureau Resources

I, BOBBY D. FLEENOR, ~~XXXXXXX~~ of the Department of Water ~~XXXXXXXXXXXX~~,

hereby APPROVE the above application for amendment on Permit No. 01-7011.

Witness my hand this 28 day of September, 19 77.

Bobby D. Fleenor
Director
Chief, Operations Bureau

PARRY, ROBERTSON, DALY & LARSON
LAWYERS
THE IDAHO FIRST NATIONAL BANK BUILDING
P. O. BOX 525
TWIN FALLS, IDAHO 83301

TELEPHONE
(208) 733-3722

R. P. PARRY
T. M. ROBERTSON
JOHN H. DALY (1913-1968)
BERT LARSON
C. G. McINTYRE
JOHN R. COLEMAN
THOMAS G. NELSON
JOHN A. ROSHOLT
FRED D. DECKER
ROBERT C. PAINE
J. EVAN ROBERTSON

RECEIVED
MAY 4 1977
Department of Water Resources
Southern District Office

OUR FILE NUMBER

May 3, 1977

Department of Water Resources
1041 Blue Lakes Blvd. North
Twin Falls, Idaho 83301

Attention: Alan Merritt

Re: Milner Dam Filing - TFCC-NSCC

Dear Alan:

Enclosed are redone pages 1 and 2 of the Milner Dam application. Also enclosed are original power of attorneys authorizing me to consent to amendments to the permits on behalf of both companies. Please keep copies of these available as they might concern other filings made by the companies.

If necessary to label page 1 "amended", please feel free to do so. Also double-check the changes that were made pursuant to our previous conversation.

Thanks for your cooperation.

Sincerely,

John A. Rosholt

JOHN A. ROSHOLT

JAR:bg
Enclosure

MICROFILMED

July 1, 1977

Re: Permit No. 01-7011

North Side Canal Company
921 Lincoln Ave.
Jerome, ID 83338

Twin Falls Canal Company
P. O. Box 326
Twin Falls, ID 83301

Dear Sirs:

Enclosed is a copy of your approved Application for Permit No. 01-7011. We direct your attention to the conditions of approval as listed on the fourth page.

Be sure to note that a special condition requiring you to install and maintain a measuring device at your point of diversion has been placed upon your permit. We are enclosing a letter describing different types of measuring devices accepted by this office.

Sincerely,

BOBBY D. FLEENOR
Chief, Water Rights

Enclosure: Copy of permit

MICROFILMED

Exhibit 4

PARRY, ROBERTSON, DALY & LARSON
P. O. Box 525
Twin Falls, Idaho 83301
Telephone: 733-3722
Attorneys for Plaintiff

FILED
A.M. P.M.
OCT 21 1977
CLARENCE A. PLANTING CLERK
BY DEPUTY

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

* * * * * * * * *

IDAHO POWER COMPANY,

Plaintiff,

vs.

THE STATE OF IDAHO, acting by and through the DEPARTMENT OF WATER RESOURCES, the IDAHO WATER RESOURCE BOARD, and its Executive Director, C. Stephen Allred, in his official capacity; The State of Idaho, acting by and through the IDAHO PUBLIC UTILITIES COMMISSION, and Commissioners Robert Lenaghen, Conley Ward, and Ralph Wickberg in their official capacities; and Matthew Mullaney, John Peavey, Charles Hisaw, Diane Plastino, Jeff Fereday, Billie Thompson, L.N. "Bud" Purdy, John Faulkner, Bill Arkoosh, Elsie Heinz, Harold Ingram, Ralph Ingram, Harold Huyser, Mary Mech, Gerald Tews, John Bryngelson, Clive Schell, David Michelson, A. W. Molyneux, Morgan & Shillington, a partnership, Fred Tiede, Gary Tiede, Otto Tiede, James Tiede, Ferdinand Gehring, Melvin Funk, Sid Allen, Jim Pahl, Lenard Schritter, Alfred Fothergill, Marcia Pursley and J.W. Swan, as Complainants in P.U.C.

Case No. 02287

COMPLAINT

Complaint, Case No. U-1006-124)
)
Murphy Water Company, Crane)
Falls Mutual Irrigation Co.,)
Nelda E. McAndrew, Pilgram)
Irrigation Company, and)
Enterprize Acres;)
)
Upper Grand View Canal)
Company, Martin K. Slane, and)
Mountain View Irrigation)
Company, aka Yahoo Company,)
Inc.,)
)
Ronald H. Warrick, Cottonwood)
Canal Company, John Doe, Roy)
Vader, and The State of Idaho,)
acting by and through the)
Department of Fish & Game,)
acting through its Executive)
Director Joseph Greenley, in)
his official capacity;)
)
John Peavey, Picabo Livestock,)
Inc., Faulkner Land & Live-)
stock, Bill Arkoosh, Ralph)
Ingram, Harold Huyser,)
Michelson Farms, Inc., A. W.)
Molyneux, Morgan & Shilling-)
ton Farm Co., a partnership,)
Fred Tiede, Gary Tiede, Otto)
Tiede, Melvin Funk, Jim Pahl,)
and Lenard Schritter)
)
Mud Flat Canal Company;)
)
Defendants,)

* * * * * * * * *

Plaintiff alleges:

I.

Plaintiff is a corporation organized and existing under the laws of the State of Maine, qualified to do business in the State of Idaho, with principal offices at 1220 Idaho Street, Boise, Idaho 83721.

II.

Plaintiff holds certain decreed and licensed water rights on the Snake River in the State of Idaho for power production at its Swan Falls hydro-electric plant. Such rights can be summarized as follows:

2150 cfs	priority January 17, 1900	(decreed)
1840 cfs	priority January 17, 1900	(license)
1460 cfs	priority April 17, 1900	(license)
4000 cfs	priority July 29, 1919	(license)

III.

Plaintiff obtained a license from the Federal Power Commission for the Swan Falls project (Project No. 503) which was issued effective January 1, 1928, for a period ending June 30, 1970. In 1969 the Company applied for a new license including several alternatives for development. Since the original date of expiration, the project has been under annual license to plaintiff under Section 15 of the Federal Power Act until the issuance of the new license for the project. The continued operation and maintenance of Swan Falls Project No. 503 is subject to the terms and conditions of its original license.

IV.

In 1971, following a joint-venture proposal by Idaho Power Company and the Idaho Water Resource Board, the Idaho State Legislature adopted the Swan Falls enabling legislation (S.L. 1971, CH. 265 p. 1064). Section 3 of that legislation provides, in pertinent part:

> "Provided that the state or the state and the joint venturer shall petition the Federal Power Commission for insertion of a license condition subordinating the project power right to future upstream depletionary use."

The joint venture contract executed by Plaintiff and the Idaho Water Resource Board contains the following provision:

> "Section 14.2. Balance Between Irrigation and Power. The parties hereto recognize that the act requires that the board, or the board and the company, shall petition the Federal Power Commission for insertion of a license condition subordinating the Swan Falls - Guffey project water right to future upstream depletionary use. The parties agree to comply with this requirement."

V.

The license issued by the Federal Power Commission for

the Hells Canyon Project (No. 1971) contained the following language:

> "Article 41. The project shall be operated in such manner as will not conflict with the future depletion and flow of the waters of Snake River and its tributaries, or prevent or interefere with the future upstream diversion and use of such water above the back water created by the project, for the irrigation of lands and other beneficial consumptive uses in the Snake River watershed."

VI.

The Idaho Power Company by agreement with the Governor and the State Reclamation Engineer in 1952 authorized the subordination of the water license to be issued for the C. J. Strike project to upstream depletionary uses. Proof of beneficial use was made on the Strike project on the 9th day of December, 1952, and the license issued on the 9th day of April, 1953 as Water License No. 21671 was conditioned as follows:

> "The rights herein granted are subject to the condition that the project shall be operated in such a manner as will not conflict with future depletion and flow of the waters of Snake River and its tributaries, or prevent or interefere with the future upstream diversion and use of such waters, for the irrigation of lands and other beneficial consumptive uses in the Snake River watershed."

VII.

The Idaho Power Company constructed the Hells Canyon project which approximately doubled its then generating capacity.

VIII.

The Columbia Interstate Compact was ratified by the Idaho Legislature when it enacted Chapter 310 of the Idaho Session Laws of 1963. While Idaho's approval of the compact draft was repealed in 1975 because the states of Washington and Oregon had not ratified said compact, Article 7 of the draft approved by the Idaho Legislature dealt with apportionment of water and related matters, pertinent parts of which section reads as follows:

"A. So far as the states are concerned, all waters of the Columbia River System shall be available for appropriation for beneficial purposes under and to the extent permitted by the laws of the states involved, but, except for the provisions in this subdivision A relating to certain relationships between consumptive and nonconsumptive uses, no apportionment of waters or determination of rights to the use thereof is made by this Compact.

So far as the states are concerned, rights to beneficial consumptive uses of water within the upstream area, whether established heretofore or hereafter under the laws of the states involved, shall be recognized up to the average annual depletions shown in Plat 7 of the Report of the North Pacific Division, U.S. Army Engineers dated 1 June, 1958, as against, and shall not be limited by, any rights, existing or future, to the quantity of such waters for nonconsumptive uses.

In the case of a stream situated wholly within a downstream state and tributary to the Snake River or to the Columbia River, however, the relationships as between nonconsumptive use rights appurtenant to a development located thereon and consumptive use rights as to the waters of such a tributary upstream from that development shall be governed by the laws of that state without regard to the foregoing limitations of this subdivision."

IX.

On January 19, 1970, Representative John Saylor of Pennsylvania submitted to the U.S. House of Representatives legislation to establish a Hells Canyon - Snake River National River in the states of Oregon, Idaho and Washington, providing among other things that no new dams be constructed on the Snake, Imnaha, Salmon or Grand Rhonde rivers. On January 23, 1970, Senator Robert Packwood of Oregon introduced an idential bill in the Senate. Neither bill contained a protection for continued upstream diversion for irrigation and other consumptive purposes. In Idaho the Bills were met with unified opposition. Congress passed neither bill.

X.

In 1964, Pacific Northwest Power Company was granted an FPC license to construct the High Mountain Sheep Dam in the reaches of the Lower Snake River below the Hells Canyon complex

of the plaintiff. Upon the urging of the state of Idaho and Idaho wateruser organizations, Article 45 was included in the license for Project No. 2243 and 2273, as follows:

> "Article 45. The Licensee shall not make any claim under the authority of this license against the United States or any water users' organization claiming through the United States for any damage resulting from any future depletion in the flow of the waters of the Snake River and its tributaries for the irrigation of lands and other beneficial consumptive uses."

XI.

In 1974, the Department of Ecology of the State of Washington proposed a unilateral establishment of minimum flow requirements for the reach of the Snake River located totally within the State of Washington. The proposals for minimum flow were opposed in Idaho and in 1974 the Idaho State Legislature adopted Senate Concurrent Resolution No. 134, pertinent provisions of which are hereinafter set out:

> WHEREAS, adoption of such flow requirements may have a detrimental effect on existing and future uses of water from the Snake River and its tributaries upstream in Idaho and other states; and
>
> WHEREAS, the proposed policy appears to be based on inaccurate information and erroneous assumptions, and was developed without consultation with other affected states; and
>
> WHEREAS, The State of Idaho is currently involved in extensive water planning studies which will identify the future needs and resources of the State of Idaho from the Snake River system; and
>
> WHEREAS, the State of Idaho, along with the State of Washington and other states is involved in coordinated planning of the future water needs of the Northwest through the Pacific Northwest River Basins Commission.
>
> NOW, THEREFORE, BE IT RESOLVED by the Second Regular Session of the Forty-second Idaho Legislature, the Senate and House of Representatives concurring therein, that it opposes and will not recognize any minimum streamflow established by any Pacific Northwest state by unilateral action which affects the abililty of upstream states to make full use of their water resources, . . ."

To date Washington has not adopted such minimum flow criteria.

XII.

In 1975, the Congress of the United States enacted legislation establishing a portion of the lower Snake River basin as a National Recreation Area. The National Recreation Area legislation was conditioned as follows in 16 U.S.C.A. Section 460gg-3 and reads as follows:

> §460gg-3. Present and future use of Snake River; flow requirements
>
> (a) No provision of the Wild and Scenic Rivers Act, nor of sections 460gg to 460gg-13 of this title, nor any guidelines, rules, or regulations issued hereunder, shall in any way limit, restrict, or conflict with present and future use of the waters of the Snake River and its tributaries upstream from the boundaries of the Hells Canyon National Recreation Area created hereby, for beneficial uses, whether consumptive or nonconsumptive, now or hereafter existing, including, but not limited to, domestic, municipal, stockwater, irrigation, mining, power, or industrial uses.
>
> (b) No flow requirements of any kind may be imposed on the waters of the Snake River below Hells Canyon Dam under the provisions of the Wild and Scenic Rivers Act, of sections 460gg to 460gg-13 of this title, or any guidelines, rules, or regulations adopted pursuant thereto. Pub. L. 94-199, ¢6, Dec. 31, 1975, 89 Stat. 1118."

XIII.

On January 7, 1977, the Idaho Water Resource Board filed an application for permit with the Idaho Department of Water Resources to construct the Shoestring Dam with the point of diversion in the NW¼ of the SW¼ of Section 9, Township 6 South, Range 11 E.,B.M., Elmore County, Idaho, on the Snake River. Said dam would be 395 feet in height with a total reservoir capacity of 1.2 million acre feet. Beneficial use of the water would be for power production, fish and wildlife and recreation on a year around basis. The Board described "instream flow augmentation" as an additional beneficial use of the water. Application No. 02-7238 on file with the Idaho Department of Water Resources, specifies an additional 360,000

acre feet of water would be withdrawn for irrigation purposes from March 15th to October 15th of each irrigation season.

The proposed project would flood plaintiff's Bliss, Lower Malad, Lower Salmon, and Upper Salmon projects consisting of dams, powerplants, and related facilities, said powerplants having a total name plate generating capacity of 182,900 kilowatts, rendering said plants unusable, and destroying plaintiff's means of utilizing its water rights at those sites.

While the Idaho Resource Board has apparent authority to construct a water project and to generate and wholesale hydro-electric power at the site of production in accordance with Article 15, Section 7 of the Constitution, Idaho Code Section 42-1734(f) limits the power of the Idaho Water Resource Board in generating and wholesaling hydro-electric power at the site of production, to the condition that such power production is connected with another purpose for such project.

The construction of the Shoestring Dam by the Idaho Water Resource Board would constitute a taking of the company's facilities at Bliss, Lower Malad, Lower Salmon, and Upper Salmon projects and would require payment in accordance with Article 1, Section 14 of the Idaho Constitution.

Plaintiff further alleges that Idaho Code Section 42-1734(g) limits the Idaho Water Resource Board to filing applications and obtaining permits "to appropriate, store, or use the unappropriated waters" . . . . Plaintiff further alleges that pursuing a completion of the Shoestring project may result in a taking of its private property in perfected water rights for public and private use and that if the Shoestring Project is within the Board's powers, the plaintiff is entitled to compensation in accordance with Article 1, Section 14 of the Idaho Constitution for the taking of such water rights, and is further entitled to a determination that its rights at the Swan

Falls and C. J. Strike projects may not in any way be jeopardized by the construction or operation of said project by the Idaho Water Resource Board.

XIV.

By constitutional amendment adopted in 1964, Article 15, Section 7 of the Idaho Constitution was added which provided for the establishment of a water resource agency "which shall have the power to formulate and implement a State Water Plan for optimum development of water resources in the public interest;" . . . Pursuant to the constitutional dictate, in 1965 the Idaho Legislature enacted Idaho Code Section 42-1731, et seq. In Idaho Code Section 42-1734(b) the Idaho Water Resource Board was given the following charge:

> "To progressively formulate an integrated, coordinated program for conservation, development and use of all unappropriated water resources of this state, based upon studies and after public hearings in affected areas at which all interested parties shall be given an opportunity to appear. . ."

In December of 1976, the Idaho Water Resource Board finalized and adopted the State Water Plan. Appropriate portions of that plan call for the irrigation development of additional acres upstream from the Swan Falls project which would cause the further depletion of the flows of the Snake River to a minimum of 3,300 cfs at Murphy in August. In Policy No. 32 of the State Water Plan as adopted by the Idaho Water Resource Board on December 29, 1976, the following language appears at page 116 of the plan:

> "A flow of 3,300 cfs at Swan Falls is about one-third of the flow necessary to meet the entitlement of hydro-generation at that power plant if the recorded water filings are valid. It is also less than the amount identified as needed for fish, wildlife and recreation purposes at Swan Falls or downstream. The potential uses of water in the main stem Snake River have been identified in sufficient detail to determine that remaining water supplies cannot fulfill all identified needs.

The Idaho Water Resource Board concluded, after considering all current and potential uses of water on the main stem Snake River, that depletion of flows below that currently available in the low flow months to maintain water for production of hydropower and other main stem water uses is not in the public interest.

Therefore, main stem Snake River flows will be protected against further appropriations and preserved to provide the following average daily flows at the following U.S. Geological Survey stream gaging stations.

Gaging Station	Protected Flow (Average Daily)
Milner	0 cfs
Murphy	3,300 cfs
Weiser	4,750 cfs

Studies indicate that sufficient water exists in excess of these flows to provide for additional uses if water conserving and storage facilities are constructed."

In early 1977, the first regular session of the Forty-fourth Idaho Legislature enacted H.B. 14, which added Idaho Code Section 42-1736. That section reads as follows:

"42-1736. LEGISLATIVE REVIEW. - The State Water Plan adopted by the Idaho Water Resource Board pursuant to authority of Section 42-1734, Idaho Code, shall not become effective until it has been submitted to the Legislature of the State of Idaho and has been affirmatively acted upon in the form of a concurrent resolution which may adopt, reject, amend or modify the same. Thereafter, any change in the State Water Plan shall be submitted in the same manner to the legislature prior to becoming effective. (1977 Session Laws, Chapter 117, Section 1, p. 252)."

Article 15, Section 3 of the Idaho Constitution provides in part the right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, "except that the State may regulate and limit the use thereof for power purposes." If Idaho Code Section 42-1736 is in conflict with the provisions of Article 15, Section 7 of the Idaho Constitution, and if this court determines that the State Water Plan as officially adopted by the Idaho Water Resource Board is in all respects effective, although plaintiff recognizes the right of the state to regulate

the use of water for power purposes in accordance with Article XV, Section 3, plaintiff alleges that pursuing the policy of the State Water Plan will result in a taking of its private property for public and private use, rather than a regulation for power purposes under Idaho Constitution, Article 15, Section 3, and that the plaintiff is entitled to compensation in accordance with Article I, Section 14 of the Idaho Constitution.

XV.

Defendants Murphy Water Company, Crane Falls Mutual Irrigation Company, Nelda E. McAndrew, Pilgrim Irrigation Company, and Enterprize Acres have filed applications with the Department of Water Resources to appropriate the flows of Snake River at various locations above Swan Falls. Said diversions will cause the diminution of flows at the Swan Falls plant of the Company if said applications are approved and permits issued pursuant thereto.

XVI.

Defendants Upper Grand View Canal Company, Idaho Water Resource Board, Martin K. Slane, and the Mountain View Irrigation Company (aka Yahoo Company, Inc.), have obtained permits from the Department of Water Resources to appropriate the waters from various reaches of Snake River above Swan Falls for the purpose of irrigation. Said diversions will cause the diminution of flows at the C. J. Strike plant of the Company.

XVII.

Defendants Ronald H. Warrick, Cottonwood Canal Company, John Doe, Roy Vader, and the Idaho Department of Fish & Game, have either obtained licensed rights from the Department of Water Resources or decreed water rights for the purpose of irrigation of certain lands with the waters of Snake River between Swan Falls and Milner Dam. Continued diversion causes diminution of flows at the Swan Falls plant of the Company.

XVIII.

Defendants John Peavey, Picabo Livestock, Inc., Faulkner Land & Livestock, Bill Arkoosh, Ralph Ingram, Harold Huyser, Michelson Farms, Inc., A. W. Molyneux, Morgan & Shillington Farm Co., a partnership, Fred Tiede, Gary Tiede, Otto Tiede, Melvin Funk, Jim Pahl, and Lenard Schritter, have filed applications to divert, have been issued permits to divert, or hold licenses to divert and appropriate certain subterranean waters of the Snake plain aquifer for irrigation purposes. Said diversions have caused or will cause the diminution of flows of the Snake plain aquifer through the springs in the Hagerman Valley and will reduce the flows available at the Swan Falls plant of the Company.

XIX.

All inflow to the Snake River between Milner Dam and Swan Falls powerplant, whether from surface or subterranean sources, is tributary to the Snake River and the water right or rights of plaintiff herein be determined to include flows from the tributaries of Snake River.

XX.

A complaint has been filed by Matthew Mullaney, John Peavey, Charles Hisaw, Diane Plastino, Jeff Fereday, Billie Thompson, L.N. "Bud" Purdy, John Faulkner, Bill Arkoosh, Elsie Heinz, Harold Ingram, Ralph Ingram, Harold Huyser, Mary Mech, Gerald Tews, John Bryngelson, Clive Schell, David Michelson, A. W. Molyneux, Morgan & Shillington, a partnership, Fred Tiede, Gary Tiede, Otto Tiede, James Tiede, Ferdinand Gehring, Melvin Funk, Sid Allen, Jim Pahl, Lenard Schritter, Alfred Fothergill, Marcia Pursley and J.W. Swan with the defendant Idaho Public Utilities Commission alleging the licensed right of the plaintiff at Swan Falls should be used as the basis for the Idaho Power Company to protest all present and future water rights,

above and below Swan Falls. A decision of this court concerning the status of the Company's Swan Falls water right and other water rights between Milner Dam and Hells Canyon is required for the guidance of the parties hereto, and a justicable controversy exists between and among the parties hereto. If it is determined by this court that Idaho Power Company has a protectable right in the reach of the Snake River between Milner Dam and Hells Canyon by reason of its Swan Falls water licenses and other licenses (whether approved by the Department of Water Resources or the Federal Power Commission), the State of Idaho Department of Water Resources should be permanently enjoined from granting further applications for permits for any consumptive purpose for the reach of the river between Milner Dam and the Swan Falls project.

XXI.

As a result of the complaint filed with the P.U.C., in Case No. U-1006-124 discussed in paragraph XX immediately above, plaintiff has notified or will notify by letter all persons, corporations or other entities including the defendant Mud Flat Canal Company, who plan depletionary water diversions from the Snake River and its surface and subterranean tributaries between Milner Dam and Hells Canyon in plaintiff's electrical service area, that power hook-ups cannot be made by plaintiff pending a disposition of this case, and P.U.C. Case No. U-1006-124, creating a justicable controversy between the plaintiff and defendant Mud Flat Canal Company and others similarly situated. If it is determined by this court that plaintiff has a right protectible as set out in paragraph XX above, the Department of Water Resources should be permanently enjoined from granting further water applications or permits for any consumptive purpose for said reach of the river and its tributaries and the defendant Mud Flat Canal Company, and others who would divert

water to diminish such protectible water rights, should be permanently enjoined by this court from forcing plaintiff by court action to supply the electrical service necessary to effect such depletionary diversions and the Idaho Public Utilities Commission should be permanently enjoined from forcing plaintiff by administrative order to supply electrical service for those who would use such electricity to effect such depletionary diversions.

WHEREFORE Plaintiff prays judgment as follows:

1. Adjudging and decreeing that plaintiff's water rights at its Swan Falls powerplant are valid, subsisting water rights not subject to upstream depletion and the subsequent rights of holders of water rights in the Snake River above Swan Falls and below Milner Dam are subject to the said rights of Idaho Power Company.

2. That it be determined by this court that the plaintiff's water license at Swan Falls is not subject to depletion for upstream consumptive uses including irrigation and other beneficial purposes; declaring and determining the rights of the plaintiff as to its relationship with the various defendants specifically identified in paragraphs XV, XVI, XVII, XVIII, and XXI.

3. Determining whether Idaho Code Section 42-1736 is constitutional in accordance with the Idaho Attorney General's opinion No. 77-26 of April 12, 1977, and if Policy No. 32 of the State Water Plan is subsequently adopted by the Idaho Legislature; or in the alternative if this court determines Idaho Code Section 42-1736 unconstitutional and that the Idaho State Water Plan is now formally adopted and in effect, as adopted by the Idaho Water Resource Board in December of 1976, thus effectuating the Idaho State Water Plan; that in either event, when the Idaho State Water Plan is declared the legally

effective State Water Policy for the State of Idaho, that this court adjudge and decree that all subsequent actions of the Department of Water Resources shall be henceforth consistent with the provisions of the Idaho State Water Plan.

4. Determining whether the construction of the Shoestring Dam project is within the constitutional and statutory power of the Idaho Water Resource Board, and if it is, adjudging and decreeing that the construction of the Shoestring Dam project by the Idaho Water Resource Board necessitates the payment of just compensation for the taking of the Bliss, Lower Salmon, Upper Salmon, and Lower Malad projects of the plaintiff and that plaintiff is entitled to a determination that its rights at its Swan Falls and C.J. Strike projects may not in any way be jeopardized by the construction or operation of said project by the Idaho Water Resource Board.

5. Adjudging and decreeing that the implementation of the State Water Plan by the Idaho Water Resource Board or its subsequent approval by the Idaho Legislature specifying certain minimum flows at Murphy, Idaho, below the Swan Falls project, which contemplated diversions above Swan Falls would constitute a taking of the property of plaintiff without compensation.

6. If the Court determines that the Swan Falls rights of plaintiff are protectable and not subject to upstream depletion, that the court identify the specific reach of Snake River and its tributaries where such right is protectible, and order the institution of a judicial proceeding by an appropriate party or parties for a full adjudication of the respective water rights within said specific stretch of the Snake River and its tributaries between Swan Falls and Milner Dam as the court shall determine in accordance with Idaho Code Section 42-1406 and that a survey and determination of water uses be made by the Director of the Department of Water Resources and supplied to the court in accordance with Idaho Code Section 42-1401.

7. For such other and further relief as this court deems just.

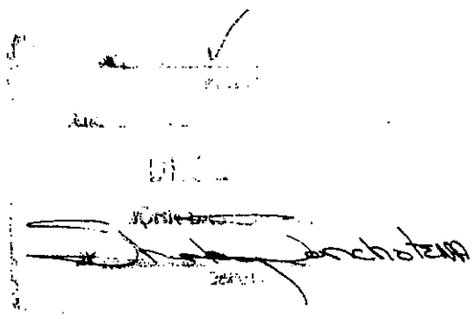
PARRY, ROBERTSON, DALY & LARSON

By: John A. Rosholt
John A. Rosholt

And

Thomas G. Nelson

Exhibit 5



IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

* * *

IDAHO POWER COMPANY,

Plaintiff,

vs.

THE STATE OF IDAHO, acting by and through the DEPARTMENT OF WATER RESOURCES, THE IDAHO WATER RESOURCE BOARD, and its Executive Director, C. Stephen Allred, in his official capacity; the State of Idaho, acting by and through the IDAHO PUBLIC UTILITIES COMMISSION, and Commissioners Robert Lenaghen, Conley Ward, and Ralph Wickberg in their official capacities; and Matthew Mullaney, John Peavey, Charles Hisaw, Diane Plastino, Jeff Fereday, Billie Thompson, L.N. "Bud" Purdy, John Faulkner, Bill Arkoosh, Elsie Heinz, Harold Ingram, Ralph Ingram, Harold Huyser, Mary Mech, Gerald Tews, John Bryngelson, Clive Schell, David Mickelsen, A.W. Molyneux, Morgan & Shillington, a partnership, Fred Tiede, Gary Tiede, Otto Tiede, James Tiede, Ferinand Gehring, Melvin Funk, Sid Allen, Jim Pahl, Lenard Schritter, Alfred Fothergill, Marcia Pursley and J.W. Swan, as Complainants in P.U.C. Complaint, Case No. U-1006-124 Murphy Water Company, Crane Falls Mutual Irrigation Co., Nelda E. McAndrew, Pilgram Irrigation Company, and Enterprise Acres;

Upper Grand View Canal Company, Martin K. Slane, and Mountain View Irrigation Company, aka Yahoo Company, Inc.,

Case No. 62237

MEMORANDUM DECISION AND ORDER

Ronald H. Warrick, Cottonwood Canal Company, John Doe, and the State of Idaho, acting by and through the Department of Fish & Game, acting through its Executive Director Joseph Greenley, in his official capacity;

John Peavey, Picabo Livestock, Inc., Faulkner Land & Livestock, Bill Arkoosh, Ralph Ingram, Harold Huyser, Mickelsen Farms, Inc., A.W. Molyneux, Morgan & Shillington Farm Co., a partnership, Fred Tiede, Gary Tiede, Otto Tiede, Melvin Funk, Jim Pahl, and Lenard Schritter,

Mud Flat Canal Company,

Defendants.

APPERANCES:

For Idaho Power:	THOMAS G. NELSON Nelson, Rosholt, Robertson, Walker, Tolman & Tucker
For the Department of Water Resources:	MICHAEL HYER Deputy Attorney General
For the Public Utilities Commission:	MICHAEL GILMORE Deputy Attorney General
For Mud Flat Canal Company:	WILLIAM RINGERT & JEFFREY CHRISTENSEN Anderson, Kaufman, Anderson & Ringert
For Grand View Canal Company:	BARRY WOOD Eismann Law Offices
For the Paragraph XX Defendants:	MATTHEW MULLANEY Attorney at Law

* * *

INTRODUCTION

> "This case lies at the cross roads of the Public Utility Law of the State of Idaho and the water law of the State of Idaho. The Court must determine whether under the statutes and case law of the State of Idaho, Idaho Power Company's water rights for the generation of electricity in its hydro-electric plants at Swan Falls Dam, at C. J. Strike Dam and at the three dams of the Hells Canyon complex are superior to those of subsequent, upstream, depletionary irrigation and other users. The legal and economic importance of this decision cannot be overstated." (Brief of the Idaho Public Utilities Commission on behalf of its motion for summary judgment; lodged July 25, 1979, pg. 1.)

This matter is before the Court upon application of the various parties for partial or complete summary judgment concerning their contentions in the case. Before delineating and disposing of the issues in the case, it would be of interest and helpful to review the historical events that gave rise to this litigation. These events are a matter of record, gleaned from the pleadings, voluminous exhibits and briefs filed by the parties to the suit and appear not to be material items of dispute.

This case was filed by the plaintiff, Idaho Power, (hereinafter sometimes referred to as the "Company") as a direct result of the consideration of a complaint filed by the Paragraph XX defendants herein (Plaintiff's Complaint, Paragraph XX) against the Idaho Power Company, before the Idaho Public Utilities Commission on June 15, 1977. That complaint alleged that the complainants were ratepayers of the Idaho Power Company; that Idaho Power owned vested water rights at Swan Falls, on the Snake River, which it had failed to protect and defend and had thereby permitted and suffered a substantial reduction of its water rights at Swan Falls by

upstream diversions; that by failing to protect its Swan Falls water rights, Idaho Power had lost hydro-electric capacity and output which it had replaced with coal-fired steam electric generation at substantially higher costs than the cost of the lost hydro-electric generation capacity; that by allowing this to happen Idaho Power had failed to exercise reasonable care to protect its property from waste, loss, damage or diversion; and that as a result, the rates and tariffs of Idaho Power were unjust, unreasonable and excessive by being based upon an overstated capital investment, a portion of which was no longer used and useful because the Company had allowed its vested water rights to be dissipated so that it no longer had the benefit of the full generating capacity associated with its Swan Falls plant. These Paragraph XX complainants prayed that the Public Utilities Commission direct Idaho Power to take all actions necessary to protect and defend its remaining water rights; that the Commission determine that the Company's then authorized rate base, i.e., the net capital investment of Idaho Power upon which it was entitled to a reasonable rate of return, was overstated because it included an electric plant which was no longer used and useful nor devoted to public service; that the Commission determine that the then existing rates of the Company were unjust, unreasonable and excessive; that the Commission find and declare that the rates collected by Idaho Power Company for the three-year period preceding filing of the complaint and ending with entry of a final order in the complaint were unjust, unreasonable and excessive; and that Idaho Power Company refund the amount of this

overcharge plus interest as determined by the Commission. This proceeding was assigned Case No. U-1006-124 by the Public Utilities Commission.

On June 23, 1977, Idaho Power moved to dismiss the complaint upon the grounds that the Commission lacked jurisdiction over the subject matter because a final disposition of the complaint necessarily required a determination of right, title or interest to water rights, a matter not within the jurisdiction of the Commission. The complainants opposed the Motion to Dismiss on the ground that because the Commission has authority to determine the reasonableness of rates, the Commission had authority to consider the complaint and to determine whether the Company has wasted its assets. The complainants argued that the latter determination did not require the Commission to make a binding judicial determination of the Power Company's water rights.

On August 31, 1977, the Commission entered Order No. 13376. In this Order the Commission determined that it had jurisdiction to consider the complaint. The Commission characterized the complaint as one running "to the management of a regulated public utility and its consequent effect upon rates and service" and determined that it had jurisdiction to consider this question based upon applicable provisions of the Idaho Code.

In response to this Order, on September 1, 1977 the Idaho Power Company filed an Answer in which it denied that its water rights at the Swan Falls plant were unconditional, and declared that the Company would file a complaint in an appropriate court of general jurisdiction requesting a

decision defining its rights and obligations in regard to the licenses held in connection with the Swan Falls plant. That action before the Idaho Public Utilities Commission then resulted in the matter presently before this district court.

SYNOPSIS OF MOTIONS AND POSITIONS OF THE PARTIES

The original complaint in this action was filed by the Idaho Power Company on October 21, 1977. An Amended Complaint was subsequently filed on November 8, 1977, before any responsive pleadings were interposed. The prayer for relief relevant hereto, as set forth in the Amended Complaint, asks for the following: first, a decree that plaintiff's water rights at its Swan Falls power plant are valid and not subject to upstream depletion. second, a decree that the implementation of the State Water Plan by the Idaho Water Resource Board specifying certain minimum flows at Murphy, Idaho, below the Swan Falls project which contemplated diversions above Swan Falls would constitute a taking; third, a request that the Court identify the specific reach of the Snake River and its tributaries where Swan Falls water rights are protectable, in accordance with I.C. 42-1406 and I.C. 42-1401.

The present proceedings for summary judgment now before this Court were initiated by the motion for Partial Summary Judgment on behalf of the Paragraph XX Defendants filed March 15, 1979. In that motion the Paragraph XX Defendants requested the Court to ""adjudge and declare that Idaho

Power Company holds water rights for power production purposes at its Swan Falls Power Plant on the Snake River which are valid and legally subsisting water rights not subject to upstream depletion for domestic or irrigation purposes by subsequent appropriators without payment of compensation to Idaho Power Company for annual loss of energy resulting from the depletion of the flows of the Snake River".

On May 4, 1979, defendants Cottonwood Canal Company, Mud Flat Canal Company and Nelda E. McAndrews, filed a Motion to Strike the Paragraph XX Defendant's Motion for Partial Summary Judgment contending that the Paragraph XX Defendants did not have standing to seek summary judgment on behalf of the plaintiff, Idaho Power Company. By order dated June 27, 1979, the motion was denied by the Court upon the basis that the question of standing should be addressed at a hearing on the merits of the motion for summary judgment.

On June 11, 1979, plaintiff Idaho Power Company moved for Partial Summary Judgment requesting the following: first, that the Hells Canyon power complex on the Snake River is subordinated to upstream appropriators up to the dam at Swan Falls; second, that the water rights of the Company at Swan Falls' are not subordinated, and that the State Water Plan minimum flow of 3,300 cubic feet per second (cfs) at the Murphy gaging station cannot stand, or in the alternative, if the Company's rights are subordinated at Swan Falls, then Idaho Power Company's rights are protected by virtue of the State Water Plan and cannot be reduced below 3,300 cfs on the Snake River; third, the water rights established at the C. J. Strike Dam on the Snake River are subordinated by provisions

in the downstream licenses issued by either the State or Federal agencies to the Company.

On July 25, 1979, defendant Idaho Public Utilities Commission filed a Cross-Motion for Partial Summary Judgment. In that motion the PUC requested a declaratory judgment deciding whether any subordination or other transfer of Idaho Power Company's water rights after January 23, 1951, without approval of the Commission, was in violation of Sections 1 and 2 of Chapter 3 of the 1951 Session Laws, Codified at I.C. Sec. 61-327 and 61-328; contending that Idaho Power Company's water rights at Swan Falls, C. J. Strike and the Hells Canyon Complex have never been subordinated to future upstream appropriators because neither the Federal Power Commission nor the State of Idaho had any authority to impose a subordination condition on water or power licenses and that any agreement by Idaho Power to accept subordination is invalid unless approval thereof is first obtained from the Public Utilities Commission.

On August 6, 1979, the Department of Water Resources filed a Motion for Partial Summary Judgment, requesting the following: first, that 1,050 cfs of recorded water rights at Swan Falls have been forfeited because they are above the hydro-electric capacity of the Swan Falls plant; second, that I.C. 42-220 and Article XV, Section I of the Idaho Constitution provide a preference for irrigation water use above uses for Hydro-power; third, if the water rights of the Company at Swan Falls are not subordinated, then 500 cfs has been adversely possessed or the Company is estopped from asserting their rights as against subsequent appropriators;

fourth, that the 3300 cfs minimum flow at the Murphy gaging station is a valid regulation adopted in accordance with the State Water Plan.

Although defendants Cottonwood Canal Company, Mud Flat Canal Company, and Nelda E. McAndrews submitted a Brief in Opposition to Plaintiff's Motion for Summary Judgment, no motion seeking affirmative relief has been filed by these defendants.

SWAN FALLS LICENSE

An appropriate point to begin in the resolution of the issues in this suit would be by discussion and determination of the contentions of the Defendants Cottonwood Canal Company, Mud Flat Canal Company and Nelda E. McAndrews who challenge Idaho Power Company's purported water rights at Swan Falls in opposition to the Power Company's motion for Summary Judgment.

Of historical interest, as noted by the plaintiff in its Amended Application for new license for the Swan Falls Hydro-electric Project before the Federal Energy Regulatory Commission dated April 26, 1979 (Plaintiff's Exhibit C-20), the existing Swan Falls Dam is the oldest dam on the Snake River and was the first power plant put into operation on that river. It was constructed and put into operation in the year 1901 by the Trade Dollar Consolidated Mining Company, which owned and operated mining properties near the crest of the Owyhee Mountains, in the vincinity of Silver City, in southwestern Idaho. The project furnished electricity to the mines and communities in the Silver City area. Electricity

from the plant was carried over the first long distance transmission line in southern Idaho to the mining properties twenty eight miles or more up the slopes of the Owyhee Mountains to serve the mining communities and operations. The Swan Falls Power Company was later formed to operate the plant and sell power at wholesale. In 1906, a power line was constructed from the Swan Falls dam to serve the cities of Caldwell and Nampa, Idaho, as the mining activities in the Owyhee Mountains began to wane. The Swan Falls Power Company was later acquired by a predecessor company of the Idaho Power Company. The Swan Falls plant has been essentially in continuous operation since 1901.

In opposition to the motion of Idaho Power for summary judgment, the defendants Cottonwood Canal Company, Mud Flat Canal Company and Nelda E. McAndrews assert that due to the failure of Idaho Power's predecessors in interest to comply with two important statutory requirements, the water rights allegedly established under their location notice in 1900 are invalid.

Idaho Power Exhibit's C. 2(a), C. 2(b), C. 2 (c) and C. 2(d) provide respectively the alleged water rights established at Swan Falls.

Right No.	Date of Priority	Rate of Diversion	Issued
1. Decree 02-001	1-17-1900	2,150 cfs	4-2-07
2. License 02-4000	1-17-1900	1,840 cfs	8-4-11
3. License 02-4001	4-17-1900	1,460 cfs	8-16-11
4. License 02-2032	7-29-1919	4,000 cfs	5-26-20
	TOTAL:	9,450 cfs	

The priority of the first three Swan Falls water rights asserted by Idaho Power is claimed by virtue of compliance

with the Idaho Session Laws of 1899, page 380. The defendants here assert that because of the failure of the Power Company's predecessors to comply with two important statutory requirements, the water rights were not properly established, and that the federal district court in the case of Trade Dollar Consolidated Mining Co. v. Fraser and Cruzen, should not have issued a decree on April 2, 1907 (Plaintiff's Exhibit C. 2(a)) settling the water rights, following remand from the Ninth Circuit Court of Appeals (148 F. 585, (CA 9th, 1906)), and the state engineer of Idaho should not have thereafter issued water licenses to Idaho Power's predecessors.(Plaintiff's Exhibits C. 2(b), C. 2(c), C. 2(d)).

Defendants specifically contend that Idaho Power's predecessors failed to comply with Section 5 of the 1899 Session Laws. at p. 380. Section 5 of that Law provides:

> "A copy of the notice must, within fifteen days after it is posted, be recorded in the office of the recorder of the county in which it is posted; and a duplicate copy thereof sent to the State Engineer for filing in his office." (Session Law 1899, pg. 381).

Idaho Power Exhibit C-2(b), and Exhibit C-2(c), shows that the location notice was posted on January 17, 1900 and was not recorded until February 2, 1900, which was sixteen (16) days after the date of posting.

Defendants further argue that Idaho Power's predecessors failed to comply with Section 6 of the 1899 Session Laws at pg. 380. Section 6 provides:

> "Sec. 6. Within sixty days after the notice is posted, the claimant must commence the excavation or construction of the works by which he intends to divert the water, and must prosecute the work diligently and uninterruptedly to completion, unless temporarily interrupted by snow, rain or cold weather." (Session Law 1899, pg. 381).

The Defendants have furnished the Court with the deposition testimony of Andrew J. Wiley, civil engineer, a witness in Trade Dollar Consolidated Mining Company v. Fraser & Cruzen, supra. The deposition, which was taken on May 4, 1905, provides on page 2 and 3 thereof:

> "Q. State your first connection with the Power plant of the Trade Dollar Consolidated Mining Company on Snake River, Idaho?
>
> A. In the later part of April, 1900, I was employed by the Trade Dollar Consolidated Mining Company to act as Chief Engineer in the construction of the Swan Falls Power Plant.
>
> Q. Had any actual construction work been done prior to that time?
>
> A. It had not." (Exhibit B to Second Supplemental Brief of Cottonwood Canal Company, September 14, 1979)

Wiley's testimony establishes that no actual construction work had been done at the Swan Falls power plant prior to the later part of April, 1900, i.e. more than 60 days after the date of posting the location notice required by Section 6 of the 1899 Session Law, page 380.

When Idaho Power Company's predecessors established these purported water rights at Swan Falls, there were two methods of appropriating water in Idaho, the so-called "constitutional" method, and the "statutory" method. Article XV, Section 3 of the constitution of Idaho as adopted in 1889 contained a provision proclaiming that the right to divert and appropriate the unappropriated waters of any natural stream for beneficial use shall never be denied.

The case of Nielson v. Parker, 19 Idaho 727, 115 Pac. 488 (1911), held that, in light of Article XV, Section 3, legislation providing for a specific method of appropriating

water did not preclude a water right from being acquired by diversion and use of the water without conforming to statutory requirements. The supreme court held:

> "It has never been the intention, so far as we are advised, of the legislature to cut off the right an appropriator and user of water may acquire by the actual diversion of the water and its application to a beneficial use. This constitutes actual notice to every intending appropriator of the water of such a stream." 19 Idaho at 733, 115 Pac. at 490.

A similar result was reached in the case of Reno v. Richards, 32 Idaho 1, 178 Pac. 81 (1918) wherein the Idaho Supreme Court held that water may be appropriated without compliance with the steps provided by the statute, but in such case it requires actual application to a beneficial use to complete the appropriation, and the right is limited to the amount so applied.

Under a statutory permit scheme as set forth in Session Law of 1899, pg. 380, the granting of a license establishes prima facie evidence of a water right. Big Wood Canal Company v. Chapman, 45 Idaho 380, 263 Pac. 45 (1927). See also, Mays v. District Court of the Sixth Judicial District of Idaho in and for Buhl County, 34 Idaho 200, 200 Pac. 115 (1921). Regarding the rights given under the permit system, one authority has stated:

> "Nature of permit. -- The right given in a permit issued by the State is merely a contingent right, which may ripen into a complete appropriation, or on the other hand may be defeated by the failure of the holder to comply with the requirements of the statute. Hence a permit is not an appropriation of water, and is not real property under the statute. It is a consent given by the State to construct and acquire real property.
>
> The permit evidences the consent of the State that the applicant may proceed under the law and make an appropriation of public water. The applicant obtains from a permit no right to the use of water unless he

complies substantially with every provision of the statute affecting the issuance of the permit and fulfills all the conditions and limitations therein; but such compliance initiates a right to the use of water in the applicant. Until all of the requirements have been complied with, the holder of the permit has nothing but an inchoate right; but after fulfilling all requirements, he is entitled to a license confirming his right of use of the water." Hutchins, Idaho Water Rights, 5 Id.L.Rev. 1 at 28 (1968). (Emphasis supplied.)

The only appreciable difference between the "constitutional" method and a "statutory" method such as was adopted by Session Law 1899, pg. 380, is the determination of a priority date.

"Under statutes prescribing the procedure for an appropriation and codifying the doctrine of relation, the priority of one who has fully complied with the statutes may be considered as vesting at, and relating back to, the time the application was filed with, and permit issued by, the state engineer, or the time notice of the appropriation was posted, according to whichever procedure is prescribed for the commencement of the appropriation; and, generally, if such a statute exists and is not complied with, there will be no relation and priority will date only from the time the appropriation was actually completed, as against one who commences an appropriation by the statutory method before the other appropriation is completed. Hence, one who complies with the statutory provisions may have priority, although he does not post his notice until after the noncomplying appropriator has commenced his work and does not complete his works until last; but, when an appropriator, who has not complied with the statutory procedure, completes an appropriation by **diversion and application to a beneficial use, his** priority dates from that time even as against one who subsequently complies with the statute; * * *." 93 C.J.S., Waters, Sec. 184, pg. 955. (Emphasis supplied.)

Idaho law seems to be in accord. The case of Sandpoint Electric Co. v. Panhandle Electric Co., 11 Idaho 405, 83 Pac. 347 (1905), interpreting Session Law 1899, pg. 380, held:

"Section 8 of the act of February 25, 1899, provides that where an appropriator has complied with the preceding sections in the posting and recording of notices and the commencement and prosecution of work, 'the claimant's right to the use of water relates back to the time the notice was posted.' Section 7 of the act provides that by a completion of the work 'is meant conducting the

waters to the place of intended use.' A person desiring to appropriate the waters of a stream may do so either by actually diverting the water and applying it to a beneficial use, or he may pursue the statutory method by posting and recording his notice and commencing and prosecuting his work within the statutory time. (Citations omitted). In the latter case his appropriation will be entitled to date from the time of posting his notice (Citations omitted.) and any intervening locator or claimant of the waters will be treated as subsequent both in time and right. In such case the appropriation is initiated by the posting of the notice, and an inchoate right thereby arises which may ripen into a legal and complete appropriation upon the final delivery of the waters to the place of intended use. In other words, by pursuing the successive steps prescribed in the statute and completing his diverting works and applying the water to a beneficial purpose, the appropriation is completed. The only difference between an appropriation initiated by posting notice and one initiated by diversion and application of the waters, is that the appropriator who claims under notice is allowed the extra sixty days within which to commence his work and reasonable time thereafter in which to complete the same." 11 Idaho at pg. 413-414, 83 Pac. at 349.

The party who carries the burden of proof, in light of a decreed water right was addressed in the case of Gilbert v. Smith, 97 Idaho 735, 552 P.2d 1220 (1976). The court stated:

> "It is established that a water right in Idaho, although affirmed by a court decree, may be abandoned and subject to subsequent appropriation. One who seeks to alter decreed water priorities has the burden to demonstrate the elements of abandonment by clear and convincing evidence." 97 Idaho at 738, 552 P.2d at 1223.

An examination of the two licenses issued on August 4th and August 16th, 1911, (Plaintiff's Exhibit C-2(b) and C-2(c)), confirms that Idaho Power Company's predecessors had beneficially applied appropriated waters in the amount of 1840 cfs, and 1460 cfs respectively. In addition the water rights in the amount of 2150 cfs acquired under the April 2, 1907 decree were likewise beneficially applied. From these three exhibits Idaho Power has established a "Constitutional" appropriation of;

(1) 2150 cfs with a priority date of April 2, 1907;

(2) 1,840 cfs with a priority date of April 3, 1911;

(3) 1460 cfs with a priority date of July 1, 1911.

Defendants hereto have attacked the validity of these three water rights because of the failure to fully comply with Session Law of 1899, pg. 380. However, as set forth above, water rights may be acquired under the Consitutional method, and without any evidence submitted by the defendants showing their water rights with a date prior to July 1, 1911, judgment on this point should be entered in favor of Idaho Power, as against the contentions of Cottonwood Canal Company, Mud Flat Canal Company and Nelda E. McAndrews.

Furthermore, on May 26, 1920 Idaho Power was granted an additional license in the amount of 4,000 cfs raising the total rate of diversion to 9,450 cfs. However, the overall hydroelectric capacity at Swan Falls is only 8400 cfs. It is an established principle in water law that 'no user is entitled to more water than is reasonably necessary to supply his needs. If more water is diverted from the stream than is needed, the appropriator acquires no right to the excess." Clark, Water & Water Rights, Sec. 514.4 (1972). Thus at this point, the Court concludes that Idaho Power Company, has an established right to 8400 cfs at Swan Falls, subject to the determination hereinafter regarding subordination of those rights, and the effect of the State Water Plan.

SUBORDINATION
(PART I.)

The next issue in this matter, which appropriately may be addressed at this juncture, is the subordination issue. Again, a review of preceding historical events may be helpful. Idaho Power operates an interconnected hydro-electric power generation system in southern and central Idaho, southeastern Oregon, and northern Nevada, composed and consisting of seventeen dams upon the Snake River and a number of its tributaries, including the Malad River, the Boise River, the Payette River, Clear Lake Springs, and Thousand Springs, as well as interconnection with systems belonging to a number of other electric utilities. The name, location, capacity and source of water of these various hydroelectric developments and systems are specified in the applications of Idaho Power for licensing or relicensing before the Federal Power Commission, Plaintiff's Exhibit G.1, page 10 (February 5, 1969); plaintiff's Exhibit C.14, page 4 (June 23, 1969); and an application before the Federal Energy Regulatory Commission, plaintiff's Exhibit C.20, page 6 (April 26, 1979).

The licenses for appropriation and use of water for the purpose of power generation at the dams operated by Idaho Power have been issued by the State of Idaho and the Federal Power Commission at various times since the turn of the century following the issuance of the Swan Falls licenses. Several of these licenses contain what has been characterized in the proceedings before this Court as "subordination" clauses. (Footnote 1) The various "subordination" restrictions subject to this dispute are as follows:

C. J. STRIKE:

A. Federal: None.

B. State:

"The rights herein granted are subject to the condition that the project shall be operated in such manner as will not conflict with future depletion in flow of the waters of Snake River and its tributaries, or prevent or interfere with the future upstream diversion and use of such waters. for the irrigation of lands and other beneficial consumptive uses in the Snake River watershed." License and Certificate of Water Right, State of Idaho, No. 21671, issued April 9, 1953, (Plaintiff's Exhibit D.2.)

SWAN FALLS:

A. Federal:

"Article 13. The Licensee will interpose no objections to, and will in no way prevent, the use of water for domestic purposes by persons or corporations occupying lands of the United States under permit along or near any stream or body of water, natural or artificial, used by the Licensee in the operation of the project works covered by this license, provided such use will not materially reduce the amount of power produced and is not in conflict with the laws of the State of Idaho." Federal Power Commission license, project no. 503, issued June 25, 1928 (Plaintiff's Exhibit C.1, Art. 13, p. 10)

B. State: None.

BROWNLEE, OXBOW & LOW HELLS CANYON:

A. Federal:

"(T)he Commission finds: * * * (47) The three proposed power developments should be considered as a single project." Finding No. 47, Order of Federal Power Commission issuing license, Projects nos. 1971, 2132, 2133 (Brownlee, Oxbow & Low Hells Canyon), August 4, 1955 (Plaintiff's Exhibit B.1, page 9, of the Order).

"The Commission Orders:
(A) This license is issued to Idaho Power * * * for the construction, operation, and maintenance of the proposed Brownlee, Oxbow and low Hells Canyon developments (which developments for the purposes of this license, shall be considered as units of one complete project designated in

the records of the Commission as Project No. 1971) * * * ." Order of Federal Power Commission issuing license, Projects Nos. 1971, 2132, 2133 (Plaintiff's Exhibit B.1, page 10 of the Order.)

Article 41. The project shall be operated in such manner as will not conflict with the future depletion in flow of the waters of Snake River and its tributaries, or prevent or interfere with the future upstream diversion and use of such water above the backwater created by the project, for the irrigation of lands and other beneficial consumptive uses in the Snake River waterhead (sic)." Order of Federal Power Commission issuing license, Projects Nos. 1971, 2132, 2133 (Brownlee, Oxbow & Low Hells Canyon) August 4, 1955 (Plaintiff's Exhibit B.1, page 13 of the Order).

B. State:

"The rights herein granted are subject to the condition that the project shall be operated in such manner as will not conflict with future depletion in flow of the waters of Snake River, and its tributaries, or prevent or interfere with the future upstream diversion and use of such waters, for the irrigation of lands and other beneficial consumptive uses in the Snake River watershed. (BROWNLEE)." License and Certificate of Water Right, State of Idaho, No. 31786, issued December 7 1965 (Plaintiff's Exhibit B.2 (a))

"(OXBOW DAM)
The rights herein granted are subject to the condition that the project shall be operated in such manner as will not conflict with future depletion in flow of the waters of Snake River and its tributaries, or prevent or interfere with the future upstream diversion and use of such waters, for the irrigation of lands and other beneficial consumptive uses in the Snake River Watershed." License and Certificate of Water Right, State of Idaho, No. 31787, issued December 7 1965, (Plaintiff's Exhibit B.2 (b).

The inclusion of the subordination clauses in the State and Federal licenses for C. J. Strike and the Hells Canyon complex resulted from a common origin. The events giving rise to inclusion of those restrictions in the various licenses is best summarized by the Power Company in its Response Brief to Defendants motions for Partial Summary Judgment; dated August 30, 1979. In that Brief, we find:

"The complexities which developed in trying to solve the Pacific Northwest's energy crisis of the late 1940s and 1950s are difficult to put into perspective some nearly 35 years later. The purpose of this background is to try to summarize the events of those times for this Court, which is now trying to interpret the meaning of the decisions of that era.

In June of 1947 the Idaho Power Company filed an application for a preliminary permit to construct a dam at the Oxbow site with the Federal Power Commission. At approximately the same time, the Corps of Engineers and the Department of Interior through the Bureau of Reclamation were discussing the construction of a dam in the Hells Canyon reach of the Snake River. In December of 1950, the formal application for license for the Oxbow plant was filed by Idaho Power with the Federal Power Commission. During this era, Idaho irrigation developers were pressing for the construction of the southwest Idaho project and particularly the Mountain Home Division. The upstream irrigation interests represented through the Committee of 9 were becoming apparently first aware of the possibility of the effect on future irrigation developments if downstream power rights were to be given priority. Pressures were also coming from downstream states for the allocation of water in the Columbia Basin and in 1951 the Idaho legislature by statute authorized the formation of the Idaho Commission to serve on the joint commission relating to the waters of the Columbia Basin. In 1952 a bill was introduced in Congress seeking the authorization of the high federal dam in Hells Canyon by the Department of Interior which sought to tie the construction of the Payette unit of the Mountain Home Division Reclamation project as a part of the bill.

At the same time as the stage for the Hells Canyon confrontation was developing, Idaho Power Company was attempting to obtain a license to construct the C.J. Strike Project below the Bliss project. Then Governor Robbins asked the Federal Power Commission to allow the Idaho Power Company to proceed to construction on the preliminary application. (See Plaintiff's Exhibit J-1). The formal application to construct Strike was filed on August 23, 1950. Even though former Idaho Power Company President C. J. Strike had apparently publicly acknowledged that Idaho Power Company was subordinated in the operation of their hydro plants to future upstream diversions in an address he made before the Oregon Legislature in 1947, (see Plaintiff's Exhibit J-2) the general counsel of the Idaho Power Company attempted in 1950 and 1951 to avoid the imposition of a subordination provision in the C. J. Strike FPC license. That controversy apparently began with the Department of Interior's comments to the Federal Power Commission dated November 3, 1950 (see Plaintiff's Exhibit J-3). On November 8, 1950, the Federal Power Commission transmitted Interior's comments to Idaho Power's then

representative in Washington, D.C. (See Plaintiff's Exhibit J-4). On November 28, 1950, Mr. A. C. Inman, then Secretary and counsel to the Idaho Power Company, responded to the Interior's proposal for subordination in the Strike license. (See Plaintiff's Exhibit A-5). On December 18, 1950, the Secretary of Interior countered Mr. Inman's letter. (See Plaintiff's Exhibit J-6.) In the last paragraph of his January 18, 1951 response, Mr. Inman suggested language of compromise for inclusion in the C. J. Strike FPC license. The resulting compromise language for the C. J. Strike project, (Project No. 2055) is found at paragraph (C) (6) of Plaintiff's Exhibit D-1. The language of the FPC license differed in substance only in the last phrase from Inman's suggestion. IPC suggested the United States should provide replacement power if the rights of the licensee had been subordinated while the license as issued gave an additional option to the United States in acquiring the licensee's project in the manner provided by the Federal Power Act.

Governor Robbins left office and Governor Len Jordan was inaugurated early in 1952. At that point, water rights applications were pending before the Idaho Reclamation Engineer's office for the C. J. Strike project. Because the federal Hells Canyon bill had then been introduced containing subordination language which would partially protect upstream irrigation, Jordan swiftly dealt with the unresolved questions concerning whether or not power rights were to be subordinate to future upstream depletions for irrigation. (Plaintiff's Exhibits B.3. and B.4. document Governor Jordan's position.) He was anxious to secure a position of subordination by the Idaho Power Company prior to his testimony in opposition to the construction of the federal project in Hells Canyon. Testimony was given by Jordan on Tuesday, April 1, 1952, before the House of Representatives' Committee on Interior and Insular Affairs (see Plaintiff's Exhibit B.5). In that testimony he appeared most concerned about the establishment of a federal right in the lower Snake that somehow could take precedence over the ability of his state to develop its irrigation economy in future years. He quoted from the limiting language which appears in the water permit granted by the State of Idaho to the Idaho Power Company for the Oxbow dam, which was obviously the result of the negotiations discussed in the March 14, 1952 letter of A. C. Inman, Vice President and Secretary of the Idaho Power Company. (Plaintiff's Exhibit B-5 explains in detail the position of the Governor.) Then State Reclamation Engineer Mark Kulp was concerned about his office's authority to condition the license. On April 1, 1952, the Attorney General for the State of Idaho issued an opinion to Mr. Kulp suggesting that he had the necessary authority to condition licenses. (See Plaintiff's Exhibit J-8). Governor Jordan was thorough in his approach. Prior to the beginning of the formal

hearings on Idaho Power's then amended application to build the three dam complex in the Hells Canyon reach of the Snake River, Governor Jordan wrote to the Secretary of the Federal Power Commission advising that the Idaho Power Company's rights for the Hells Canyon project had been subordinated by the State. (Plaintiff's Exhibit j-9). The Company then recognized that quid pro guo (sic) for the issuance of a water license for the C. J. Strike project as well as obtaining an FPC permit for the Hells Canyon project was a subordination provision. This position was essentially stated in Mr. R. P. Parry's opening statement to the Federal Power Commission in the first session of the hearing on the Hells Canyon application for license which occurred in July of 1953.

The final State of Idaho water license for the C. J. Strike project issued April 9, 1953 (see Plaintiff's Exhibit D-2) contained the same subordination language as was to eventually appear in article 41 of the Hells Canyon FPC license. The August 4, 1955 order of the Federal Power Commission issued the license for Project No. 1971, and article 41 thereof conclusively subordinated the Hells Canyon project.

One must remember that Idaho Power Company officials felt that the Company's survival was the construction of the C. J. Strike project and the Hells Canyon project. A then dominant force in Idaho politics were the irrigators. In order to obtain the support of that segment of Idahoans and to eventually acquire the right to construct power facilities (which have since served as well) it was necessary that the threat of downstream non-consumptive power rights preempting upstream future development be eliminated. The Company's reluctant agreement to subordinate resulted in not only support from the State of Idaho and its irrigation water users, but others in the northwest and the country.

The FPC License application and congressional action were proceeding simultaneously. The pending federal legislation was being widely discussed and the later drafts of the federal legislation contained more severe subordination provisions than the earlier drafts. The water users supported the Idaho Power Company because it was always assumed that subordination would be in the FPC License. Because of Jordan's letter and his action at the State level, subordination was really not an issue in the FPC proceeding. It was put to rest by the opening statement of R. P. Parry and the testimony of then Idaho Power Company President T. E. Roach to the Federal Power Commission in the hearing on Idaho Power's application. The testimony of State Engineer Kulp confirmed the State's position and the subordination provisions for both the Hells Canyon and C. J. Strike projects. (See Plaintiff's Exhibits J-10, J-11, and J-12).

Idaho Power was awarded a license by the FPC for the Hells Canyon project on August 4, 1955. The proponents of the high dam finally gave up when a bill authorizing

> construction of a federal dam and including compensation for the work Idaho Power had done prior to that time, failed to clear Committee in the United States House of Representatives in 1956. The last appeal of the Hells Canyon dam was laid to rest when the United States Supreme Court denied certiorari in a case brought by the National Hells Canyon Association, Inc., and others, contesting the Federal Power Commission's authority to grant Idaho Power Company a license. That action of the United States Supreme Court occurred on April 1, 1957."

The foregoing summary is accurate and correct, as established and confirmed by the contents of the voluminous exhibits and documentary evidence submitted in the instant matter.

SUBORDINATION
(Part II.)

HELLS CANYON COMPLEX

The question here presented relates for the most part, to the propriety of the inclusion of the Article 41 conditions in the Federal Power licenses, and the overall effect thereof. Concerning the inclusion of Article 41 in the tendered license, the Public Utilities Commission and the Paragraph XX defendants present certain additional questions, towit: first, may these licenses now be collaterally attached; second, are these parties real parties in interest, to assert Idaho Power's water rights; third, do these parties have standing; fourth, if Idaho Power's water rights are subordinated, is such a subordination a transfer in violation of I.C. 61-327 et.seq.

If the Court determines that Article 41 is valid and not an ultra vires act on behalf of the Federal Power Commission, a discussion of these additional questions will be largely superfluous.

The pertinent statutory and administrative background begins with the Federal Water Power Act of 1920. (Act of June 10, 1920, 40 Stat. 1063.) The act reflected: "an undertaking involving a major change of national policy and the intention of Congress to secure a comprehensive development of national resources and not merely to prevent obstructions to navigation." First Iowa Hydro-Electric Cooperative v. F.P.C., 328 U.S. 152, 180-181, 66 S.Ct. 906, 919, 90 L.Ed. 1143 (1946). However, the 1920 act reflected deficiencies in administration and implementation, and in the Public Utility Act of 1935, (Act of August 26, 1935, 49 Stat. 838). Congress amended the 1920 law and enacted it as Part I of the Federal Power Act.

It is well established that Congress has the constitutional power to promote a comprehensive development of the nation's water resources under the authority of the "Commerce clause", Art. 1, Sec. 8, U. S. Constitution.

> "The (Federal Power Act) leaves to the states their traditional jurisdiction subject to the admittedly superior right of the Federal Government, through Congress, to regulate interstate and foreign commerce, administer the public lands and reservations of the United States and, in certain cases, exercise authority under the treaties of the United States. These sources of constitutional authority are all applied in the Federal Power Act to the development of the navigable waters of the United States." First Iowa HydroElectric Coop. v. F.P.C., 328 U.S. 171,172, 66 S.Ct. 906, 915. 90 L.Ed. 1155.

The interplay between Federal and State law has evolved into a principle of the division of constitutional powers between the state and federal government. In First Iowa Hydro-electric Coop. v. F.P.C., supra, it was noted:

"In the Federal Power Act there is a separation of those subjects which remain under the jurisdiction of the states from those subjects which the Constitution delegates to the United States and over which Congress vests the Federal Power Commission with authority to act. To the extent of this separation, the Act establishes a dual system of control. The duality of control consists merely of the division of the common enterprise between two cooperating agencies of Government, each with final authority in its own jurisdiction. The duality does not require two agencies to share in the final decision of the same issue. Where the Federal Government supersedes the state government there is no suggestion that the two agencies both shall have final authority. In fact a contrary policy is indicated in Sec. 4(e), 10(a) (b) and (c), and 23(b). In those sections the Act places the responsibility squarely upon federal officials and usually upon the Federal Power Commission. A dual final authority, with a duplicate system of state permits and federal licenses required for each project, would be unworkable. 'Compliance with the requirements' of such a duplicated system of licensing would be nearly as bad. Conformity to both standards would be impossible in some cases and probably difficult in most of them." 328 U.S. 152 at pg. 167-168, 66 S.Ct. 906 at pg. 913, 90 L.Ed. 1151, 1152.

The case of First Iowa Hydro-Electric Coop., supra, illustrated the integration of federal and state jurisdiction in licensing water power projects under the Federal Power Act. There, the Supreme Court held that evidence of compliance with local state law was not necessary for a license to be tendered and issued by the Federal Power Commission. The decision recognized that the Federal Power Commission as an arm of the Federal Government, is the exclusive grantor of licenses for the development of hydroelectric installations on navigable streams and rivers of the United States. (Footnote #2) See also Power Authority of the State of New York v. Department of Environmental Conservation of the State of New York, 379 F.Supp. 243, 251 (1974); City of Tacoma v. Taxpayers, 357 U.S. 320, 334, 78 S.Ct. 1209, 2 L.Ed.2d 1345 (1958); Mtr. De Rham v. Diamond, 32 NY2d 34,

343 N.Y.S.2d 84, 295 N.E.2d 763 (1973).

Appropriate terms and conditions may be attached to and imposed upon the issuance of licanses by the Federal Power Commission. Section 799 of the Federal Power Act (16 U.S.C. 791 et seq.), provides in part:

> "Each such license shall be conditioned upon acceptance by the licensee of all of the terms and conditions of this chapter and such further conditions, if any, as the Commission shall prescribe in conformity with this chapter, which terms and conditions and the acceptance thereof shall be expressed in said license."

Section 803 of the same act sets forth various specific conditions upon which all licenses must be issued and allows the imposition of:

> "Such other conditions not inconsistent with the provisions of this chapter as the Commission may require." 16 U.S.C. 803 (g).

The authority of the Federal Power Commission to impose conditions upon federally issued water power licenses was addressed in the case of State of California v. Federal Power Commission, 345 F.2d 917 (9th Cir. 1965), cert. den. 382 U.S. 941 (1965). There conditions were imposed upon a license, wherein certain amounts of release water was required to maintain adequate fish runs. The appellant irrigation district therein maintained that such a condition impaired its water rights established under California Law, and that the respondent Commission was without authority to impair those rights. The Court of Appeals, Ninth Circuit, held that "the Commission had authority to incorporate in the tendered license a condition which could operate to impair the district's full use of their irrigation water rights in some future years." 345 F.2d at pg. 924.

A similar result was reached in Portland General Electric Co. v. F.P.C., 328 F.2d 165 (9th Cir. 1964), where petitioner Portland General Electric Co. applied for and subsequently was granted a license pursuant to the Federal Power Act. The petitioner specifically took exception with the inclusion of two conditions imposed by the Federal Power Commission. Those two conditions, contained in Article Nine and Ten of the license provided:

> "Article 9. Whenever the United States shall desire to construct, complete, or improve navigation facilities in connection with the project, the licensee shall convey to the United States, free of cost, such of its lands and its rights-of-way and such right of passage through its dams or other structures, and permit such control of pools as may be required to complete and maintain such navigation facilities.
>
> Article 10. The Licensee shall furnish free of cost to the United States power for the operation and maintenance of navigation facilities at the voltage and frequency required by such facilities and at a point adjacent thereto whether said facilities are constructed by the Licensee or by the United States."

The Court of Appeals stated in regard to the propriety of such conditions:

> "Petitioners argue that, by requiring the licensee to accept a license with the Article 9 provision for the giving of property free of cost for navigation, the Government by indirection is taking property without due process of law, resulting in confiscation.
>
> This is not true because petitioners are not required to accept the tendered license. Any license rights which petitioners ever had to construct and maintain these project works expired in 1954. See note 3. In applying for a major license effective as of 1955, petitioners seek rights they do not now have. In order to gain those rights they must accept the license upon such terms as Congress has determined should be imposed in the public interest. See United States v. Appalachian Elec. Power Co., 311 U.S. 377, 427-428, 61 S.Ct. 291, 85 L.Ed. 243; Fox River Paper Co., v. Railroad Comm. of Wisconsin, 274 U.S. 651, 656-657, 47 S.Ct. 669, 71 L.Ed. 1279. It is not a taking for the Government to withhold a benefit it is not contractually or constitutionally obliged to confer. Nor is it a taking for the Government to impose financial obligations upon the recipient of a benefit if, as here, the benefit may be declined." 328 F.2d at 173. (Emphasis supplied.)

Likewise in, First Iowa Hydro-Electric Corp., supra, the Supreme Court stated:

> "The point is that navigable waters are subject to national planning and control in the broad regulation of commerce granted the Federal Government. The license conditions to which objection is made have an obvious relationship to the exercise of the commerce power. Even if there were no such relationship the plenary power of Congress over navigable waters would empower it to deny the privilege of constructing an obstruction in those waters. It may likewise grant the privilege on terms. It is no objection to the terms and to the exertion of the power that 'its exercise is attended by the same incidents which attend the exercise of the police power of the states.' The Congressional authority under the commerce clause is complete unless limited by the Fifth Amendment." (Emphasis Supplied). 328 U.S. 182, 66 S.Ct. 920, 90 L.Ed. 1159.

It is notable that the legislature of the State of Idaho has officially recognized the right and desirability of insertion in federally issued power licenses, of a condition subordinating the rights reflected by such licenses, to future upstream depletionary uses. In 1971, the Legislature passed an act relating to the development of water resources in Southwest Idaho, through a project known as the Guffey project. As part of that enactment, the Legislature of the State of Idaho declared and provided:

> "that the state or the state and the joint venturer shall petition the federal power commission for insertion of a license condition subordinating the project power right to future upstream depletionary use." Chapter 265, Session Laws of 1971 at page 1065.

As seen by the previous authority the Federal Power Commission has authority to impose whatever conditions it sees fit, in the public interest. (Footnote #3) Various parties hereto have attacked Article 41 of the Hells Canyon Complex as invalid, because of the preference given to irrigators. They assert irrigation is not a public use

sufficient to subordinate Idaho Power Company's water rights to future depletion by the Hell's Canyon license. This issue was addressed in the case of California Oregon Power Co. v. Beaver Portland Cement Co., , 295 U.S. 142, 55 S.Ct. 725; 79 L.Ed. 1356, (1935), wherein the Supreme Court, referring to an earlier decision said:

> "The public interest in such state control in the arid-land states is definite and substantial. In Clark v. Nash, 198 U.S. 361, 370, 49 L.ed. 1085, 1088, 25 S.Ct. 676, 4 Ann.Cas. 1171, this court accepted that view to the extent of holding that in the arid-land states the use of water for irrigation, although by a private individual, is a public use; and sustained as constitutional a state statute which, for purposes of irrigation, permitted an individual to condemn a right-of-way for enlarging a ditch across the land of another. Mr. Justice Peckham, delivering the opinion of the court, said:
>
> > 'The rights of a riparian owner in and to the use of the water flowing by his land are not the same in the arid and mountainous States of the West that they are in the States of the East. These rights have been altered by many of the Western States, by their constitutions and laws, because of the totally different circumstances in which their inhabitants are placed, from those that exist in the States of the East, and such alterations have been made for the very purpose of thereby contributing to the growth and prosperity of those States arising from mining and the cultivation of an otherwise valueless soil, by means of irrigation. This court must recognize the difference of climate and soil, which render necessary these different laws in the States so situated.'" (Emphasis supplied.) 295 U.S. 142 at page 165, 55 S.Ct. 725, 732, 79 L.Ed. 1356, 1365.

It is the conclusion of this Court that Article 41 is a valid and appropriate condition, lawfully imposed by the Federal Power Commission in the Hells Canyon License.

SUBORDINATION
(Part III.)

The next issue to be determined is the extent of subordination this clause (Article 41) has on other vested water rights

of the Idaho Power Company upstream on the Snake River watershed (particularly at and upstream of Swan Falls). As discussed earlier, Federal authority over State water law is not plenary; but rather the Federal Power Act establishes a dual system of control. First Iowa Hydro-Electric Coop., supra. The question thus remains to be answered is whether Idaho Power Company's agreement of the inclusion of Article 41 in the tendered license affected it's earlier state established water rights along the Snake River.

From the onset, it should be noted that the Federal Power Act has included a proviso regarding preemption of state law. Federal Power Act, sec. 27, (16 U.S.C.A., sec. 821) provides:

"Sec. 821. State laws and water rights unaffected

> Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein. June 10, 1920, c.285, Sec. 27, 41 Stat. 1077."

One authority has noted:

> "The power of the state is plenary until the federal government sees fit to exercise its constitutional prerogative; unless Congress has manifested an intent completely to supersede the authority of the state, navigable waters are subject to the control of both the state and federal governments. It has been held that legislation by the federal government is ordinarily exclusive of the authority of the state on the same subject, and always so where there is conflict, but not necessarily so otherwise.
>
> A state is not deprived of power to legislate with reference to navigable waters except by a direct federal statute dealing with the matter in question, and is not deprived of such power by an act of Congress making appropriations for the improvement of the waterway, or providing that a city situated on, or reached by, the waterway is a port of entry, or establishing harbor lines where the state regulations do not conflict with those of the federal government. The presumption is that Congress has not withheld from a state sovereignty over its inland waters; such a withholding is not lightly to be inferred.
>
> Provisions of the ordinance of 1787 for the government

of the Northwest Territory, and similar provisions in the statutes admitting various states into the Union, that certain navigable rivers should be and remain highways, forever free, without any tax, impost, or duty thereon, have been generally held not to take away the power which the state could otherwise exercise over such waters, since such provisions do not refer to physical obstructions, but to political regulations. Furthermore, it is recognized that the states have powers of control and regulation over navigable waters which can be exercised as a matter of local or state policy without interfering with the paramount right of navigation and which are, or should be, exempt from federal interference." 65 C.J.S., Navigable Waters, Sec. 10, pg. 89-90.

The case of California v. United States, 438 U.S. 645, 98 S.Ct. 2985, 57 L.Ed.2d 1018 (1978), although involving the Reclamation Act of 1902, illustrates the federal prerogative of allowing the states to control appropriation and distribution of water within their sovereignties. The Court stated:

"A principal motivating factor behind Congress' decision to defer to state law was thus the legal confusion that would arise if federal water law and state water law reigned side by side in the same locality. Congress also intended to 'follow the well-established precedent, in national legislation of recognizing local and state law relative to the appropriation and distribution of water.' 35 Cong.Rec. 6678-6679 (Cong. Mondell). As Representative Mondell noted after reviewing the legislation discussed in Part II of this opinion, 'Every act since that of April 26, 1866, has recognized local laws and customs appertaining to the appropriation and distribution of water used in irrigation, and it has been deemed wise to continue our policy in this regard.' (Emphasis supplied.) Id., at 6679." 438 U.S. at 668, 669, 98 S.Ct. 2997, 57 L.Ed.2d 1035.

The Supreme Court went on to hold, pursuant to the Reclmation Act of 1902, (sec. 8 as amended 43 U.S.C.A., Sec. 372, 383) that the Secretary of the Interior must follow state law as to appropriation of water and condemnation of water rights. The Court noted:

"Section 8 cannot be read to require the Secretary to comply with state law only when it becomes necessary to purchase or condemn vested water rights. That section does, of course, provide for the protection of

vested water rights, but it also requires the Secretary to comply with state law in the 'control, appropriation, use, or distribution of water.' Nor, as the United States contends, does Sec. 8 merely require the Secretary of the Interior to file a notice with the State of its intent to appropriate but to thereafter ignore the substantive provisions of state law. The legislative history of the Reclamation Act of 1902 makes it abundantly clear that Congress intended to defer to the substance, as well as the form, of state water law. The Government's interpretation would trivialize the broad language and purpose of Sec. 8." (Emphasis supplied.) 438 U.S. at 674, 675, 98 S.Ct. 3001, 57 L.Ed.2d 1038.

In First Iowa Hydro-Electric Coop., supra, the Supreme Court interpreted Sec. 27 of the Federal Power Act (16 U.S.C. 821), stating:

"The effect of Sec. 27, in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature. It therefore has primary, if not exclusive reference to such proprietary rights. The phrase 'any vested right acquired therein' further emphasizes the application of the section to property rights. There is nothing in the paragraph to suggest a broader scope unless it be the words 'other uses.' Those words, however, are confined to rights of the same nature as those relating to the use of water in irrigation or for municipal purposes. This was so held in an early decision by a District Court, relating to Sec. 27 and upholding the constitutionality of the Act, where it was stated that 'a proper construction of the act requires that the words "other uses" shall be construed ejusdem generis with the the words "irrigation" and "municipal."' Alabama Power Co. v. Gulf Power Co., D.C., 283 F. 606, 619.

This section therefore is thoroughly consistent with the integration rather than the duplication of federal and state jurisdictions under the Federal Power Act. It strengthens the argument that, in those fields where rights are not thus 'saved' to the states, Congress is willing to let the supersedure of the state laws by federal legislation take its natural course." (Emphasis supplied) 328 U.S. 175, 176, 66 S.Ct. 917, 90 L.Ed. 1156.

Perhaps even more interesting than the Court's interpretation of Sec. 27 is the footnote following the above quote. Footnote twenty indicates that the opinion rendered in California v. United States, supra, may be applicable to the problem at hand. That footnote states:

"The legislative history of Sec. 27 confirms these conclusions. The language is similar to that of Sec. 8 of the Reclamation Act of 1902, 32 Stat. 390, 43 U.S.C. Sec. 383, 43 U.S.C.A. Sec. 383, which provides 'nothing (in several listed sections) in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, * * *.'

This restricted clause, appeared in a modified and broader form in the Ferris Public Lands Bill of 1916, H.R. No. 408, 64th Cong., 1st Sess.:

'Sec. 13. That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State relating to the control, appropriation, use, or distribution of water.'

It also had aopeared in Sec. 14 of the Ferris Bill of 1914, H.R. No. 16673, 63rd Cong., 3d Sess., as follows:

'Section 14. That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired thereunder.'

Discussion in Congress further emphasized the purely proprietary sense in which this language was used. 51 Cong. Rec. 13630-13631.

The clause reappeared in the Bill which became the Federal Water Power Act and was there enacted into law in its present form. The use, in Sec. 27 of the Federal Power Act, of language having a limited meaning in relation to proprietary rights under the reclamation law and in public land bills, carries that established meaning of the language into the Federal Power Act in the absence of anything in the Act calling for a different interpretation of the language." 328 U.S. 176, 98 S.Ct. 919, 920, 90 L.Ed. 1156.

In Portland General Electric Co. v. Federal Power Commission, supra, Sec. 27 of the Federal Power Act was again discussed. There the Court stated:

"Finally, as to Articles 9 and 10, Portland and Pubishers' assert that they have valid property rights at the project site, including water rights duly vested under state law. These rights, it is argued, are expressly recognized by section 27 of the Act. These companies urge that the Commission should have considered these rights before Articles 9 and 10 were included as navigation conditions in the license. They suggest that acceptance of the license with Articles 9 and 10 included, in effect, concludes them from objecting if, at some subsequent time, those articles are invoked and the property of petitioners is either 'taken over' by

the United States or rendered useless by navigation improvements which the United States desires to make.

If Portland and Publishers' mean to imply that the Commission failed to consider the impact of section 27 in determining to include Articles 9 and 10 in the license, they are mistaken. This matter was dealt with in the Commission's opinion and order of December 3, 1962, 28 F.P.C. 924, 928-929.

The Commission held that to construe section 27 as precluding the imposition of navigation conditions such as those set out in Articles 9 and 10, where, as here, such imposition might affect or interfere with state water rights, would in effect nullify section 11. An interpretation of section 27 that makes it irreconcilable with the specific provisions of section 11, the Commission concluded, would not be a reasonable interpretation.

Section 27 of the Act, quoted in note 20 is, in substance, the same as section 18 of the Boulder Canyon Project Act, and section 8 of the Reclamation Act. In Arizona v. California, 373 U.S. 546, 585-588, 83 S.Ct. 1468, 10 L.Ed.2d 542, the Supreme Court held that the latter statutes were general provisions preserving state law which could not override other specific provisions of those Acts. In our view section 27 of the Federal Power Act should be similarly construed as not affecting the right of the Commission to exercise the power specifically vested in it by section 11 of that Act. The only purpose of section 27 is to preserve to holders of state-conferred water rights a right to compensation if those rights are taken or destroyed as an incident to the exercise by another, of a license granted by the Commission.

While, as the Commission concedes, the burdens which may be imposed upon petitioners as a result of the inclusion of Articles 9 and 10 in the tendered license may involve interference with the licenses' retention and exercise of water rights, this is a price they must pay if they are to obtain a license. It may fairly be assumed that, without such a license, petitioners' water rights will have relatively little value.

We conclude that, under the facts of this case, section 27 does not stand in the way of inclusion of Articles 9 and 10 in the license." (Emphasis supplied.) 328 F.2d 165, 176-177.

The inclusion of the subordination clause in the licenses for the Hells Canyon Complex was, as is recognized by the Power Company, a quid pro quo for the issuance of those licenses, as a matter of contract between the Federal Power

Commission and the Power Company. By entering into and accepting the license - contract upon the terms specified by the Federal Power Commission, the right of Idaho Power to use the water at the site of the complex for power, became subordinated. The effect of the subordination restriction is that Idaho Power does not have a guaranteed or unlimited right to a fixed amount of water flowing into the Hells Canyon Complex via the Snake River. The right might be better characterized as an open-ended right to use only such water as remains flowing in the river after upstream diversion and depletion. Theoretically, if the entire amount of water in the Snake River were duly appropriated, diverted and depleted before it reached Hells Canyon, so that the river bed was dry at that point, the Company would have no recourse, since the Company has agreed to such a situation by acceptance of the conditions of the subordinated license.

The extent of the subordination is clearly stated in Art. 41 of the licenses, towit:

> "The project shall be operated in such a manner as will not conflict with the future depletion in flow of the waters of Snake River and its tributaries * * *." (Emphasis supplied.)

No limitation is expressed as to the extent of the subordination either upstream or downstream from the site of the Hells Canyon complex; neither is there any restriction or limitation as to any of the tributaries in the Snake River drainage and watershed. Thus the entire Snake River and all of the tributaries thereof, both above and below Hells Canyon may be depleted; the operation of the Complex by Idaho Power shall not be conducted in conflict or interference with such depletions. Obviously, if the Power Company were

to operate its project in derrogation of the subordination condition, it would be in violation of the terms of the license and be thereby exposed to a possible revocation of the license for failing to abide by the terms thereof.

Article 41 continues on to provide that the project shall be operated in such a manner as will not:

> " * * * prevent or interfere with the future upstream diversion and use of such water above the backwater created by the project, for the irrigation of lands and other beneficial consumptive uses in the Snake River waterhead (sic)." (Emphasis supplied.)

There is no limitation on the upstream extension of the subordination "above the backwater created by the project". Thus the subordination extends up the Snake River, above the backwater, to the beginning headwaters and source or sources of the Snake River i.e. the entire Snake River watershed. This obviously extends over, above and upstream of the Swan Falls Dam as well as any other dams owned or operated by Idaho Power on the Snake River, upstream of Hells Canyon.

The evidence submitted in this matter is replete with statements of policy on the part of the Idaho Power Company through the years, recognizing the upstream use and diversion of water in the Snake River above the Company's hydroelectric developments. On March 14, 1952, Mr. A.C. Inman, Vice President and Secretary of the Idaho Power Company communicated by letter to Governor Len B. Jordan that:

> "Idaho Power Company fully recognizes the primary importance in sourthern Idaho of the use of water for reclamation and irrigation purposes, and over more than 35 years of its existence has cooperated fully with water users in the Snake River valley. Our system has been planned and built accordingly, and in the entire history of the Company, I know of no instance where the Company has ever protested a water appropriation filing, or raised any objection to diversion or use of water,

for such purposes.

> In accordance with our understanding with you, we are pleased to affirm that any license and certificate of water right issued to the Company pursuant to the Oxbow permit may contain the provision that 'the rights herein granted for the use of the waters, stream bed and other lands of the State of Idaho, necessary for the construction and operation of the dam and reservoir, are subject to the condition that the project shall be operated in such manner as will not conflict with future depletion in flow of the waters of Snake River and its tributaries, or prevent or interfere with the future upstream diversion and use of such waters, for the irrigation of lands and other beneficial consumptive uses in the Snake River watershed.' Our application and permit may be considered as amended to include the foregoing provision." Plaintiff's Exhibit B.3.

During the pre-licensing hearings regarding the Hells Canyon project, Mr. R . P. Parry, a representative of Idaho Power Company, stated before a Hearings Examiner:

> "No proper evaluation can be made of this stretch of the Snake River without being realistic and honest in connection with irrigation development. No storage reservoir can be evaluated without taking these depletions into account.
>
> Historically, the Applicant has always conceded that water rights for future irrigation development shall have precedence over their hydroelectric water rights. All water licenses being currently issued by the State of Idaho provide specifically that this shall be true. And it is obvious that this Commission would not authorize any project without making the same requirement.
>
> The Applicant has long lived with the irrigation people on the Snake River. Its dams are intermingled along the river with irrigation dams and it has learned to live with the irrigation users, and in its planning for the development of this stretch of the river, this paramount and primary irrigation situation has been always kept in mind." Plaintiff's Exhibit J - 10, page 1240-1241.

T. E. Roach, then President of the Idaho Power Company, testified at such a hearing. His testimony was as follows:

> "Q: Has your company adopted any policy for the integration or joint use of the water for irrigation and hydro-electric development both in the past and as respects the future?
>
> A: Well, our company for a period of 37 years or more has had a very firm and fixed policy of complete coordination of the use of the Snake River waters for

the development of hydroelectric power with the needs of that water for irrigation and has followed the policy of always placing the use of that water for irrigation in a prior position to the use of the water for hydroelectric development.

As far back formally as 1947, in our hearing, our initial hearing, before the Oregon Hydroelectric Commission, that policy was stated and made a formal part of our application to the Oregon Hydroelectric Commission, and currently all of our State permits in the State of Idaho carry in them a specific provision which preserves for irrigation not only now but at all times in the future a prior claim on the water, with the claim for hydroelectric energy being secondary to that of the irrigator or the farmer.

Q: And is that in accordance with your formal request as you apply for these water permits from time to time?

A: It is.

Q: And is that true of the water permits that have been issued for the three projects here involved -- Oxbow, Brownlee, and Hell's Canyon?

A: It is. All three of these permits contain the specific reservation or provision which I have just described.

Q: That they will be subordinate to all future irrigation development?

A: Yes."

Plaintiff's Exhibit J-11, page 1419-1420.

The various power generation sites operated by the plaintiff are integral parts of one entire system. It is difficult to see how those various installations can be subordinated in bits and pieces. Rather, the entire system must be subordinated along the entire upstream length of the Snake River by virtue of the Hells Canyon licenses, Article 41.

The same conclusion was arrived at by counsel for Idaho Power Company in 1976, as stated in a memorandum submitted to James E. Bruce, President of Idaho Power Company, concerning the possibility of using the Swan Falls water rights of Idaho Power to stop upstream depletion of the Snake River. There counsel concluded that the Company's water rights for its Swan Falls plant cannot be used to prevent consumptive

uses from depleting the flow of the river above Swan Falls. After reviewing the history of the water rights of Idaho Power and the events relating to inclusion of the Article 41 subordination conditions in the Hells Canyon project license, counsel succinctly noted:

> "If IPC was to attempt to use its Swan Falls water right to prevent further irrigation depletion above Strike, any benefit from stopping such depletion would, of course, redound to the benefit of flows at Strike, and potentially in Hells Canyon. Thus IPC would be doing indirectly what it cannot do directly, that is, protect its Strike and Hells Canyon projects from upstream depletion. In our judgment, the FPC license and state water license provisions above referred to would be construed to make the Swan Falls right subject also to depletion, since the IPC plants on the Snake are all co-ordinated for operation, and since the water license depletion provision in the Strike and some of the Hells Canyon licenses were inserted at the request of IPC." Memorandum to James E. Bruce from Thomas G. Nelson, dated June 22, 1976, (Plaintiff's Exhibit C.1) at page 6 thereof.

It would appear that counsel's analysis is correct. If the Company were to demand and seek enforcement of a water flow at Swan Falls, guaranteed by the license issued for that site, there would be water in the Snake River below the Swan Falls dam, which in the natural course of flowing down the channel of the Snake River, would arrive at the back waters of the Hells Canyon installations, thus interfering with or preventing diversion upstream from Hells Canyon, in derogation of the Federal and State licenses. The enforcement of a licensed water flow at Swan Falls would allow the Company to accomplish indirectly that which it may not do directly under the conditions of the Hells Canyon licenses.

It must be concluded therefor that the Company's right under the Swan Falls license are clearly subordinated by the Hells Canyon licenses.

APPLICATION OF TITLE 61

The Idaho Public Utilities Commission (hereinafter referred to as the PUC) asserts that the application of Chapter 3, Title 61 of the Idaho Code prohibits the Idaho Power Company from voluntary or involuntary, directly or indirectly, transfering any water rights used for electrical generation without the approval of the Public Utilities Commission. The PUC's contention would have the effect of: first, nullifying any subordination language contained in state and federal licenses, as a transfer of a property right from Idaho Power to future upstream appropriators without the PUC's approval; second, deny any rights acquired through adverse possession, equitable estoppel, abandonment, etc., against Idaho Power, again as a transfer without approval by the PUC.

The important statutory provisions are found in I.C. 61-327, 61-328,and 61-329. Relevant hereto the statutes provide respectively:

> "61-327. Electric utility property -- Acquisition by certain public agencies prohibited. -- No title to or interest in any property located in this state which is used in the generation, transmission, distribution or supply of electric power and energy to the public or any portion thereof, shall be transferred or transferable to, or acquired by, directly or indirectly, by any means or device whatsoever, any government or municipal corporation, quasimunicipal corporation, or governmental or political unit, subdivision or corporation, organized or existing under the laws of any other state; or any person, firm, association, corporation or organization acting as trustee, nominee, agent or respresentative for, or in concert or arrangement with, any such government or municipal corporation, quasi-municipal corporation, or governmental or political unit, subdivision or corporation; or any company, association, organization or corporation, organized or existing under the laws of this state or any other state, whose issued capital stock, or other evidence of ownership, membership or

other interest therein, or in the property thereof, is owned or controlled, directly or indirectly, by any such government or municipal corporation, quasi-municipal corporation, or governmental or political unit, subdivision or corporation; or any company, association, organization or corporation, organized under the laws of any other state, not coming under or within the definition of an electric public utility or electrical corporation as contained in chapter 1, title 61, Idaho Code, and subject to the jurisdiction, regulation and control of the public utilities commission of the state of Idaho under the public utilities law of this state."

"61-328. Electric utilities -- Sale of property to be approved by commission. --No electric public utility or electrical corporation as defined in chapter 1, title 61, Idaho Code, owning, controlling or operating any property located in this state which is used in the generation, transmission, distribution or supply of electric power and energy to the public or any portion thereof, shall sell, assign or transfer, directly or indirectly, in any manner whatsoever, any such property or interest therein, or the operation, management or control thereof, or any certificate of convenience and necessity or franchise covering the same, except when authorized to do so by order of the public utilities commission of the state of Idaho."

"61-329. Unlawful transfer or acquisition -- Escheat. -- Any such property or interest in property hereafter transferred or acquired in violation of this act shall escheat to the state of Idaho. The attorney general of the state shall institute proceedings in the district court of any county in which such property, or any portion thereof, is situated, to have such escheat adjudged and decreed. If the property is operating property, the court shall continue the operation thereof under a receiver appointed by and under the control and supervision of the court, pending final determination of the action and the sale and disposition of the property. When the court has entered judgment escheating the property to the state, the court shall thereupon order a sale of the property, or interest therein, in the same manner as prescribed by the laws of the state of Idaho for the sale of real estate under mortgage foreclosure. Out of the proceeds arising from such sale, any valid liens or claims of third parties shall be paid, and the balance shall be paid into the state treasury for the credit of the school fund."

The PUC was first confronted with the interpretation of the above statutes in June 15, 1977, when the Paragraph XX defendants herein initiated the complaint before the PUC, requesting the Idaho Power Company "to take all necessary

actions to protect and defend its remaining water rights in the Snake River for hydroelectric power production," (Case No. U-1006-124). The PUC in Order No. 13376 found ample statutory grounds for the commission's jurisdiction to consider the complaint. However, on September 1, 1977 the Idaho Power Company filed an Answer and stated in Paragraph V of an Affirmative Defense that the Company would file a complaint in an appropriate court of general jurisdiction requesting a decision defining its rights and obligations in respect to the licenses held in connection with the Swan Falls plant.

The problem presently before this Court, involves the PUC's request for a declaratory judgment, to determine if Idaho Power has vis-a-vis its agreement of the subordination language in its licenses or inaction on its behalf in protecting its water rights, violated the provisions of Title 61 of the Idaho Code.

The availability of a declaratory judgment remedy has been explained by one authority as:

> "It is the general rule that the granting of declaratory relief is discretionary, under both the federal and the state acts. Whether such jurisdiction is to be entertained rests in the exercise of sound judicial discretion by the trial court, and its decision will not be disturbed on appeal, in the absence of a clear showing of abuse of that discretion. Even though a court may have jurisdiction of the subject matter and the parties, there is no absolute mandate compelling it to exercise that jurisdiction. Thus, the fact that a cause of action averred in the petition is within the jurisdiction of the court does not require the lower court to exercise its jurisdiction, nor is a court required to assume jurisdiction merely because an actual controversy exists or because the objective essentials of a declaratory judgment proceeding exist.
>
> Although, as a general proposition, the courts should be liberal, and not reluctant or niggardly, in granting declaratory relief, the discretion entrusted

to the courts must be exercised judicially and cautiously, with due regard to all the circumstances of the case. Such discretion must be based on good reason and calculated to serve the purposes for which the legislation was enacted --namely, to afford relief from uncertainty and insecurity. It has been said that the courts must be alert to avoid imposition upon their jurisdiction through obtaining futile or premature interventions, especially in the field of public law, and should exercise a maximum of caution where a ruling is sought that would reach far beyond the particular case. On the other hand, the discretion of the court with regard to declaratory relief is not unlimited, and where a complaint sets forth facts and circumstances showing that a declaratory judgment is entirely appropriate, the court may not properly refuse to assume jurisdiction. Consequently, the failure of the trial court to exercise its discretionary power to determine whether it should assume declaratory jurisdiction has been held to be ground for reversal of the dismissal of the action." 22 Am.Jur.2d, Declaratory Judgments, Sec. 9.

The basis of the declaratory judgment sought herein involves the interpretation of Title 61 and its application to the facts involved in this action. The interpretations given to a statute can be a proper subject for a declaratory judgment, and accordingly, I.C. 10-1202 provides:

"10-1202. Person interested or affected may have declaration. -- Any person interested under a deed, will, written contract or other writings constituting a contract or any oral contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder."

One authority has noted:

"Declaratory judgment proceedings may be employed to determine questions as to the construction or interpretation of statutes, and constitute a particularly appropriate method for the determination of controversies relating to such construction and rights, status, or other legal relations under a statute are proper subjects of inquiry under the declaratory judgment statute. The remedy is applicable, or peculiarly appropriate, where the meaning of a statute is at issue, or in question; it is available, or appropriate, or particularly appropriate or peculiarly applicable, in cases where the meaning of a statute is in question and no question or issue of

fact is involved." (Emphasis supplied.) 26 C.J.S., Declaratory Judgment, Sec. 45.

The treatise further provides:

> "The bare allegation that a statute is in some particulars vague to the point where one bound to observe it is uncertain as to just what is thereby required is not a compelling reason why a court should attempt, in a declaratory action, to direct in detail the manner in which, and the methods by which, the administrative agency shall administer the law." 26 C.J.S. Declaratory Judgments, Sec. 45.

Furthermore, a case for a declaratory judgment must be formally presented with proper parties and this means both the parties plaintiff and defendant must be the real parties in interest. Green v. Lewiston Golf and Country Club Inc., 81 Idaho 393, 342 P.2d 719 (1959).

> "Any person who has a real interest in, or is directly affected by, a statute or ordinance is entitled to obtain a judicial declaration as to the validity, construction, or operation of the legislation. However, in order to be entitled to maintain the action plaintiff must have a direct and present interest in the statute or ordinance and the effect of the declaration; and it is insufficient that plaintiff has a consequential, remote, or indirect interest in the litigation. It must appear that the rights of plaintiff will be affected by the legislation, in a manner distinct from that of every other citizen, inhabitant, and visitor in the municipality. Plaintiff must have an individual, special, protectible right which is in controversy and which will be lost or prejudiced unless the court intervenes to preserve it." 26 C.J.S. Declaratory Judgments, Sec. 119.

Here, the PUC has itself declined interpretation of Title 61, and has left the resolution of these administrative statutes to a court of general jurisdiction. It would seem appropriate for this forum to allow the proper administrative branch of government with special expertise, i.e. the Public Utilities Commission to have first opportunity to determine the application to be given to I.C. 61-327 et seq. under the doctrine of primary jurisdiction. In the case of Grever v.

Idaho Telephone Company, 94 Idaho 900, 499 P.2d 1256 (1972), the court stated:

> "In view of the fact that the Idaho Public Utilities Commission has been vested with jurisdiction to regulate and supervise public utilities in the state, it has been given power to 'prescribe rules and regulations for the performance of any service or the furnishing of any commodity supplied by a public utility,' and it is the duty of the Commission to assure that adequate service is furnished. The Idaho Public Utilities Commission is the body that has primary jurisdiction in matters such as the case at bar and that the plaintiff must exhaust his administrative remedies before seeking judicial relief. ..
>
> A leading authority in the field of administrative law has written: 'The doctrine of primary jurisdiction determines whether the court or the agency should make the initial decision.' The doctrine of primary jurisdiction is not an inflexible mandate but rather is predicated on an attitude of judicial self-restraint, and is generally applied when the court believes that considerations of policy recommend that the issue be left to the administrative agency for initial determination.
>
> The following quote from Davis's Treatise on Administrative Law is helpful:
>
> > 'The principal reason behind the doctrine of primary jurisdiction is not and never has been the idea that "administrative expertise" requires a transfer of power from courts to agencies, although the idea of administrative expertise does to some extent contribute to the doctrine. The principal reason behind the doctrine is recognition of the need for orderly and sensible coordination of the work of agencies and of courts. Whether the agency happens to be expert or not, a court should not act upon subject matter that is peculiarly within the agency's specialized field without taking into account what the agency has to offer, for otherwise parties who are subject to the agency's continuous regulation may become the victims of uncoordinated and conflicting requirements.'
>
> The subject matter of the case at bar is within the specialized field of the Idaho Public Utilities Commission, therefore it is that body, rather than the courts, that must make the initial determination. In a leading case, Fogelsville & Trexlertown Elec. Co. v. Pennsylvania Power and Light Co. the Supreme Court of Pennsylvania said that 'The tribunal of first instance as to relations between public service companies and the public is the commission, not the court * * *.' Requiring litigants, in most instances, to resort to the administrative agency equipped to handle such problems will attain uniformity of regulatory laws and will result in orderly coordination between the agencies and the courts." 94 Idaho at 902, 903. 499 P.2d at 1258, 1259 (Emphasis original.)

The case of Idaho Mutual Benefit Association, Inc. v. Robinson, 65 Idaho 793, 154 P.2d 156 (1944), involved a declaratory judgment remedy, wherein the district court was asked for a determination of an unemployment compensation statute. There the court stated:

> "While the district court had jurisdiction to declare whether an appeal would lie directly from the board to this court and to pass upon certain constitutional questions, it did not have jurisdiction to determine whether or not appellant or its agents were within the scope of the act, since they involve fact finding. In other words we hold that the district court had jurisdiction to construe the law and pass upon its constitutionality, but that it had no jurisdiction to investigate the facts, to make findings thereon or to determine the weight of the evidence or credibility of witnesses. (Abelleira v. District Court, 17 Cal. (2d) 295, 109 P.(2d) 942, 132 A.L.R. 715; In re Persons Employed at St. Paul & Tacoma Lumber Co., 7 Wash. (2d) 580, 110 P. (2) 877; Knestis v. Unemployment Compensation and Placement Division, 16 Wash. (2) 577, 134 P. (2d) 76; In re Morton, 284 N.Y. 167, 30 N.E. (2d) 369; South v. Railroad Retirement Board, 43 F.Supp. 911; Johnson v. Pratt, 200 S.C. 315, 20 S.E. (2d) 865; Craig v. Kansas State Labor Commissioner, 154 Kan. 691, 121 P. (2d) 203.) These were questions to be determined by the Industrial Accident Board in the first instance reviewable on appeal. We will therefore not determine these phases of the controversy but leave them for the appropriate tribunal and consequent attendant procedure." (Emphasis original.) 65 Idaho at 803, 154 P.2d at 161.

In conclusion, it would seem that the proper procedure to be taken is for the PUC to make the initial determination of the application of the above statutes to this action, and parties dissatisfied therein may utilize the appropriate appellate process.

> "Where a judicial review provided by statute affords parties aggrieved by the commission's order sufficient or adequate remedies, an independent action for a declaratory judgment interpreting the order will not lie." 26 C.J.S., Declaratory Judgments, Sec. 90.

The request of the PUC for declaratory judgment in its favor on the issue of the application of Title 61, Chapter

3, Idaho Code, will therefore be denied.

In passing it may be noted that an apparent conflict arises as to which agency, as between the PUC and the State agency issuing licenses and water permits has, or had, standing to intercede in the Federal licensing proceedings to question the validity or effect of the subordination restrictions. It is questionable whether either body could assert such a position.

After Idaho Power Company had obtained its license in 1955 for the dams at the Hells Canyon Complex and began construction at the Brownlee site between Oregon and Idaho, the Company was indicted in Oregon for the statutory crime of beginning construction of a water power project without a state permit or license from the State of Oregon. In affirming dismissal of the indictment, the Oregon Supreme Court said:

> "Our only concern is whether the state has the power to veto a license granted by the federal government to construct a dam across a navigable stream for purposes of generating electricty (sic). The right (of Oregon) to grant a hydroelectric permit includes the right to deny it. Neither section 9(b) nor section 27 grants to the states this right. Commission v. State of Oregon, supra.
>
> "It is unnecessary to cite authority from the long-settled proposition that powers granted by the people of the United States to the Federal Government in the constitution and laws passed pursuant thereto shall be the supreme law of the land. If there is any conflict between such laws and a law passed by a state, even in the exercise of its acknowledged powers, the state must yield." State of Oregon v. Idaho Power Company, 311 Ore. 284, 312 P.2d 583, 586 (1957).

By analogy, it is questionable that the State of Idaho through any agency or commission could veto a subordination provision in the federal Hells Canyon complex license any more than the State of Oregon could prosecute for failure to obtain a state permit to construct the project pursuant to

state law.

It is questionable also, that at this late date, some twenty four years after the issuance of the license, that the PUC may collaterally attack the Federal license.

Administrative determinations, like court judgments, generally cannot be collaterally attacked. Whitney National Bank v. Bank of New Orleans and Trust Co., 379 U.S. 411, 85 S.Ct. 551, 558 (1965); 2. K. Davis, Administrative Law, Sec. 18.10 (1958). Thus, one

> "who fails to make a direct attack (review by appeal) upon an administrative order is barred by res judicata from making a collateral attack except where the order is void (because of) fraud or lack of jurisdiction or denial of fair hearing." 2. K. Davis, supra, at 612.

Moreover, where a proceeding in rem is involved, i.e. a proceeding affecting "the interests in the thing, not merely of particular persons, but of all persons in the world", and "where reasonable opportunity has been afforded to litigate rights of all persons," the resulting final determination cannot be collaterally attacked by anyone. Restatement, Judgments, 92 Comment (a) (1942). Id. 92.

The licensing proceedings before the Federal Power Commission were essentially proceedings in rem; their purpose was for the Federal Power Commission to hear and decide all objections to the application and to consider the interests of all persons. 16 U.S.C., Sec. 797 (e) and (f) require that upon filing of an application for a license or a preliminary permit, the Federal Power Commission must "at once give notice of such application in writing to any state or municipality likely to be interested in or affected by such application . . .," (emphasis supplied) and to publish notice of the

application in a newspaper for four weeks. Compliance with the notice requirement of Section 797 has the effect of "making all persons, directly or remotely interested, parties to the proceedings before the Power Commission. . . ." Grand River Dam Authority v. Going, 29 F.Supp. 316, 325 (D. Okla. 1939).

With respect to the Idaho Power Company's application for its Hells Canyon license and the Federal Power Commission hearings thereon, the Court must presume that the statutory notice requirements were followed and that the Idaho Public Utilities Commission was therefore afforded a reasonable opportunity to participate in those proceedings, although it apparently elected not to do so.

The Federal Water Power Act also provides for an appeal to the United States Court of Appeals of any Federal Power Commission order. 16 U.S.C. Sec. 825 L(a). Following the hotly contested hearings before the Federal Power Commission, an appeal-to which Idaho Public Utilities Commission was a party-from the Federal Power Commission's license was taken to the Court of Appeals, which affirmed the Federal Power Commission's order in all respects. National Hells Canyon Association v. Federal Power Commission, 237 F.2d 777 (D.C. Cir. 1956) cert. denied 353 U.S. 924 (1957). In particular, the Court upheld the Federal Power Commission's conclusion that Idaho Power Company project, which included the subordination provision, was "best adapted to a comprehensive plan" for developing the Snake River.

Although the argument raised here by the Idaho Public Utilities Commission, that Article 41 of the license is

inconsistent with 16 U.S.C. Sec. 821, was apparently not raised in that appeal, the Idaho Public Utilities Commission could have raised that issue had it participated in the proceedings and Idaho Power Company, who was a party to the appeal, clearly was in a position to raise that issue before the Court. The Court's affirmance of the Federal Power Commission order therefore in all likelihood became res judicata barring everyone, including the Public Utilities Commission from attacking that judgment years later in this state court action.

Furthermore, even if the Federal Power Commission proceedings were not proceedings in rem, it would appear that the Idaho Public Utilities Commission may still be barred from collaterally attacking the Federal Power Commission order. Clearly Idaho Power Company, a party to the Federal Power Commission proceedings and the proceedings before the Court of Appeals, is now barred from collaterally attacking the order in this action. Since the Idaho Public Utilities Commission is in effect seeking to assert Idaho Power Company's rights, the Idaho Public Utilities Commission should also be barred from attacking that order.

Moreover, the Idaho Public Utilities Commission's argument does not raise jurisdictional issues which would render the Federal Power Commission's order void on its face and therefore permit a collateral attack. See Hartenbauer v. Mutual Benefit Life Insurance Co., 67 Idaho 254, 175 P.2d 698 (1946). There is no question that the Federal Power Commission had jurisdiction over the Idaho Power Company and the subject matter and jurisdiction to issue a conditional

license. See 16 U.S.C. Sec. 797(e) and 803(g). The Idaho Public Utilities Commission's argument only raises a non-jurisdictional issue whether the subordination condition is consistent with 16 U.S.C. Sec. 821. To rule that a jurisdictional issue, which can be raised collaterally by anyone at any time, is presented by any argument that any condition of a license (there are 45 on Idaho Power Company's license) is inconsistent with any of the numerous provisions of the Federal Power Act, would mean, as a practical matter, that a Federal Power Commission order would never be final and would be eternally vulnerable to attack. It would also have a significantly adverse affect on a licensee's ability to issue bonds or obtain other financing for a Federal Power Commission licensed project. Public policy, reflected in the principles of res judicata, requires that at some point in time the litigation over an Federal Power Commission determination must come to an end. With respect to litigation over the validity of this Federal Power Commission license, it probably came to an end on April 1, 1957 when the Supreme Court of the United States denied the petition for certiorari in National Hells Canyon Association v. Federal Power Commission, supra.

Notwithstanding the above observations it would appear that if the Public Utilities Commission has any right under Title 61, Chapter 3 of the Idaho Code to interfer with the issuance of the Federal Power Commission licenses, it has the primary jurisdiction to resolve that issue through its own intra-agency proceedings.

JUST COMPENSATION

The next issue to be determined is whether Idaho Power is able to demand compensation for any water rights lost at Swan Falls, in light of the subordination language contained in the Federal Power Commission licenses at the Hells Canyon complex, or the State subordination language contained in the C. J. Strike license.

The framers of the Idaho Constitution realized in adopting Article 15, Sec. 3 that the use of water for certain beneficial purposes would be given preferential rights to water superior to those water rights previously appropriated for inferior uses. Article 15 Sec. 3, as amended in November, 1928 reads:

> "Sec. 3. Water of natural stream -- Right to appropriate -- State's regulatory power -- Priorities. -- The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes. Priority of appropriation shall give the better right as between those using the water; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any other purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes. And in any organized mining district those using the water for mining purposes or milling purposes connected with mining, shall have preference over those using the same for manufacturing or agricultural purposes. But the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use, as referred to in section 14 of article I of this Constitution."

Article 1, Section 14 provides:

> "Sec. 14. Right of eminent domain. -- The necessary use of lands for the construction of reservoirs or storage basins, for the purpose of irrigation, or for

rights of way for the construction of canals, ditches, flumes or pipes, to convey water to the place of use for any useful, beneficial or necessary purpose, or for drainage; or for the drainage of mines, or the working thereof, by means of roads, railroads, tramways, cuts, tunnels, shafts, hoisting works, dumps, or other necessary means to their complete development, or any other use necessary to the complete development of the material resources of the state, or the preservation of the health of its inhabitants, is hereby declared to be a public use, and subject to the regulation and control of the state.

Private property may be taken for public use, but not until a just compensation, to be ascertained in the manner prescribed by law, shall be paid therefor."

The Idaho Power Company seeks just compensation from junior upstream irrigators, who have depleted the flow in the Snake River below their hydro-production capacity (8,400 cfs) at Swan Falls. It is generally recognized that the Court should decide as a matter of law that the use for which condemnation is sought is a public use. Washington Water Power Company v. Waters, 19 Idaho 595, 115 Pac. 682 (1911); Boise City v. Boise City Development Company, 41 Idaho 294, 238 Pac. 1006 (1925); Bassett v. Swanson, 51 Idaho 256, 5 Pac.2d 722 (1931).

In the case of McKenney v. Anselmo, 91 Idaho 118, 416 P.2d 509 (1966), the Court stated:

"The timber of this state is a material resource and where that resource cannot be completely developed without the exercise of the power of eminent domain that power may be lawfully excercised. The fact that the use may be for private benefit is immaterial since the controlling question is whether the use is for the complete development of the material resources of the state. (Cites omitted) Art. 1, Sec. 14, of the Idaho Constitution is self-executing in the sense that the nature of the use required is established and constitutes a grant of the power of eminent domain in behalf of the uses therein expressed." 91 Idaho at pg. 123.

Here, the development sought by diversion of water, is an increase in productive agricultural land, a natural

resource that cannot be completely developed without the aid of water. Had the Idaho Power Company not accepted the terms and provisions of the subordination language contained in Article 41 of the Federal Power Commission license at the Hells Canyon complex, there can be no doubt that under the mandate of Article 15, Section 3 of the Idaho Constitution future upstream appropriators diverting water for irrigation purposes that resulted in depleting the flow of water below Idaho Power's established water rights at Swan Falls, would have been required to pay just compensation to Idaho Power for their loss.

Referring again, to the conditions imposed by the Federal Power Commission in the Hells Canyon licenses, Article 41 provides:

> "Article 41. The project shall be operated in such manner as will not conflict with the future depletion in flow of the waters of Snake River and its tributaries, or prevent or interfere with the future upstream diversion and use of such water above the backwater created by the project, for the irrigation of lands and other beneficial consumptive uses in the Snake River waterhead."

The terms of Article 41 are clear and uncontradictory. It is apparent that Idaho Power in return for the benefits arising from the construction of the Hells Canyon complex, waived its rights of compensation allowed under Article 15, Sec. 3, Idaho Constitution. One authority has noted in regard to waiver of, or estoppel to assert, a claim for just compensation, following deprivation of a property right:

> "A landowner may waive all claim to compensation, or under appropriate circumstances, a landowner may be estopped by his own acts to claim it. If the owner waives his right, no one else can take advantage of the omission to compensate him. A waiver should be definite and certain in its terms. A waiver by claimant of a right under one statute does not constitute a waiver of

rights under other statutes, even though the claims are of similar nature.

The question of what acts constitute an estoppel depends largely on the circumstances of each case, for example, an owner who has dedicated land for a street or highway, or other public improvement, is not entitled to compensation on the laying out of the street or the construction of the improvements; so a landowner who expressly consents to the construction of a public improvement on his land or in the street on which such land abuts, is precluded from recovering compensation or damages, provided his consent is given with full knowledge of the facts; and it has been held that the consent of the owner to the apppropriation of his land without compensation may be impled by a long acquiescence, or by failure to protest as required by statute, provided due and sufficient notice of the proposed improvement was given.

Ordinarily, however, the right to recover compensation or damages will not be lost by a mere acquiescence in, or failure to object to, the construction of a public work, if not continued beyond a reasonable time, or beyond the statutory period of limitations." 29 A. C.J.S., Eminent Domain, Sec. 208, pg. 927, 928, 929. (Emphasis supplied.)

Idaho law seems to recognize that compensation can be waived. The case of Crane v. City of Harrison, 40 Idaho 229, 232 Pac. 578 (1925), provides an illustration:

> "In the case of Idaho etc. Ry. Co. v. Columbia etc. Synod, 20 Idaho 568, 119 Pac. 60, which was an action brought under the eminent domain statutes for the purpose of determining the value of the property sought to be taken and damage to the property not taken, in the course of that opinion it was held that damages should be assessed once and for all times and should be based upon the most injurious use to which the condemnor may lawfully put the property. If this is a correct statement of the rule, at the time the municipality acquired the right of way for street purposes, appellant or his predecessor was given damages once and for all time, based upon the most injurious use of the land reasonably possible to which the city might lawfully put it. This would be true where the city acquired the property either by dedication or condemnation and the damages sought to be recovered were included in the just compensation required to be paid under the provisions of the constitution above quoted. Where a street or highway becomes such by dedication, compensation for the easement is expressly waived by the dedicator." 40 Idaho at pg. 234, 232 Pac. at 580. See also Symms v. Nelson Sand & Gravel Inc., 93 Idaho 574, 468 P.2d 306 (1970).

By analogy other states have reached similar results. The case of Department of Transportation v. Western National Bank of Cicero, 63 Ill.2d 179, 347 N.E.2d 161 (1976) involved a landowner who had conveyed a portion of his property to the state in 1958, and later sought compensation for his loss of access to an adjoining highway. The 1958 deed of dedication stated:

> "the Grantors further, as a part of this dedication, on behalf of himself, his heirs, executors, administrators and assigns, does hereby release, quit-claim and extinguish any and all rights or easements of access and crossing under which the tract of land herein conveyed and dedicated might otherwise be servient to abutting lands of the grantor."

The Illinois Court, in holding that the prior conveyance was binding for future damage, stated:

> "The State contends that, by the 1958 deed of dedication, defendants released all right of access to and across the dedicated property and that, since no right of access remains to be extinguished, there is no compensable injury to defendant's remaining property. We agree.
>
> A deed speaks for itself and its construction is dependent upon the language used. (Cites omitted). Where there is no ambiguity in the terms used, the instrument itself is the only criterion of the intention of the parties and there is no need for us to construe it. (Cites omitted.) It is clear to us that in the 1958 deed the grantors released any and all rights or easements of access and crossing' which they possessed. Consequently, they have no rights remaining to be extinguished and no rights for which the State must compensate them. Defendants had the benefit of legal counsel when this deed was executed, and there is no allegation of mistake or fraud. The defendants are bound by the clear meaning of the words of their 1958 deed.
>
> *
>
> Defendant has not called into question the sufficiency of the $125,000 paid as compensation for the 1958 taking. We note, however, that while this is not an exorbitant sum, it does seem adequate to compensate defendants for all the property and rights -- including the right of access -- relinquished.
>
> We find the terms of the 1958 deed to be clear and unambiguous, and in the absence of any mistake or fraud, we will not release the defendants from the effect of their agreement. We find that they now have

no rights of access left to be extinguished by the instant proceedings." 347 N.E.2d at pg. 164.

Also see, Busby v. State of Arizona, 101 Ariz. 388, 420 P.2d 173 (1966), holding that a prior conveyance which expressly included damages subsequently accruing estopped landowner from demanding additional compensation; State of Missouri v. Thurman, 428 S.W.2d 955 (Mo. 1968) holding that if a condemnee voluntarily relinquishes a property right for his own benefit, he cannot then ask for damages in condemnation proceedings for loss of that right; and Hale v. Lavaca County Flood Control District, 344 S.W.2d 245 (Texas, 1961), holding that a condemnee impliedly consented to taking of his property without payment of compensation when he made no objection whatever, to the taking, and he could not thereafter institute a collateral attack on the judgment of county court in that prior condemnation case.

Based upon the foregoing authorities, it is clear that Idaho Power waived any right to claim just compensation for loss of its water rights resulting from upstream diversion and depletion from the Snake River, by consenting to and accepting the subordinated Federal Power licenses.

POSSIBLE LOSS OF WATER RIGHTS AT SWAN FALLS

The Department of Water Resources has raised various water law principles regarding Idaho Power Company's claimed 8400 cfs water rights at Swan Falls. The issues present questions of whether Idaho Power has lost any of those rights through: abandonment, forfeiture, adverse possession, prescription, equitable estoppel, or laches.

The Department relies substantially upon figures that indicate there has been a number of years that a flow of less than 8400 cfs, passed through the Murphy gage station. Affiant Kenneth Dunn estimates that the decreased water flow is a result of an increase in irrigated acres from the years 1914 to 1977. The Department therefore argues Idaho Power Company has lost, at least to certain subsequent irrigators, a portion of their water rights at Swan Falls.

The determination made herein regarding subordination of the Power Company's rights renders unnecessary any discussion of these issues raised by the Department of Water Resources. The motion of that department for summary judgment will therefore be denied.

THE STATE WATER PLAN

The Idaho Power Company in its Amended Complaint seeks a declaration in the alternative that if the Company's water rights are subordinated at Swan Falls, then the Company's rights cannot be reduced below the 3,300 cfs minimum flow established at the Murphy gage station by the state water plan implemented by the Idaho Water Resource Board.

Article 15, Sec. I of the Idaho Constitution provides:

> "The use of all waters now appropriated, or that may hereafter be appropriated for sale, rental, or distribution, also of all water originally appropriated for private use, but which after such appropriation has heretofore been, or may hereafter be sold, rented or distributed, it is hereby declared to be a public use, and subject to the regulations and control of the state in the manner prescribed by law." (Emphasis supplied).

Pursuant to Article 15, Sec. I, the regulation of 3,300 cfs minimum flow, originally appeared in December, 1976 in the State Water Plan adopted by the Idaho Water Resource Board. Thereafter, it was enacted into law by the 1978 legislature. Idaho Code, Sec. 42-1736 A (2).

The Department of Water Resources argues that such a regulation is valid under the police powers of the State of Idaho. One authority has stated:

> "The police power appertains to such sales and regulations relating to personal and property rights as affects the public health, public safety, and public welfare. It is the power inherent in a government to enact laws, within constitutional limits to promote the order, safety, health, morals, and general welfare of society." 16 C.J.S. Constitutional Law, Sec. 174.

Generally broad discretion is necessarily vested in the legislature to determine not only what interests of the public welfare required, but what measures are necessary to serve such interests. Messerli v. Monarch Memory Gardens, Inc., 88 Idaho 88, 397 P.2d 34 (1964). Thompson v. Hagen, 96 Idaho 19, 523 P.2d 1365 (1974).

The case of Berry v. Koehler, 84 Idaho 170, 369 P.2d 1010 (1962), provides an excellant overview of the extent of the state's police powers. The Court stated:

> "The Legislature , under the broad field of 'police power', may enact laws concerning the health, welfare and morals of the people. This authority, resting with the legislature, is not subject to question by the courts, except to determine whether such authority has been exercised in an arbitrary or unreasonable manner, and whether it actually accomplishes some real purpose, State v. Finney, 65 Idaho 630, 150 P.2d 130. This concept has been appropriately stated by the Supreme Court of the United States in McLean v. State of Arkansas, 211 U.S. 539, 29 S.Ct. 206, 208, 53 L.Ed. 315, as follows:
>
> > 'It is also true that the police power of the state is not unlimited, and is subject to judicial

review; and when exerted in an arbitrary or oppressive manner, such laws may be annulled as violative of rights protected by the Constitution. While the courts can set aside legislative enactments upon this ground, the principles upon which such interference is warranted are as well settled as is the right of judicial interference itself.

The legislature, being familiar with local conditions, is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power * * *.

If there existed a condition of affairs concerning which the legislature of the state, exercising its conceded right to enact laws for the protection of the health, safety, or welfare of the people, might pass the law, it must be sustained; if such action was arbitrary interference with the right to contract or carry on business, and having no just relation to the protection of the public within the scope of legislative power, the act must fail.'

It is also incumbent upon this court in reviewing the constitutionality of legislative action to presume it to be constitutional unless its unconstitutionality is shown beyond all reasonable doubt. Bannock County v. Citizens' Bank & Trust Co., 53 Idaho 159, 22 P.2d 674; Eberle v. Nielson, 78 Idaho 572, 306 P.2d 1083.

The wisdom, justice, policy, or expediency of a statute are questions for the legislature alone. Saccamonno v. Great Northern Ry. Co., 30 Idaho 513, 166 P. 267; State ex rel. Capital Inv. Co. v. Lukens, 48 Idaho 357, 283 P. 527; 2 Cooley, Constitutional Limitations 1228. In passing on the constitutionality of an act, the courts may not inquire into either the wisdom or motive of the legislature. Wanke v. Ziebarth Const. Co., 69 Idaho 64, 202 P.2d 384. It is the duty of the courts to interpret the meaning of legislative enactments without regard to the possible results. State v. Village of Garden City, 74 Idaho 513, 265 P.2d 328." (Emphasis supplied.) 84 Idaho at 176, 177, 369 P.2d at 1013.

HCR 48, 1978 Session Laws 1011, states that the flow requirement was intended to provide, "optimum development of water resources in the public interest." The State Water Plan itself provides that water for production of hydropower

is not within the public interest. "The Objectives: State Water Plan Part One," June 1974, pg. 17-18 states:

> "after considering all current and potential uses of water on the main stem Snake River, that depletion of flows below that currently available in the low flow months to maintain water for production of hydropower and other main stem water is not in the public interest. P. 116 S.W.P. Pt. Two, as adopted by I.W.R.B. December 29, 1976." (Idaho Department of Water Resources' Brief in support of motion for summary judgment, August 6, 1979, p. 22).

The Department of Water Resources, in its brief filed on August 6, 1979 at page 22 further states in reference to the State Water Plan, that " * * * without the State Water Plan and the 3,300 cfs minimum flow requirement, the local custom of allowing certain upstream depletion would have eventually and theoretically reduced Idaho Power's rights at Swan Falls to zero."

This Court agrees with the Department's reasoning and finds that the regulation is a valid and an appropriate measure promoted by the state for the general welfare of its citizenry.

The State of Idaho has, by virtue of the State Water Plan, granted back and allowed a minimum guaranteed flow of 3,300 cfs in the Snake River at the Murphy gage station, for hydroelectric power generation purposes, which inures to the benefit of Idaho Power Company, not withstanding the subordination provisions of the Hells Canyon licenses, agreed to by Idaho Power, and otherwise affecting that company's water rights. (Footnote #4).

PARAGRAPH XX DEFENDANTS

The posture of the Paragraph XX Defendants in this litigation has been questioned at one time or another by all other parties, without resolve. It was the Paragraph XX defendants, who, on March 15, 1979 initiated the present summary judgment by filing their own motion for partial summary judgment on behalf of the Idaho Power Company. On May 4, 1979, defendants Cottonwood Canal Company, Mud Flat Canal Company and Nelda E. McAndrews, filed a motion to strike the Paragraph XX defendants motion for partial summary judgment contending that the Paragraph XX Defendants did not have standing to seek summary judgment on behalf of the plaintiff, Idaho Power Company. This Court on June 27, 1979 denied the motion, reasoning that the question of standing should be resolved at the hearing on the merits of the motion for summary judgment.

The position of the Paragraph XX Defendants perhaps can best be explained by their own statement contained at page 7 in their brief filed August 31, 1979:

> "The paragraph XX Defendants have from the outset of this action and the IPUC proceeding in 1977 had two goals:
>
> 1. To stop the erosion of the hydropower base of Idaho Power Company by continued irrigation depletions from the Snake River without payment of just compensation to the Company for taking its water rights.
> 2. Obtain a rebate to ratepayers reflecting the substitution of more expensive thermal power to replace cheaper hydropower lost by the wrongful action or inaction of the Idaho Power Company."

It is the impression of this Court that the issues raised by the Paragraph XX Defendants have been disposed of

by the determinations already made regarding the substantive issues of this case. First, this Court has specifically found that Idaho Power had established water rights at Swan Falls under the "Constitutional method" of appropriation. Second, Idaho Power by consenting to the terms imposed in Article 41 of the Federal Power Commission license at the Hells Canyon Complex, subordinated its prior water rights held on the entire Snake River watershed. Third, Idaho Power, by not requesting an award of compensation at the time of executing it's Federal Power Commission license at Hells Canyon, waived any further rights of just compensation for water rights taken by future upstream appropriators.

The final issue raised by Paragraph XX Defendants is to obtain a rebate to the ratepayers for Idaho Power's substitution of more expensive thermal power to replace cheaper hydropower lost by the alleged wrongful action or inaction of the Idaho Power Company. As discussed earlier such questions of alleged wrongful action or inaction come squarely under the application of Chapter 3, Title 61 of the Idaho Code. This Court in exercising its sound judicial discretion declined to grant any declaratory relief to the Public Utilities Commission based upon Chapter 3, Title 61, holding that under the doctrine of primary jurisdiction the factual issues representing any violations of the Public Utility Law would be better left to the determination of the appropriate administrative agency, the Public Utilities Commission. So must the issue of entitlement to rebate be presented to, and determined by, the Public Utilities Commission, having primary jurisdiction over the rates and tariffs of the Power Company.

ORDER

Counsel for Idaho Power Company may prepare and submit for consideration by the Court an appropriate form of Order and Judgment granting and denying Summary Judgments, as the case may be, regarding each of the parties, consistent with the foregoing.

IT IS SO ORDERED.

Dated this 10th day of December, 1979.

Jesse R. Walters
District Judge

FOOTNOTE: (1)

Relevant hereto, we are concerned only with subordination clauses that allow upstream diversion and depletion of water. We are not concerned with subordination for navigation or other non-depletionary and non-consumptive uses imposed or conditions of the various licenses. See for example, Swan Falls Federal License, Project No. 503, Plaintiff's Exhibit C.1, Art. 14, p. 10; Brownlee, Oxbow and Low Hells Canyon Federal License, Project No. 1971, 2132 and 2133, Plaintiff's Exhibit B.1, Art. 43, p. 14; and similar non-depletionary restrictions contained in other licenses issued to the Idaho Power Company.

FOOTNOTE: (2)

No issue is raised in this case as to whether the Snake River is a navigable stream. In the order issuing the license for the Hells Canyon project, the Federal Power Commission determined that the Snake River from its junction with the Columbia River up to the mouth of Henrys fork is a navigable water of the United States. Order of Federal Power Commission issuing license, Projects Nos. 1971, 2132, 2133 (Brownlee, Oxbow and Low Hells Canyon, August 4, 1955, (Plaintiff's Exhibit B.1, page 2, paragraph (2), of the Order).

FOOTNOTE: (3)

In this regard, in related litigation, the Federal Power Commission has been recognized as the "guardian of the public domain" for the purpose of supervising a system of control over the generation and transmission of electric energy in interstate commerce. See, Federal Power Commission v. Idaho Power Company, 344 U.S. 17, 73 S.Ct. 85, 97 L.Ed.2d 15 (1952).

FOOTNOTE: (4)

Concurrence with the Idaho Department of Water Resources on this issue is not a retraction by the Court of its earlier opinion entered on December 11, 1978, regarding which body, as between the legislature and the State Water Resource Board, had the authority to adopt the State Water plan. This decision has been appealed. Until the Supreme Court renders its opinion on that issue, the present state water plan will be recognized as an expression of public policy and be enforceable by this Court.

Exhibit 6

1982 OPINION NO. 96

IN THE SUPREME COURT OF THE STATE OF IDAHO
No. 13794

IDAHO POWER COMPANY,

Plaintiff-Appellant-Cross-Respondent,

v.

THE STATE OF IDAHO, acting by and through the DEPARTMENT OF WATER RESOURCES, the IDAHO WATER RESOURCE BOARD, and its Executive Director, C. Stephen Allred, in his official capacity,

Defendants-Respondents-Cross-Respondents,

and

THE STATE OF IDAHO, acting by and through the IDAHO PUBLIC UTILTIIES COMMISSION, and Commissioners, Robert Lenaghen, Conley Ward, and Ralph Wickberg in their official capacities; and Matthew Mullaney, John Peavey, Charles Hisaw, Diane Plastino, Jeff Fereday, Billie Thompson, L.N. "Bud" Purdy, John Falkner, Bill Arkoosh, Eslie Heinz, Harold Ingram, Ralph Ingram, Harold Huyser, Mary Mech, Gerald Tews, John Bryngelson, Clive Schell,

Defendants-Respondents-Cross-Appellants-Cross-Respondents,

and

David Michelsen, A.W. Molyneux, Morgan & Shillington, a partnership,

Defendants-Respondents-Cross-Respondents,

and

Fred Tiede, Gary Tiede, Otto Tiede, James Tiede, Ferdinand Gehring, Melvin Funk, Sid Allen, Jim Pahl, Lenard Schritter, Alfred Fothergill, Marcia Pursley and J.W. Swan, as Complainants in P.U.C. Complaint, Case No. U-1006-124,

Defendants-Respondents, Cross-Respondents-Cross-Appellants.

Boise, December 1981 Term

Filed: November 19, 1982

Frederick C. Lyon, Clerk

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and

Murphy Water Company, Crane Falls Mutual Irrigation Co.,

Defendants-Respondents-Cross-Respondents,

and

Nelda E. McAndrew,

Defendant-Respondent-Cross-Appellant-Cross-Respondent,

and

Pilgram Irrigation Company and Enterprise Acres,

Defendants-Respondents-Cross-Respondents,

and

Upper Grand View Canal Company,

Defendant-Respondent-Cross-Respondent,

and

Martin K. Slane, and Mountain View Irrigation Company, Inc., aka Yahoo Company, Inc., Ronald H. Warrick,

Defendants-Respondents-Cross-Respondents,

and

Cottonwood Canal Company,

Defendant-Respondent-Cross-Appellant,

and

John Doe, and the State of Idaho, acting by and through the Department of Fish & Game, acting through its Executive Director Joseph Greenley, in his official capacity; John Peavey, Pitabo Livestock, Inc., Faulkner Land & Livestock, Bill Arkoosh, Ralph Ingram, Harold Huyser, Mickelsen Farms, Inc., A.W. Molyneux, Morgan & Shillington Farm Co., a partnership, Fred Tiede, Otto Tiede, Melvin Funk, Jim Pahl, and Lenard Schritter,

Defendants-Respondents-Cross-Respondents,

and)
)
Mud Flat Canal Company,)
)
Defendant-Respondent-)
Cross-Appellant-Cross-)
Respondent.)

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, Ada County. The Honorable Jesse R. Walters, District Judge.

Cross-appeals from a grant of partial summary judgment on cross-motions constituting a final judgment. Affirmed in part and reversed in part.

Thomas G. Nelson, of Nelson, Rosholt, Robertson, Tolman & Tucker, Twin Falls, for appellant Idaho Power Company.

David H. Leroy, Attorney General, Josephine P. Beeman, Deputy Attorney General, and Howard Carsman, Deputy Attorney General, Boise, for C. Stephen Allred, et al.

Phillip Barber, Boise, for Water Resource Board.

David H. Leroy, Attorney General, and Michael S. Gilmore, Deputy Attorney General, Boise, for Idaho Public Utilities Commission.

Jeffrey R. Christensen, of Anderson, Kaufman, Ringert & Clark, Boise, for Mud Flat Canal Company, Cottonwood Canal Company, Nelda E. McAndrew, and Upper Grand View Canal Company.

Matthew J. Mullaney, Jr., Boise, for Paragraph XX defendants and Pro Se.

Ben Cavaness, American Falls, for Picabo Livestock.

Severt Swenson, Jr., Gooding, for Faulkner Land & Livestock.

Larry R. Duff, of Goodman, Duff & Chisholm, Rupert, for Morgan Shillington Farm Company.

David H. Leroy, Attorney General, and John Vehlow, Deputy Attorney General, Boise, for Idaho Department of Fish & Game.

Lloyd J. Walker, Twin Falls, for Pilgrim Irrigation Co. and Mountain View Irrigation Company, Yahoo Company, Inc.

Jack Murphy, Shoshone.

Fred Stewart, Pro Se.

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SHEPARD, J.

This case involves a series of appeals from an order of the district court which granted certain motions for summary judgment, disposed of all the issues raised, and constituted a final judgment. Narrowly stated, the case involves the validity of Idaho Power's water rights at its Swan Falls Power plant on the Snake River, and the case arose when Idaho Power brought the action seeking a determination of the validity of those water rights, and that they were not subject to future upstream depletion. More broadly stated, the case involves conflicting claims to utilization of the waters of the Snake River between competing interests of power generation and agricultural irrigation. The issues involved are of large significance to the majority of the people of the state. We affirm in part and reverse in part.

The Snake River system rises in the easternmost part of Idaho and the adjoining area and flows westward across the entire breadth of the state. Thereafter it turns northward, forming Idaho's western border, and ultimately falls into the Columbia River, of which it is a principal tributary. Hence, the Snake River and its use has exercised and will continue in the future to exercise an enormous influence over a very substantial portion of Idaho and its people.

The roots of this litigation stretch back to the early days of the state and the background must be set out in some considerable detail. The Trade Dollar Consolidated Mining Company constructed the first hydroelectric dam on the Snake River at the Swan Falls site in 1901. It originally provided power to the mines of the Silver City area, which service was later shifted to the towns which lay to the north. At that time there were a number of small scale companies supplying electric power in that region, and eventually five of those companies came to dominate the electric power supply market for southern Idaho. In 1915

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those five companies merged to form Idaho Power Company, and in the merger Idaho Power acquired the Swan Falls dam and powerplant, as well as others which had been built in the interim. See R. Sessions, Idaho Power Co., 43-54 (1939).

Idaho Power had secured a federal court decree which, together with state water licenses, granted Idaho Power water rights at Swan Falls of 9450 cfs with priority dates ranging from 1900 to 1919. However, it is undisputed that the Swan Falls power plant's hydroelectric capacity is 8400 cfs, and therefore the water rights at Swan Falls are limited to 8400 cfs.

Congress, in 1890, had passed legislation prohibiting construction of obstructions to navigation without the approval of the Secretary of War. 26 Stat. 454 (1890). That legislation was superseded by a provision of the 1899 Rivers and Harbors Act which, in part, made it unlawful to build dams on navigable rivers without the consent of Congress and approval of the plans by the Corps of Engineers and Secretary of the Army. 33 U.S.C. § 401. In 1920 Congress enacted the Federal Water Power Act, now known as the Federal Power Act, 16 U.S.C. §§ 791-828, and thereafter created the Federal Power Commission (FPC) to administer the Act. One of the stated purposes of the FPC was, in conjunction with the Corps of Engineers, to issue licenses for construction and operation of dams and other hydroelectric projects. 16 U.S.C. § 797(e). It does not appear from the record before us that such a license was obtained for Swan Falls until an operating license was granted in 1928. That license by its terms expired in 1970, but annual renewals have kept it in force. The record here reflects only that Idaho Power's application for a new license for Swan Falls is presently pending before the FERC.[1]

[1] The functions of the FPC were transferred to the Secretary of Energy and the Federal Energy Regulatory Commission (FERC) within the Department of Energy, by the Act creating the Department of Energy in 1977. 42 U.S.C. §§ 7151, 7171, 7172(a)(1)(A) and 7172(a)(2)(A). This appeal involves action taken by the FPC long before the creation of the Department of Energy; therefore this opinion will refer throughout to the FPC. To the extent that we discuss the power of the FPC under the Federal Power Act, it follows that such discussion applies to its modern counterpart, the FERC.

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Thereafter, in the late 1920s and the 1930s, new dams and improvements on existing facilities were constructed on the Snake River. Following the Second World War, Idaho Power undertook a massive dam building campaign, and between 1948 and 1952 five additional dams (Upper and Lower Malad, Lower Salmon Falls, Bliss, and C.J. Strike) were constructed on the central portion of the Snake River. See G. Young & F. Cochrane, Hydro Era: The Story of Idaho Power Company, 46-53 (1978).

With the completion of the C.J. Strike dam in 1952, it became apparent that the Snake River was no longer inexhaustible and concerns began to be expressed as to the usage of the remaining finite flow of the river. Reflective perhaps of those concerns were provisions that began to be placed in FPC licenses and in state water licenses, known as "subordination" clauses. Therein water rights of power companies did not contain the customary total priority of right but, rather, would be inferior to future upstream depletion. The validity and scope of those subordination clauses have become the principal issues of this appeal.

The license obtained by Idaho Power in 1928 for operation of the Swan Falls dams and generating facility which was granted by the FPC contained a provision forbidding Idaho Power from objecting to use of water by others, "provided such use will not materially reduce the amount of power produced." The Idaho Power license granted by the FPC for the Twin Falls dam (1934) provided that its water rights were subordinate to present and future irrigation uses, except that Idaho Power could use its water stored at the American Falls reservoir some distance upriver and any water entering the river below Milner dam (approximately half way between Twin Falls dam and American Falls dam), but stated that the license affected water rights at no other point. Of the other licenses granted Idaho Power for dam construction

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prior to 1952 which appear in the record here, neither FPC project licenses nor state water licenses appear to contain any subordination language.

The FPC license granted Idaho Power in 1928 for operation of the Swan Falls project also provided that the licensee "will, during the period covered by this license, retain possession of all project property . . . including . . . water rights; and that none of such properties valuable and serviceable to the project . . . will be voluntarily sold, transferred, abandoned, or otherwise disposed of without the approval of the Commission." That provision appears to have become a standard form attached to later FPC licenses and appears in the record relating to the licenses for several other dams.

When Idaho Power sought a license for the C.J. Strike project, a subordination clause was sought to be inserted in that license. Idaho Power resisted such efforts for the insertion of the subordination clause in the C.J. Strike license. At that time the federal government had plans for the building of upstream irrigation diversion projects and the then secretary of interior, in light of those plans, sought some form of protection guaranteeing the availability of water for future upstream irrigation. A compromise was reached and in the 1951 license for C.J. Strike dam, provisions were inserted giving the federal government a choice of paying damages or acquiring the C.J. Strike project if federal irrigation projects caused a reduction of power output. We pause to note that, as will later be developed, perfection of water rights depends not only on FPC licenses, but also upon granting of state water licenses. Such state water licenses are not granted until the completion of the project. In 1951, the C.J. Strike project had not been completed, and hence its accompanying state water license application was still pending.

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Meanwhile, Len Jordan had been elected governor of Idaho, taking office in 1951, and a major controversy was under way between the federal government and Idaho Power regarding the development of the Hells Canyon stretch of the Snake River (lying northerly along a portion of the western boundary of Idaho). Jordan sought to apply pressure to Idaho Power by insisting upon subordination clauses being inserted in the licenses for the proposed Hells Canyon project.

Faced with Jordan's attitude, which was reflected by his administrative department charged with issuing state water right licenses, Idaho Power agreed to subordinate their state water right license at C.J. Strike to future upstream depletion. That water license was issued in 1953 and contained the first unrestricted subordination language on record.

As to the Hells Canyon stretch of the Snake River, two competing proposals had been put forward. One, a single massive structure to be known as High Hells Canyon project, was to be constructed and operated by the federal government. The second was the proposal of Idaho Power to build three smaller dams on the same portion of the river. Legislation authorizing the federal project was introduced in Congress and contained a subordination clause, but attached certain conditions giving the federal government limited control over the reasonableness of future upstream depletions. Hells Canyon Dam: Hearings on H.R. 5743, Before the Subcomm. on Irrigation and Reclamation of the House Comm. on Interior and Insular Affairs, 82d Cong., 2d Sess. 510 (1952) (statement of Rep. Engle).

To obtain the influence of Jordan and the irrigators, then as now a powerful political force in the state, for its Hells Canyon three-dam project, Idaho Power proposed that the FPC license for the Hells Canyon project contain a clause subordinating its rights to future upstream depletion without condition. That

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distinction between the two projects appears to be one of the major factors in gaining Jordan's support for Idaho Power's proposal. Id. at 501 (statement of Gov. Jordan). By the time of the senate hearings on the Hells Canyon project in 1955, Robert E. Smylie was governor of Idaho. Smylie also reiterated the state's interest in full unconditional subordination of Idaho Power's water rights in Hells Canyon project to future upstream diversion. Hells Canyon Project: Hearings on S. 1333 Before the Subcomm. on Irrigation and Reclamation of the Senate Comm. on Interior and Insular Affairs, 84th Cong. 1st Sess., 6 (1955) (statement of Gov. Smylie).

Idaho Power asserts that its economic survival was dependent upon the Hells Canyon project and that it thus agreed to subordinate its water rights at Hells Canyon in return for the support of state government and the agricultural irrigators. While such might be regarded as an overstatement, nevertheless, the Hells Canyon dams remain today one of the more important parts of Idaho Power's rate base. Another factor, although unarticulated, may well be that a single high federal dam would have been administered by the Bonneville Power Administration, and historically, Idaho Power has actively opposed efforts to extend Bonneville Power's authority into this portion of the Northwest. See G. Young & F. Cochrane, Hydro Era: The History of Idaho Power Co., 64 (1978); Idaho Evening Statesman, May 30, 1963, p.8 (full page advertisement by Idaho Power).

At the time of the pendency of congressional action authorizing the federal High Hells Canyon project, Idaho Power had initiated and was engaged in proceedings before the FPC to obtain a license for its three-dam project. In 1955 the FPC issued a single license to Idaho Power for the construction of three dams (Low Hells Canyon, Oxbow and Brownlee), stating that the dams should be treated for the purposes of that license as

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"one complete project." Consistent with the request of Idaho Power, that license contained a subordination provision with no conditions attached. In another portion of the Hells Canyon license, minimum flows were required at specified points on that reach of the river in accordance with the federal governments' navigational servitude. (Hells Canyon Project FPC license, Article 43). The FPC order granting the license to Idaho Power was appealed by proponents of the federal High Hells Canyon dam to the D.C. Circuit of the United States Court of Appeals. That Court held that the FPC was not required to approve a potential federal project over an available private project and that the FPC was not required to measure a federal project it had just rejected against the remaining private project to determine which of the two was the "best adapted" plan for developing the waterway. National Hells Canyon Ass'n v. Federal Power Comm'n, 237 F.2d 777 (D.C. Cir. 1956), cert. denied, 353 U.S. 924 (1957). The subordination clause, its validity or scope, was neither challenged nor considered on that appeal.

Following construction of Idaho Power's three Hells Canyon dams, state water licenses were issued. Seven of those licenses appear in the record here. One is a storage right measured in acre-feet, and the six others are flow rights measured in cubic feet per second (cfs). Two of those licenses contain subordination clauses identical to that in the FPC license, i.e. one granted for Brownlee in 1964 for a flow of 10,000 cfs with a priority date of 1965, and the second granted at the same time for Oxbow for a flow of 14,000 cfs with a priority date of 1964. The other four licenses for water flow rights, one each for Oxbow and Brownlee and two for Low Hells Canyon, are silent upon the subject of subordination.

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Thereafter in the 1960s other projects continued to be proposed for the Snake River in the area of Hells Canyon. A utility consortium obtained an FPC license for a proposed High Mountain Sheep dam one mile below the confluence of the Salmon and Snake Rivers. That license was overturned by the U.S. Supreme Court on the grounds that the FPC had failed to consider a proposed federal project for the site and failed to fully consider the "recreational purposes" served by the river, including the conservation of anadromous fish. Udall v. Federal Power Comm'n, 387 U.S. 428 (1967). That dam was not and has not been built. During the late 1960s, a congressional moratorium was placed on dam building in Hells Canyon. Subsequently Congress placed Hells Canyon downstream from Low Hells Canyon Dam within the Wild and Scenic Rivers system, thereby effectively foreclosing any further hydroelectric development on that stretch of the Snake River. 16 U.S.C. §§ 1274(12), 1273(b)(1), 1273(b)(2).

During the same period of time in the 1960s, the state of Idaho negotiated with Idaho Power over a proposed dam known as the Guffey project. It was to be built downstream from Swan Falls and would be substantially higher than the Swan Falls dam. Such a joint venture was authorized by the legislature, 1971 Idaho Sess. Laws, Ch. 265, p. 1064. See generally Idaho Water Resource Board v. Kramer, 97 Idaho 535 (1976). Such a joint venture contract was entered into in 1972, amended in 1974 and again in 1976. That project was abandoned in 1979 following the withdrawal of the Snake River Birds of Prey area in 1971, its expansion in 1975, and an environmental impact statement released in 1978, indicating major environmental difficulties with the proposed project.

The legislature enacted a comprehensive water resource policy in 1978 establishing minimum stream flows on the Snake River. I.C. § 42-1736A. That statute established minimum flows

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of 5000 cfs at Johnson's Bar, 4750 cfs at Weiser, and 3300 cfs at Murphy (just downstream from the Swan Falls dam). Those minimum flows were set aside as beneficial uses.

The cessation of construction of hydroelectric facilities on the Snake River, the scrapping of plans for coal-fired power plants, oil embargoes and escalating costs and opposition to nuclear generation plants, all coupled with a continuing demand for energy, have been the cause of large concern and have inevitably focused attention on the existing hydroelectric plants.

The genesis of the instant litigation was a complaint filed with the Idaho Public Utilities Commission by one Matthew Mullaney on behalf of himself and other ratepayers alleging that Idaho Power had failed to protect and preserve its Swan Falls water rights and that, by so doing, Idaho Power had wasted its assets and overstated its capital investment, thus resulting in overcharges to its ratepayers. Idaho Power sought to have that complaint dismissed for lack of jurisdiction. Idaho Power's motion to dismiss was denied, and Idaho Power answered the complaint indicating it would file an action in district court to protect those Swan Falls water rights. A large number of applications for water permits were then pending before the Idaho Department of Water Resources and Idaho Power filed protests against a large number of those applications. In the interim, and pending the outcome of this case, the Public Utilities Commission has retained jurisdiction over the Matthew Mullaney complaint.

Idaho Power's action in the district court named as defendants the Public Utilities Commission, the Department of Water Resources, numerous canal and irrigation companies, and individuals involved with irrigation, together with the ratepayers who brought the complaint before the Public Utilities Commission. Therein Idaho Power sought a decree that its Swan

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Falls rights were not subject to upstream depletion and that the state water plan was a taking of those rights. Idaho Power also sought to have the court identify those areas where its water rights were protected. The Department of Water Resources answered Idaho Power's complaint, claiming that the State Constitution allows the state to limit hydropower rights and that Idaho Power had lost those rights by adverse possession, forfeiture, and abandonment. Grandview Canal Co. in its answer added laches and subordination in the Hells Canyon and Strike licenses as affirmative defenses, and Nelda McAndrew added waiver and quasi-estoppel to the list of affirmative defenses. The Public Utilities Commission in its answer claimed primary jurisdiction and raised the questions of applicability of I.C. Title 61. The Public Utilities Commission also sought to obtain declaratory relief. All parties then filed motions and cross motions for summary judgment based in part or in whole upon their respective theories of the case.

As a preliminary matter, the district court determined that Idaho Power's Swan Falls water rights held priority dates from 1907 to 1930 rather than 1900 to 1919. That portion of the order is not an issue of this appeal, and we express no view as to whether those priority dates were correctly determined by the district court.

The district court next held that Article 41 of the Hells Canyon Project's FPC license, subordinating Idaho Power's water rights, was a lawful exercise of power by the FPC. In that part of the decision the district court relied upon the FPC's power to implement a comprehensive development of navigable waters, its authority to impose conditions on licensees, the state legislature's recognition of desirability of subordination clauses in the enabling legislation for the now defunct Cuffey joint project, and a U.S. Supreme Court case recognizing use of water for irrigation as being a public use. In so upholding the validity of

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Article 41, the district court held it was not necessary to reach a number of related issues: (1) Whether the licenses can be collaterally attacked; (2) whether the Public Utility Commission and the ratepayers are real parties in interest; (3) whether the Public Utility Commission and the ratepayers have standing to attack the validity of Article 41; and (4) whether the subordination was a transfer in violation of I.C. § 61-327.

The district court next held that the effect of the subordination language in Article 41 of the Hells Canyon license had subordinated all of Idaho Power's water rights used in hydropower production at all of its facilities on the entire Snake River watershed. In reaching that result the district court relied on federal preemption under the Federal Power Act. The court focused on language in Article 41 subordinating water rights at the Hells Canyon project to future upstream depletion "on the Snake River and its tributaries," from which the court reasoned that this meant the entire river upstream could be depleted, including any water rights at any other dam upstream from Hells Canyon. The court reasoned that since the entire river is one hydropower system, with Idaho Power operating its dams in a coordinated manner, such system could not be subordinated in bits and pieces.

As to the Public Utilities Commission's contention that Idaho Power had violated I.C. § 61-327 et seq., by the acceptance of the subordination language of Article 41 in its licenses, the court held that the Commission had no standing, or in the alternative was barred by estoppel, res judicata and laches. The court also held that Idaho Power's upstream rights were not "interests in property" and that the subordination language of Article 41 was not a transfer of property under I.C. § 61-327 et seq. It further held that if any such transfer did occur, it was forced upon Idaho Power by the federal government, and the power increase

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obtained by the acceptance of that subordination clause was so much in the public interest, it outweighed any violation of those sections.

As to Idaho Power's demand for compensation for loss of its Swan Falls water rights, the district court held that Idaho Power had waived whatever right it had to demand such compensation in accepting the licenses with the subordination provisions. The court reasoned that Idaho Power was barred from seeking damages since, although it had the right to compensation for its Swan Falls water rights, they had been bargained away in exchange for the FPC license.

The court held that the minimum flow requirement in the state water plan, I.C. § 42-1736A, was the exercise of a valid police power of the state to protect the public welfare.

Finally, the district court held that its decision subordinating the water rights of the entire system to all future upstream depletion had mooted the contention that Idaho Power had lost its water rights at Swan Falls by forfeiture, abandonment, adverse possession, equitable estoppel and customary preference.

This appeal and these cross-appeals were filed from the decision of the district court and the parties have stipulated to the existence of five broad issues as constituting the assignments of error:

I. THE SUBORDINATION CLAUSE

On appeal the first issue presented is the authority of the FPC to insert a subordination clause into the Hells Canyon project license. We affirm the district court and hold that the subordination clause is a valid condition which, within the circumstances of this case, fell within the power and authority of the FPC.

Section 10 of the Federal Power Act provides that FPC licenses "shall be" issued on the following pertinent conditions:

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"(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes." 16 U.S.C. § 803(a).

The ratepayers and the PUC argue that such statutory language confers on the FPC the power to approve only conditions involving non-consumptive use to the end that water be retained in the river for commerce and hydropower. We disagree.

The Federal Power Act was passed by Congress in 1920, but it had its roots in the philosophies of Theodore Roosevelt's administration that the country's natural resources should be developed in an orderly manner and water resources should be developed by a single governmental agency responsible for coordinated planning of flood control, navigation, hydropower, irrigation, and waterway improvements. That philosophy was opposed by various forces including the Corps of Army Engineers, which then had existing jurisdiction over flood control and navigation, as well as those interests who wanted free use of the nation's waterways and resources. See S. Hays, Conservation and the Gospel of Efficiency (1959); G. Pinchot, Breaking New Ground (1947). The struggle between those opposing forces resulted in the passage of a compromise Federal Power Act, which did not provide for the single agency concept. Hays, supra. We deem it clear, however, that the Act delegated to the FPC the authority, in Section 10 thereof, to consider uses other than mere hydropower production. G. Pinchot, The Long Struggle for Effective Federal Water Power Legislation, 14 Geo. Wash. L. Rev. 9 (1945).

It also appears clear from the legislative history of the Act, that the FPC was required to consider irrigation

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as one of the other uses in its determination of whether a project is "best adapted for a comprehensive plan" for the waterway. In the committee hearings, each appearing witness was questioned by Rep. Raker of California as to his belief on the question of whether the bill encompassed irrigation. Therein the Forest Service and administration spokesman, O.C. Merrill, indicated that the Administration intended that the Commission consider irrigation as part of the comprehensive plan.

> "Mr. MERRILL. [T]he commission . . . should make a thorough examination of the stream and prepare, as the bill provides, for a scheme of development that will utilize to the full the resources of that stream for every purpose.
> Mr. RAKER. That is just what I am asking about.
> Mr. MERRILL. Irrigation, water power, water supply, navigation, and whatever there may be; and it should have a plan drafted which would comprehend that, and then it should, in considering applications for license, approve the application of that applicant who will carry out to the best degree the plans prepared.
> * * *
> Mr. ESCH. So you get the utmost use, whether for irrigation or for power?
> Mr. MERRILL. And that is the intention, judge, that the plan for development that should be approved should take into consideration all uses that can be made of the water and of the site in that particular locality, as a unit.
> * * *
> Mr. MERRILL. In my judgment it is covered by the provisions of subparagraph (a) of section 10, as well as by the last part of section 7 in the preferences. Not only should the scheme of development be considered in relation to irrigation and to navigation and to water power, but also to flood control."

Hearings on Water Power Before the House Comm. on Water Power, 65th Cong. 2d Sess. 90-94 (1918).

See also the colloquy between the Secretary of the Interior and Rep. Raker and Rep. Hamilton.

> "[Mr. RAKER.] Now I wanted to suggest and to ask you if you do not believe it would be a wise thing in this bill, and in this connection, after having designated navigation and water-power development, that we should make irrigation as important as we do those two and should include the word "irrigation" in that connection, so

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there would be no possible doubt as to what the intention of Congress was in such legislation; and in order that we may get two developments, water power and irrigation, to their utmost. I would like to ask if you do not think it would be a good thing to so draft the bill that we would be sure to get all those uses?

Secretary LANE. I can not see now any objection to it, Judge. It seems to me in the granting of a power proposition you have got to take into consideration what is the best use to make of that water, and there should not be a development simply of power to the exclusion of irrigation.

* * *

Mr. HAMILTON. Is there any danger of irrigation being overlooked in that connection?

Mr. RAKER. It is my purpose and I believe it is the duty of the committee to so get it before the committee that it could not be overlooked.

Mr. HAMILTON. It can not be."

Id. at 455-56.

See also Congressman Raker's summation of the testimony before the committee:

"I have suggested to add in there [Section 10] 'and irrigation, and of other beneficial public uses.' Now, I asked particularly Mr. Merrill and every man that had been on the stand in regard to this provision, and they all say unanimously that those words are intended to cover irrigation and all other matters that may be used in connection with the project. So therefore, if there is water-power development connected with it, navigation or irrigation, it applies."

Id. at 615-16. See W. Walker & W. Cox, Jurisdiction of the Federal Power Commission over Non-Power Water Uses, 5 Land & Water L. Rev. 65, 70-75 (1970).

The Public Utilities Commission and the ratepayers argue that the case law to this date has established that the FPC's authority to consider various factors has not included non-consumptive uses. While many of the cases cited do direct the FPC to consider nonconsumptive uses such as recreation and fish conservation, e.g. Udall v. Federal Power Comm'n, 387 U.S.428 (1967), we find that none of those cases state that such non-consumptive uses are the only ones that may be considered by the

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FPC. We cannot conceive that with agricultural irrigation being such a large factor in both federal and private development of the arid lands of the West, a federal agency developing a "comprehensive" plan would be precluded from considering the effect of irrigation. Indeed the United States Supreme Court, while recognizing that hydroelectric power was the principal use to be regulated by the Federal Power Act stated:

> "The central purpose of the Federal Water Power Act was to provide for the comprehensive control over those uses of the Nation's water resources in which the Federal Government had a legitimate interest; these uses included navigation, irrigation, flood control, and, very prominently, hydroelectric power--uses which, while unregulated, might well be contradictory rather than harmonious." (emphasis added)

Federal Power Comm'n. v. Union Electric Co., 381 U.S. 90, 98 (1965). While that language might arguably be dicta, it supports the interpretation we have made of the legislative history and intent behind the Act. See also Chemehuevi Tribe of Indians v. Federal Power Comm'n, 420 U.S. 395, 408 (1975); Harris v. Central Nebraska Public Power & Irrigation Dist., 29 F.Supp. 425 (D.Neb. 1938).

Finally, we note that Section 10 of the Act specifically requires that "other beneficial public uses" be considered in the comprehensive plan. 16 U.S.C. § 803(a). At the time of the passage of the Act, the United States Supreme Court had long recognized that irrigation was a "public use", Clark v. Nash, 198 U.S. 361, 369-70 (1905); Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 160-61 (1896). See also, Id. Const. Art. 15, § 1 (providing in the original constitution, adopted in 1889, and continuing to the present, that irrigation is a public use). Hence we hold that the condition in the Hells Canyon licence subordinating Idaho Power's water rights to future upstream depletion was within the authority of the FPC.

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As indicated above, the trial court viewed the subordination language in Article 41 of the Hells Canyon licenses as subordinating all of Idaho Power's water rights on the entire Snake River watershed. We disagree and hold that the language of the subordination clause affects the operation of the three dams in the Hells Canyon project only and does not extend to the other dams on the river, and specifically does not subordinate the water rights of Idaho Power at Swan Falls.

The language of Article 41 provides:

> "The project shall be operated in such manner as will not conflict with the future depletion in flow of the waters of Snake River and its tributaries, or prevent or interfere with the future upstream diversion and use of such water above the backwater created by the project, for the irrigation of lands and other beneficial consumptive uses in the Snake River waterhead.(sic)." (emphasis added).

The license states that the proposed Brownlee, Oxbow, and Low Hells Canyon dams "for the purposes of this license shall be considered as units of one complete project." FPC Order issuing license, August 9, 1955, at 10. We deem therefore that when Article 41 requires "the project" to be operated in such a manner that it will not interfere with future upstream depletion, it refers to Brownlee, Oxbow and Low Hells Canyon dams and demonstrates no intent that all of Idaho Power's dams on the river be considered as "the project" subject to subordination. Further, the opinion and order of the FPC issuing the Hells Canyon dams licenses contain no mention of the Swan Falls dam or the subordination of Idaho Power's water rights in that dam, and we find therefore no intent to subordinate water rights at other projects.

We have considered and reject the argument of the Department of Water Resources and canal companies that permitting Swan Falls to receive its full water right allocation somehow

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allows Idaho Power to utilize those rights at Hells Canyon in violation of Article 41 of the Hells Canyon FPC license.

. . . Finally on this issue, we deem it questionable whether the FPC would have the authority to subordinate then-existing water rights, even assuming such had been the intent in the Hells Canyon licenses. Section 27 of the Federal Power Act, known as the "Savings Clause." provides that the Act does not intend to interfere with any vested right acquired under state water law. 16 U.S.C. § 821. See Federal Power Comm'n v. Niagara Mohawk Power Corp., 347 U.S. 239 (1954); Henry Ford & Son, Inc. v. Little Falls Fibre Co., 280 U.S. 369 (1930). Here Swan Falls water rights were vested, having been acquired in the early part of this century. C.f. Hidden Springs Trout Ranch v. Allred, 102 Idaho 623, 636 P.2d 745 (1981); Big Wood Canal Co. v. Chapman, 45 Idaho 380, 263 P. 45 (1927). We further note in this regard that Section 6 of the Federal Power Act states that licenses can be altered only after thirty days public notice. 16 U.S.C. § 799. Clearly Idaho Power possessed a valid license for the operation of Swan Falls. Nowhere in the record before us is there any indication that the public notices of the Federal Power Commission proclaim any intent to amend Idaho Power's Swan Falls license.

The district court, as noted above, held that Idaho Power had waived its right to compensation for its water rights at Swan Falls by accepting the subordination clause in the Hells Canyon license. Since we have concluded that Hells Canyon license subordination clause does not affect Swan Falls water rights, that portion of the district court decision is reversed.

II. THE SAVINGS CLAUSE

A number of subsidiary yet important issues have been raised which flow from the FPC licenses and in particular, the subordination clauses thereof. Those issues involve the interplay

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between state water law, the Federal Power act, and the provisions of the FPC licenses. The resolution of those issues focuses upon the "Savings Clause" of Section 27 of the Federal Power Act. Therein it is provided:

> "Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."

16 U.S.C. § 821.

The ratepayers and the Public Utilities Commission assert that Section 27 "saves" all Idaho water law; that Idaho water law forbids subordination; and that therefore the subordination clause in the Hells Canyon license is in conflict with Idaho water law and ineffective. We disagree. No case holding that subordination is prohibited by Idaho water law or the law of any state has been cited to us. Rather, the ratepayers and the Public Utilities Commission rely on Idaho's constitutional provision of priority in time being priority in right. Id. Const. Art. 15, § 3.

The record here makes it clear that Idaho Power voluntarily agreed to have the subordination clause inserted in the Hells Canyon licenses. We find nothing in the law of this state which precludes a person from voluntarily obtaining less than the full panoply of rights associated with the ownership of real property. Agreements not to assert ownership rights to their fullest are common in today's society, e.g. restrictive covenants and equitable servitudes. Whatever merits such an argument may have with regard to subordination clauses forced upon an unwilling appropriator by the FPC or the state, we need not decide. We hold only that a voluntary subordination agreement is not in violation of Idaho's water law, and therefore we find no conflict between our state water law and the language

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of the subordination clause inserted in the Hells Canyon licenses.

The record indicates that of the six state water licenses for flow rights at the Hells Canyon project, only two of those licenses contain a subordination clause. Ratepayers and the Public Utilities Commission assert therefore that the four state water licenses not containing such clauses somehow control and override the federal subordination clause contained in the FPC licenses. Again we disagree. However, neither do we agree with the assertion of the canal companies that the state water licenses are preempted by the federal license.

Authorization from the FPC is a threshold step for constructing a dam on navigable waters. United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940); Citizens Utilities Co. v. Prouty, 176 A.2d 751 (Vt. 1961), cert. denied, 369 U.S. 838 (1962). The Federal Power Act does preempt some state laws relating to the building of dams on navigable streams and particularly does it preempt those state laws which require a state license as a predicate for building a dam. First Iowa Hydro-Electric Coop. v. Federal Power Comm'n., 328 U.S. 152 (1946); State v. Idaho Power Co., 312 P.2d 583 (Ore. 1957); City of Tacoma v. Taxpayers of Tacoma, 262 P.2d 214 (Wash. 1953). However, state law regarding proprietary rights in water is expressly saved. Federal Power Comm'n v. Niagara Mohawk Power Corp., 347 U.S. 239 (1954); Henry Ford & Son, Inc. v. Little Falls Fibre Co., 280 U.S. 369 (1930); cf. California v. United States, 438 U.S. 645 (1978) (savings clause of Reclamation Act). Under Idaho law, a water license does not issue until after the diversion works are completed and the water is applied to a beneficial use, albeit an application for licensure can be made prior to actual construction. I.C. §§ 42-202 to 42-219; Big Wood Canal Co. v. Chapman, 45 Idaho 380, 405-06, 263 P. 45, 53-54 (1927). When the FPC licensed Idaho Power's

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Hells Canyon project, it was conditioned upon Idaho Power obtaining only such water rights as would not interfere with future upstream depletion. This insertion of that subordination clause in the FPC licenses had the consent, knowledge and support of Idaho's state officials. Hells Canyon Dam: Hearings On H.R. 5743 Before The Subcomm. on Irrigation and Reclamation of the House Comm. on Interior and Insular Affairs, 82d Cong., 2d Sess. 501 (1952) (statement of Gov. Jordan); Hells Canyon Project: Hearings on S. 1333 Before the Subcomm. on Irrigation and Reclamation of the Senate Comm. on Interior and Insular Affairs, 84th Cong., 1st Sess. 6 (1955) (statement of Gov. Smylie). There can be no doubt from this history that the officials of the State of Idaho intended and believed that Idaho Power's water rights at Hells Canyon were subordinated. No party asserts that the subordination language was omitted from some of the state water licenses because the state officials intended to override the federal subordination clause. Whether the subordination language was omitted from the state water licenses through administrative oversight or because the appropriate state officials felt its insertion unnecessary in light of the federal license language, we need not speculate. We hold only that when the FPC has authorized the obtention of only subordinated state water rights, and where, as here, the state and the licensee power company both intended the subordination of those water rights, failure to include a subordination clause in the state water licenses does not render those rights unsubordinated. Since we so hold, we need not reach the more delicate issues of federalism that might arise from an FPC authorization for one form of water rights at a licensed project, and the state, in the exercise of its authority, expressly authorizing a greater or lesser form of water right.

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During proceedings below, various parties argued that Idaho Power had abandoned or forfeited all or part of its water rights at Swan Falls. The district court held that those issues were rendered moot by its ruling that the subordination clause included the Swan Falls water rights. Since we have reversed that ruling of the district court, the cause must be remanded for consideration of, and findings of fact and conclusions of law on, the issues of abandonment and forfeiture of Idaho Power's water rights at Swan Falls. Although we are urged to make such a determination, we deem those issues to involve factual determinations inappropriate to this Court.

The elements of abandonment and forfeiture are set out in several recent decisions of this Court and need not be reiterated here. Jenkins v. State Department of Water Resources, ____ Idaho ____, ____ P.2d ____ (No. 13705) (1982); Sears v. Berryman, 101 Idaho 843, 623 P.2d 455 (1981); Gilbert v. Smith, 97 Idaho 735, 552 P.2d 1220 (1976).

It is also argued that the issues of abandonment and forfeiture are preempted by Article 21 of the FPC license issued for the operation of Swan Falls. That provision states:

> "Article 21. It is hereby understood and agreed that the Licensee, its ~~(his)~~ successors and assigns will, during the period of this license, retain the possession of all project property covered by this license as issued or as hereafter amended, including the project area, the project works, and all franchises, easements, water rights, and rights of occupancy and use; and that none of such properties valuable and serviceable to the project and to the development, transmission, and distribution of power therefrom will be voluntarily sold, transferred, abandoned, or otherwise disposed of without the approval of the Commission." (emphasis added)

In Idaho, "[i]f a water right has indeed been lost through abandonment or forfeiture, the right to use that water reverts to the state and is subject to further appropriation. [citations omitted]. . Other parties may then perfect a water right in those waters." Jenkins v. State Department of Water

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Resources, supra (slip. op. at 6) (1982). Under Section 27 of the Federal Power Act, 16 U.S.C. § 821, all state water law is preserved "relating to the control appropriation, use, or distribution of water." Idaho's state water law, allowing subsequent appropriators to perfect a water right in water that has been abandoned or forfeited clearly relates to the control, appropriation, use or distribution of water. Hence, we deem it follows that neither the Federal Power Act nor a license issued pursuant to that authority has overridden Idaho's law of abandonment or forfeiture of water rights. Cf. California v. United States, 438 U.S. 645 (1978). To what extent, if any, the Article 21 "retain possession" language may create a cause of action against the licensee or others, the complex questions of plaintiff's standing and other questions are not substantially presented here, and we doubt the authority of any state forum to adjudicate such an action.

III. EFFECT OF I.C. §§ 61-327 to 61-331

The PUC asserts that if Idaho Power has subordinated water rights used in the generation of electricity, it has violated I.C. §§ 61-327 and 61-328. I.C. § 61-327 provides generally that property in this state used in the generation or transmission of electricity shall not be transferred in any manner to out-of-state organizations, governmental entities, or any entity not subject to regulation by the PUC. I.C. § 61-328 provides that any transfer of such property must be approved by the PUC after public hearings. I.C. § 61-329 states that property transferred in violation of those sections shall escheat to the state and the attorney general must institute court proceedings to adjudicate such an escheat, and I.C. § 61-331 sets forth criminal penalties for violation of the preceding sections. The Public Utilities Commission concedes that if the Hells Canyon water rights were subordinated at the time of acquisition, the

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above statutes would not apply. Here we have held that Idaho Power acquired only subordinated water rights at the Hells Canyon complex, therefore, there has been no transfer, and those statutes do not apply. We have held that the Swan Falls water rights were not subordinated, but we have also held that the cause must be remanded for consideration of whether Idaho Power has abandoned or forfeited any of its water rights at Swan Falls. Since the argument of the Public Utilities Commission can be applied to the question of abandonment and forfeiture, we turn to the consideration of the applicability of those statutes to abandonment or forfeiture of a water right. See I.C. § 1-205; Tibbs v. City of Sandpoint, 100 Idaho 667, 670; 603 P.2d 1001 (1979); County of Bingham v. Woodin, 6 Idaho 284, 289, 55 P.662 (1898).

While we agree that the language of the statute I.C. § 61-327 to 61-331 is very broad in forbidding any transfer "directly or indirectly, in any manner whatsoever" (I.C. § 61-328), nevertheless, we hold they are inapplicable to abandonment or forfeiture of a water right. If those sections were applied to abandonment or forfeiture of a water right used to generate electricity, the attorney general would be required to file an action to have such an escheat decreed, and thereafter there would be a court ordered sale of the property. Such a scheme is totally inconsistent with Idaho water law, which provides that if a water right is abandoned or forfeited it reverts to the state, following which third parties may perfect an interest therein. I.C. § 42-222(2); Jenkins v. State Department of Water Resources, ____ Idaho _____, _____P.2d ____, (No. 13705) (1982); Sears v. Berryman, 101 Idaho 843, 623 P.2d 455 (1981); Gilbert v. Smith, 97 Idaho 735, 552 P.2d 1220 (1976). Absent a clear legislative mandate, we will not infer such an intent from a provision of a statute relating to Public Utility Regulation.

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IV. THE STATE WATER PLAN

It is next argued by Idaho Power that the State Water Plan effectuates a taking of its Swan Falls water rights without payment of just compensation. That assertion was rejected by the trial court, and we agree with that court's conclusion. The State Water Plan was enacted by the legislature in 1978 and codified at I.C. § 42-1736A (1981 Supp.). That plan established as a beneficial use minimum stream flows at various points along the Snake River. A flow of 3300 cfs on the Snake River at the Murphy gaging station was established. I.C. § 42-1736A(2). The Murphy gage is just downstream from the Swan Falls dam and power plant. Idaho Power argues that the river may thereby be depleted to 3300 cfs at the Murphy gage in derogation of its water rights of 8400 cfs at Swan Falls.

We hold that the State Water Plan does not mandate a taking of Swan Falls water rights. There is no requirement contained therein that the Snake River be depleted to 3300 cfs at Swan Falls, but rather the plan only prohibits a reduction below 3300 cfs. To that extent, if anything, it protects the Swan Falls rights to the extent of 3300 cfs. I.C. § 42-1736A recognizes House Concurrent Resolution No. 48 (44th Leg., 2d Sess. 1978) as the guide for the interpretation for the state water plan. Policy No. 1 of that Resolution requires the protection of all existing water rights vested under state law. Since we have held that Idaho Power's water rights at Swan Falls are vested, the State Water Plan is not to be construed as affecting those water rights.

V. CONCLUSION

In summary, we hold that the Federal Power Commission lawfully acted within its authority in issuing the license for Hells Canyon project by the insertion of the subordination clause therein and such subordination clause is a valid condition of the

BRS013268

license. However, we hold that that subordination clause applies only to the Hells Canyon project water rights, and not to those at Swan Falls or any other dams upriver. We hold that by accepting the subordination clause for the Hells Canyon project, Idaho Power has not waived its compensation for any taking of its Swan Falls water rights. Having differed in the latter two conclusions from the decision of the district court, we must remand this cause for further proceedings on the issues of abandonment and forfeiture, since those matters were raised below and not there decided. With respect to the statutes requiring Public Utilities Commission approval of transfers of utility property, we hold that the statutes do not apply to water rights subordinated when acquired, nor do they apply to water rights which have been abandoned or forfeited. Finally, we hold that the State Water Plan does not take Idaho Power's water rights at Swan Falls without payment of compensation. We have not specifically dealt with a number of arguments raised by the parties which we deem to have been subsumed by our discussion of the issues, and therefore, we intimate no views on the validity of those arguments.

The judgment of the district court is affirmed in part, reversed in part, and remanded. Each party to bear its own costs.

BAKES, C.J., McFADDEN, BISTLINE and DONALDSON, JJ., concur.

(McFADDEN, J., registered his vote prior to his retirement on August 31, 1982.)

BRS013269

Exhibit 7

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SUN VALLEY, IDAHO 83353
TELEPHONE (208) 726-4491

May 3, 1982

RECEIVED
MAY 4 1982
Department of Water Resources

Honorable Reed Hansen
Chairman
Idaho Water Resource Board
Statehouse
Boise, Idaho 83720

Re: Milner Power Project - State of Idaho

Dear Reed:

On past occasions we have generally discussed the Milner Power Project with members of the Idaho Water Resource Board. The purpose of this letter is to ask the Board to officially consider and adopt a position in regard to the project. First, let me give you the background.

In 1977, Steve Allred came to the Twin Falls Canal Company and advised that a recent study disclosed that the Milner Dam was a potential hydropower site. The Twin Falls Canal Company and the North Side Canal Company jointly own the Milner Dam. Based upon Mr. Allred's recommendation, and fueled by some rumors that were then being circulated about the interest of others, the Companies jointly filed an application for 12,000 c/f/s of water for the Milner Power development and Permit No. 01-7011 was issued by the Department with no conditions attached . . . in other words, no subordination of power to irrigation was imposed as a condition of the issued permit. As it presently stands, the permit is in good standing and has been extended. The permit would allow the construction of a power facility with the use of the water at several different sites. The Federal Energy Regulatory Commission issued a preliminary permit to the Twin Falls Canal Company and the North Side Canal Company and they are now proceeding to study and select the best site so as to construct a facility which will meet FERC's criteria as the best development of the water resource.

Since most of the water at Milner is diverted for irrigation April through October, the Milner project would essentially generate only during the winter time or when flows above the irrigation demand are available.

MICROFILMED

As a part of the saga of obtaining a water permit and the FERC permit, certain committments have been made. Studies have been conducted including the by-pass study by the Idaho Fish and Game. Real properties have been purchased. Passage of a Congressional Bill has been obtained

During the last few years, the case of Idaho Power company vs. State of Idaho has been pending. As you know, the District Court decided that the subordinations which were imposed in the early 1950s by the then Federal Power Commission and the then State Department of Reclamation on Idaho Power's dams below Milner were in fact valid and those projects were subject to all future upstream depletions for irrigation purposes. The District Court's decision also suggested that the wintertime diversion of water to offstream storage for eventual irrigation use was within the interpretation of the subordinations.

The Milner Power project proposal also became more complicated by the State Supreme Court's decision in the Canyon View case which would allow entities to condemn use in common. It was also further complicated by the filing of a permit by the Idaho Water Resource Board (01-7021) which contemplated the winter time diversion of all of the annual average water flows past Milner to offstream storage for the irrigation of some 327,000 acres of the Bruneau desert.

Presently, the Twin Falls Canal Company and the North Side Canal Company are working with Idaho Power Company and their engineers to comply with the provisions of the preliminary power permit of FERC and be in a position to submit an application for license in 1983. If in 1983 such a license application is submitted to FERC, and the Idaho Water Resource Board or the State of Idaho would then appear in those proceedings asking subordination of the Milner water permit to future upstream diversions for irrigation purposes, it is likely that the Milner Power Project could not be financed. While we recognize that there have been some changes in emphasis as to the priority for development of the water resources of our State, the possibility still exists that the Board, or the Governor or some other official state agency would request subordination of this power permit by the Federal Energy Regulatory Commission.

If my clients are to proceed to the final stages of the preparation of a FERC license application, perhaps as

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much as a half million dollars will have to be expended in that effort. My clients are concerned that that money would possibly be wasted if the Idaho Water Resource Board or some other official state agency was successful in obtaining a subordination of the water right as a part of FERC's licensing proceedings for the reason that probably no financing could thereafter be obtained for the construction of the project, or the project would not have the ability to "pay-out".

I have been asked by my clients to officially request that the Idaho Water Resource Board consider the adoption of an official position in support of the Milner Project in which the Board would agree to not assert a subordination of the power permit for at least the term of the original financing. If this matter could be considered and decided at this time, less exposure is involved from the standpoint of my clients spending unnecessary dollars for a project that cannot be financed.

I request the opportunity to appear on your May or June meeting agenda in Boise. I am sending this letter in advance with a copy to Ken Dunn and upon your request he has agreed to circulate a copy to all of the Board members and staff personnel so that we might better discuss the matter at your meeting.

Do not hesitate to contact me in any regard if you want me to supply more specific information or answer questions prior to the meeting.

Respectfully submitted,

John A. Rosholt

JOHN A. ROSHOLT
Attorney for Twin Falls
Canal Company and North Side
Canal Company

JAR:bs

MICROFILMED

Exhibit 8

July 6, 1982

MEMORANDUM

To: Norm Young
Wayne Haas

FROM: Phil Rassier

RE: Milner Power Project

This memorandum is in response to your request for comments on the May 3, 1982 letter from John Rosholt to the Chairman of the Water Board concerning the Milner Power Project proposed by the Twin Falls Canal Company and the North Side Canal Company.

Mr. Rosholt requests that the Board consider the adoption of an official position in which the Board would (1) support the Milner Project and (2) agree to not assert a subordination of the power permit to future upstream diversions for irrigation purposes for at least the term of the original financing.

Mr. Rosholt's concern is that if the Milner power right were to be subordinated to future upstream diversions for irrigation the project could not likely be financed. His clients would then have wasted perhaps as much as a half million dollars which will have to be spent to proceed to the final stages of applying for a FERC license.

Water right permit 01-7011 for the project was issued June 29, 1977 with a priority of March 30, 1977. The permit has not been conditioned so as to be subordinated to future upstream diversions for irrigation purposes. Authority to condition the water right permit on behalf of the State rests with the Department of Water Resources. FERC could include a subordination condition in the project license, but it would have no practical effect on the

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amount of water available to the project unless the Department were to recognize the subordination and grant a junior upstream irrigation right which could affect the project.

As indicated in Mr. Rosholt's letter, the Water Board has reason to be interested in the Milner power project because of the Board's junior application for water right permit 01-7021 for winter time diversion at Milner to off-stream storage for the Bruneau irrigation project. It would clearly appear that, as presently proposed, the Milner power project and the Board's offstream storage proposal are not compatible.

It is noted that the Board's filing when made in 1978 was heavily protested. A principal reason for the protests was the fear that the Board's project would effectively terminate any further development in the Upper Snake River Valley. It would appear that this feared result could occur as well from an unsubordinated power right at Milner as it could from the Board's proposal to divert water to offstream storage for irrigation. This suggests that the Board might seek some public imput before taking an official position on the subordination issue.

Well I would not feel comfortable in advising a particular action for the Board to follow in this matter, it does appear that some suitable middle ground position could be developed.

Mr. Rosholt appears to have been careful in his letter not to state definitely that financing could not be obtained if the water right is sub-ordinated. Perhaps it would be useful to determine more precisely under what circumstances financing could and could not be obtained. For example, would

MICROFILMED

it be possible to subordinate a portion, but not all, of the water right and still obtain financing? Could the subordination, if imposed, take effect in whole or in part at some future date and still satisfy the project's financing needs? Could a subordianation provision be conditioned so that a new irrigation project which interferes with the power right would have to assume part of the financial burden of the power project?

It is presumed that the Milner power project is a good project and is deserving of Board support. However, it would appear somewhat inconsistent for the Board to take an official position supporting a project which is incompatible with the Board's pending application for offstream irrigation storage.

Phil

Phil Rassier

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Exhibit 9

State of Idaho
DEPARTMENT OF WATER RESOURCES
STATE OFFICE, 450 W. State Street, Boise, Idaho

CECIL D. ANDRUS
Governor

R. KEITH HIGGINSON
Director

Mailing address:
Statehouse
Boise, Idaho 83720
(208) 334-4440

November 18, 1987

John Rosholt
Nelson, Rosholt, Robertson, Tolman & Tucker
P.O. Box 1906
Twin Falls, ID 83303-1906

RE: PERMIT NO. 01-7011 - REQUEST FOR EXTENSION OF TIME

Dear John:

The department apologizes for the delay in response to your May 8, 1987 letter.

The department will use the amended language which you suggested in your letter for the subordination condition to be placed as a condition of approval on the extension request, since the approval being sought is in connection with a permit rather than an application for permit. The condition will appear as follows:

> "The rights for the use of water acquired under this permit shall be junior and subordinate to all other rights for the consumptive beneficial use of water, other than hydropower and groundwater recharge within the Snake River basin of the state of Idaho that are initiated later in time than the priority of this permit and shall not give rise to any right or claim against any future rights for the consumptive beneficial use of water, other than hydropower and groundwater recharge within the Snake River basin of the state of Idaho initiated later in time than the priority of this permit".

From a review of the file, I note that on March 31, 1987, the department granted a 5 year extension of time based on due diligence as authorized by Section 42-204 paragraph 5, Idaho Code.

I also note that the pending request for extension of time requested approximately 6 years and 7 months based on delays by FERC. The delay attributable to FERC which the department can grant is the time from which the application for license was submitted to FERC (July 27, 1984) until FERC rules on the application for license. Since department files

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FEB 24 1988

do not show that FERC has yet ruled on the application, an extension can be granted based upon FERC delay from July 27, 1984 until October 31, 1987, a period of approximately 3 years and 3 months. Additional time, however, may be requested for FERC delay on the license application subsequent to October 31, 1987.

The department will expedit the approval of the request for extension of time.

Sincerely,

R. KEITH HIGGINSON
Director

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FEB 24 1988

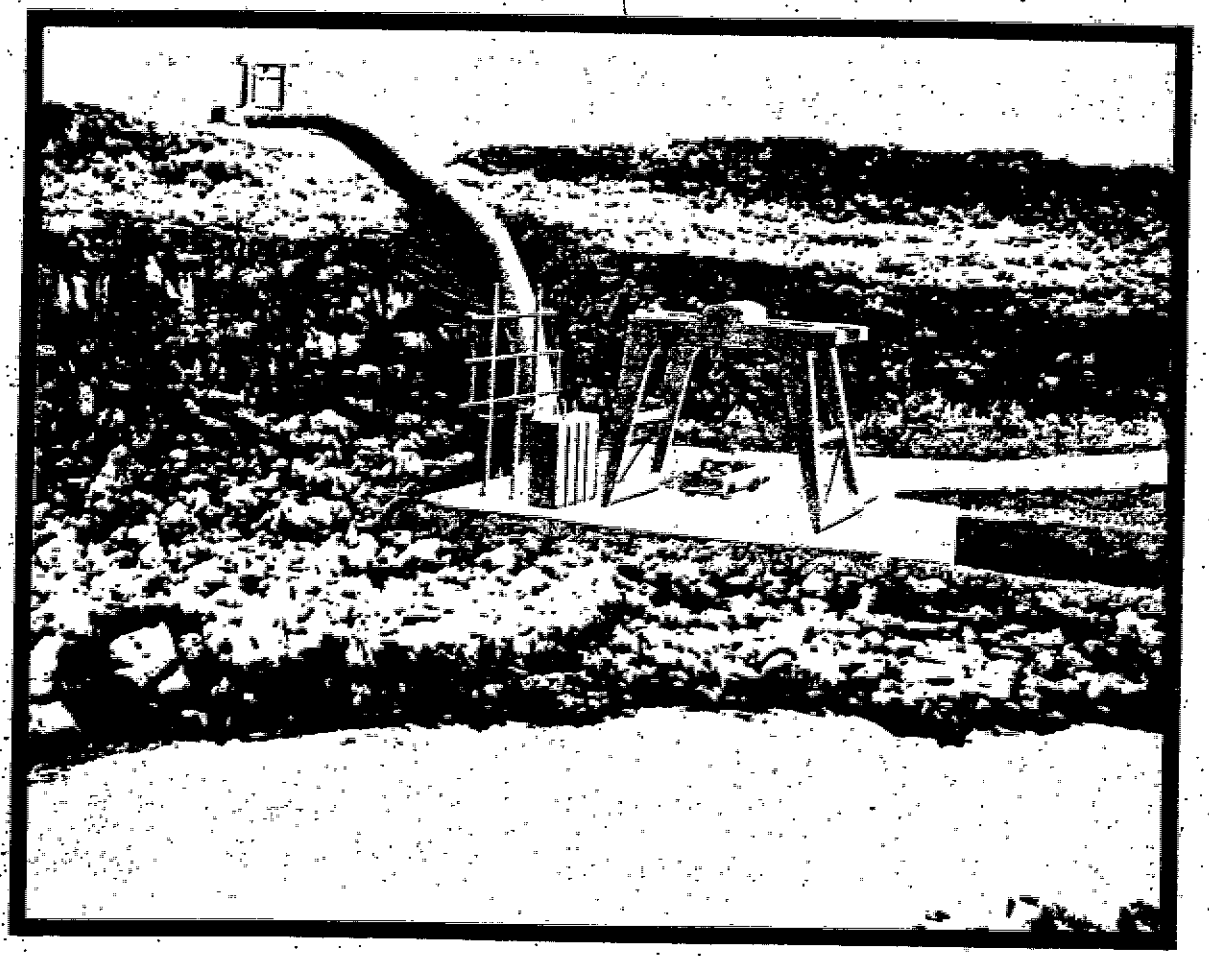
Exhibit 10

File Copy

BEFORE THE FEDERAL ENERGY REGULATORY COMMISSION

Application for Initial License: Project No. 2899-002

MILNER
HYDROELECTRIC PROJECT



TWIN FALLS CANAL COMPANY
NORTH SIDE CANAL COMPANY, LTD.

JULY 1984

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UNITED STATES OF AMERICA
BEFORE THE FEDERAL ENERGY REGULATORY COMMISSION

APPLICATION FOR LICENSE FOR MAJOR PROJECT - EXISTING DAM

MILNER
PROJECT NUMBER 2899-002

(1) The Twin Falls Canal Company and the North Side Canal Company, Ltd, apply to the Federal Energy Regulatory Commission for a license for the Milner water power project, as described in the attached exhibits. Applicants are permittees under the preliminary permit issued for Milner Project No 2899-002.

(2) The location of the proposed project is:

o State	:	Idaho
o Counties	:	Twin Falls, Cassia, Jerome & Minidoka
o Township or Nearby Town	:	The project is approximately 11 miles downstream from the City of Burley, Idaho
o Stream or Other Body of Water	:	Snake River

(3) The exact name and business address of the applicants are:

Twin Falls Canal Company
P O Box 326
Twin Falls, Idaho 83301

North Side Canal Company, Ltd
921 North Lincoln Avenue
Jerome, Idaho 83338

The exact name and business address of each person authorized to act as agent for the applicants in this application are:

John A Rosholt, Esq
P O Box 1906
Twin Falls, Idaho 83303-1906

(4) The applicants are corporations organized under the laws of the State of Idaho and authorized to do business in Idaho.

(5)(i) The statutory or regulatory requirements of the State of Idaho that affect the project as proposed, with respect to bed and banks and to the appropriation, diversion and use of water for power purposes, and with respect to the right to engage in the business of developing, transmitting and distributing power and in any other business necessary to accomplish the purposes of the license under the Federal Power Act are:

No special laws with respect to bed and banks are applicable to the project.

Reference is made to the general laws of the State of Idaho relating to the appropriation of waters and attainment of permits and licenses as contained in Idaho Code Title 42, Chapters 2, 4 and 17. An application to appropriate waters of the State of Idaho for power purposes is required.

No special laws with respect to the right to engage in the business of developing, transmitting and distributing power are applicable to the applicants.

(ii) The steps which the applicants have taken or plan to take to comply with each of the laws cited above are:

Applicants have filed an application with the Idaho Department of Water Resources of the State of Idaho to appropriate 12,000 cubic feet per second of waters of the Snake River for power purposes. This application is designated as Permit No 01-7011.

The following exhibits are hereby made a part of this application:

- Exhibit A - Project Description
- Exhibit B - Project Operation and Resource Utilization

IPCM001686

- Exhibit C - Construction History and Proposed Construction Schedule
- Exhibit D - Costs and Financing
- Exhibit E - Environmental Report
- Exhibit F - Drawings of the Project Works
- Exhibit G - Map of the Project

(6) Applicants are the owners and operators of the existing project facilities.

IN WITNESS WHEREOF, applicant Twin Falls Canal Company has caused its name to be hereunto signed by Maurice Klass, its President, and attested by Robert Reichert, its Secretary, and applicant North Side Canal Company has caused its name to be hereunto signed by C J Marshall, its President, and attested by Bernice Johnson, its Secretary, all thereunto duly authorized this 20th day of July, 1984.

TWIN FALLS CANAL COMPANY

By _____
President

ATTEST:

By _____
Secretary

NORTH SIDE CANAL COMPANY, LTD

By _____
President

ATTEST:

By _____
Secretary

IPCM001687

EXHIBIT A

MILNER PROJECT NO. 2899-002

EXHIBIT A

PROJECT DESCRIPTION

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MILNER PROJECT NO. 2899-002

EXHIBIT A

PROJECT DESCRIPTION

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IPCM001690

MILNER PROJECT NO. 2899-002

EXHIBIT A

PROJECT OESCRIPTION

Introduction

As shown on Figure A-1 the project is located in Idaho on the Snake River about 130 miles southeast of Boise and between the town of Burley and the city of Twin Falls. The project facilities extend from the existing Twin Falls Main Canal Headworks in Milner Reservoir about 1.3 miles along the canal to the powerhouse site where most of the new facilities are located.

Milner Oam was constructed in 1905 to provide irrigation storage and diversions. The dam is owned jointly by the Twin Falls Canal Company, the North Side Canal Company and the American Falls Reservoir Oistrict No. 2.

Three canals with their headworks adjacent to the dam are fed from Milner Lake. The Twin Falls Main Canal (or South Side Main Canal) constructed in 1905 will be utilized for the project. Its headworks is located near the left (south) abutment of the dam and it flows west near the Snake River for about 12 miles.

The proposed Milner Hydroelectric Project will use Snake River flows that presently pass through the Milner Oam Spillway. Such flows occur during the non-irrigation season and at times during the irrigation season when there are flows in excess of irrigation diversions pursuant to prior rights. The water will be conveyed in an enlarged Twin Falls Canal (forebay) and diverted to an intake structure, penstock and powerhouse. Head will be obtained through utilization of the difference in elevation between the Twin Falls

IPCM001691

GENERAL LOCATION MAP

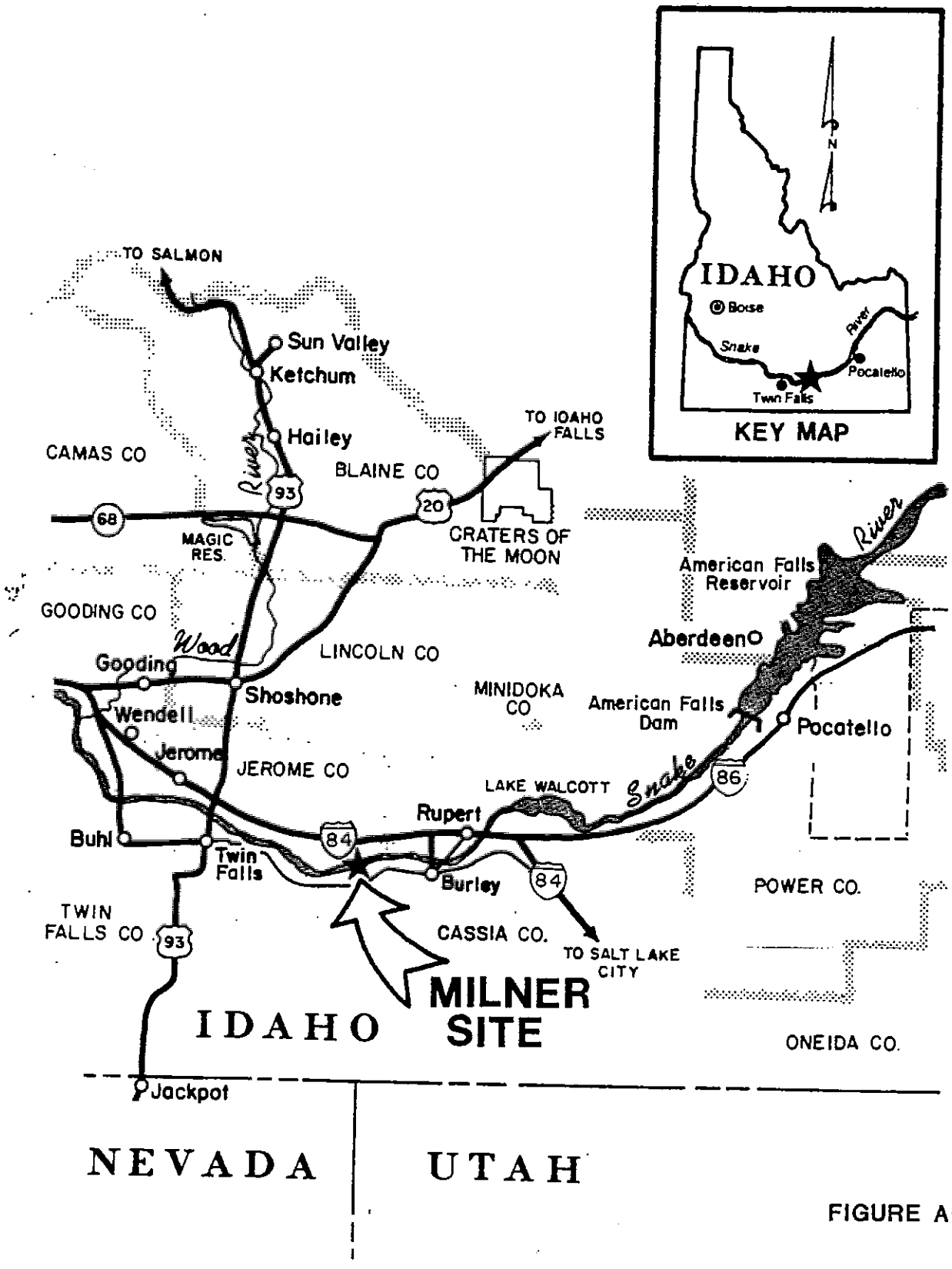


FIGURE A-1

Canal and the Snake River. Other facilities required for the project include modifications to the existing headworks, canal and bridge and a new wasteway, control structure, tailrace channel, access road and transmission line.

I. PHYSICAL COMPOSITION OF FACILITIES

The physical composition of existing and proposed facilities are described below and depicted on the drawings in Exhibit F of this Application.

1.1 Existing Facilities

1.1.1 Existing Milner Dam and Spillways

The site for Milner Dam consists of three channels in the river canyon separated by two islands. The north channel normally carried the main flow of the river. The south channel carried water only during extreme floods. The middle channel was dry except during periods of high water.

The three Milner Dam embankments are constructed with a trapezoidal-shaped rockfill section forming the downstream portion of the embankments. Placed directly against the upstream slope of this rockfill section is a triangular shaped earthfill zone. A vertical wood core was provided in the rockfill.

The upstream face of each embankment was built at a 4:1 (horizontal:vertical) slope. The upstream zone is built of non-plastic sandy silt or silty sand placed directly against the rockfill. Riprap was placed on the face of the upstream shell at and above the elevation of the gated spillway crest.

The dam has a gated spillway which is used to release water from the reservoir to the river downstream and to pass floodflows. In addition, there is an ungated emergency overflow spillway which would

IPCM001693

Exhibit 11

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Deputy Attorney General
Chief, Natural Resources Division

PHILLIP J. RASSIER
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Boise, Idaho 83720
Telephone: (208) 334-4448

UNITED STATES OF AMERICA

FEDERAL ENERGY REGULATORY COMMISSION

In the Matter of Application for Major License by Twin Falls Canal Company and North Side Canal Company	)	Project No. 2899-003
	)	MOTION TO INTERVENE OF IDAHO DEPARTMENT OF WATER RESOURCES

TO: Kenneth F. Plumb, Secretary
Federal Energy Regulatory Commission

The Idaho Department of Water Resources, by and through its undersigned counsel, Phillip J. Rassier, Deputy Attorney General, respectfully moves the Federal Energy Regulatory Commission for an order permitting ~~the Department~~ to intervene as a party for all purposes in the above referenced project proceeding pursuant to Rule 214, 18 C.F.R. § 385.214.

BRSM006802

Statement of Department's Interest and Grounds for Intervention

I.

The Idaho Department of Water Resources (Department) is a duly established executive department of the State of Idaho. Idaho Code §42-1701 (1977); Idaho Code §67-2402 (1980). The names and addresses of persons designated for service of documents in connection with this motion and all further proceedings are as follows:

Phillip J. Rassier
Deputy Attorney General
Idaho Department of Water Resources
450 West State Street
Boise, Idaho 83720

II.

The Department is that agency in state government designated to supervise the appropriation of the waters of the state and allotment of waters to those persons diverting the same for beneficial purposes. Idaho Code §§42-101, 42-1701, 42-1805 (1977 and Supp. 1985). The director of the department is authorized to represent the state in all matters pertaining to the appropriation of water in the State of Idaho. Idaho Code §42-1701, 42-1805 (1977 and Supp. 1985).

III.

Twin Falls Canal Company and North Side Canal Company filed an application for Major License with the

BRSM006803

Commission for the Milner Project No. 2899-003 on the Snake River in Twin Falls, Cassia, Jerome and Minidoka Counties, Idaho, near the town of Burley on lands managed by the U.S. Bureau of Reclamation.

IV.

The Department's participation in the Commission proceeding on the Milner Project No. 2899-003 is in the public interest because the Applicants and the Commission need to know the policies of the State of Idaho regarding the proposed hydroelectric development at the Milner Project site.

Position of Department

V.

The Department's position is that any license issued by the Commission to the Twin Falls Canal Company and North Side Canal Company should be subordinated to upstream depletionary uses. Specifically, the Department requests the Commission to include the following provision in any license issued for the proposed Milner Hydroelectric Project:

> The Project shall be operated in such manner as will not conflict with the future depletion and flow of the waters of the Snake River and its tributaries, or prevent or interfere with the future upstream diversion and use of such water above the back water created by the project, as needed for upstream development in the public interest, or give rise to any right or claim against any future rights for the use

BRSM006804

of water, other than hydropower, within the State of Idaho initiated later in time than the priority for any rights to the use of water acquired for the project.

Basis For Department's Position

VI.

The Constitution of the State of Idaho provides that the waters of the state are subject to the regulation and control of the state. Idaho Cost. art. 15, §§ 1, 3.

VII.

The Constitution of the State of Idaho provides that the Idaho Water Resource Board shall have the power to formulate and implement a state water plan. Idaho Const. art. 15, § 7.

VIII.

The Idaho Water Resource Board has recently amended the state water plan for the reach of the Snake River where the proposed Milner Project will be located which imposes new restrictions on water use. See Exhibit A, which is attached hereto and is incorporated herein by reference. The amended state water plan provides a comprehensive plan for the development of the water resources of the State of Idaho.

IX.

The State of Idaho has enacted legislation which further implements the state's policy of subordinating hydropower water rights to upstream consumptive uses. Idaho

BRSM006805

Code § 42-203B (Supp. 1985).

X.

The Snake River hydrologic system is the major source of water for the southern portion of Idaho and proper allocation of its water is essential to the overall development of this area.

XI.

If the license is issued without a condition subordinating the operation of the Project to future upstream depletionary uses, there may be a waste of resources because the proposed Milner project may not be in compliance with the comprehensive development requirements of the Federal Power Act and the comprehensive state water plan.

XII.

Because the state water plan establishes a zero minimum flow at the Milner gaging station, it is important that the Milner Project be subordinatd to upstream depletionary uses in order to allow for some new water uses above Milner.

XIII.

The Commission has in the past issued licenses for major hydroelectric projects on the Snake River which contain conditions subordinating the operation of the project to future upstream depletionary uses. In the Matter of Idaho Power Company, 14 F.P.C. 55 (1955) (Order Issuing

BRSM006806

License for Projects Nos. 1971, 2132 and 2133, Brownlee, Oxbow and Lower Hells Canyon).

Prayer For Relief

For the reasons given above, the Department respectfully requests as follows:

1. The Idaho Department of Water Resources' Motion for Intervention be granted for all purposes.
2. A copy of all pleadings filed with the Commission in this matter and a copy of all progress reports or other documents that the Applicants file with the Commission regarding this project be sent to the Idaho Department of Water Resources.
3. Any license issued by the Commission for the Twin Falls Canal Company and North Side Canal Company for the Milner Project include a provision subordinating the operation of the project to upstream depletionary uses.
4. For such other and further relief as the Commission may deem just and proper.

BRSM006807

DATED this 23rd day of September, 1985.

JIM JONES
Attorney General
State of Idaho

PHILLIP J. RASSIER
Deputy Attorney General
Idaho Department of
Water Resources

CERTIFICATE OF MAILING

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary for this proceeding which includes the following:

Fred E. Springer, Director
Division of Project Management Branch
Office of Hydropower Licensing
Federal Energy Regulatory Commission
Room 208 RB
825 N. Capitol Street, N.E.
Washington, D.C. 20426

John Rosholt, Esq.
P.O. Box 1906
Twin Falls, Idaho 83303-1906

DATED at Boise, Idaho, this 23rd day of September, 1985.

PHILLIP J. RASSIER
Deputy Attorney General
Idaho Department of Water
Resources
Statehouse
Boise, ID 83720
(208) 334-4448

BRSM006808

EXHIBIT A

BEFORE THE IDAHO WATER RESOURCE BOARD

IN THE MATTER OF)
POLICY 32 OF THE)
STATE WATER PLAN)
)

A RESOLUTION

WHEREAS, pursuant to Chapter 17, Title 42, Idaho Code, the Idaho Water Resource Board (Board) has the power and duty to adopt a comprehensive State Water Plan; and,

WHEREAS, portions of the Snake River Water Rights Agreement (Agreement) entered into by the Governor, the Attorney General, and the Idaho Power Company on October 25, 1984 are not in accord with the State Water Plan; and,

WHEREAS, the Board has conducted 12 formal hearings in affected areas of the state on proposed changes to Policy 32 of the State Water Plan;

NOW, THEREFORE, BE IT RESOLVED that, the Idaho Water Resource Board under its authority to establish water policy amends Policy 32 of the State Water Plan to read as follows:

Policy 32 - Snake River Basin

It is the policy of Idaho that the ground water and surface water of the basin be managed to meet or exceed a minimum average daily flow of zero measured at the Milner gaging station, 3900 cfs from April 1 to October 31 and 5600 cfs from November 1 to March 31 measured at the Murphy gaging station, and 4750 cfs measured at the Weiser gaging station. A minimum average daily flow of 5,000 cfs at Johnson's Bar shall be maintained and an average daily flow of 13,000 cfs shall be maintained at Lime Point (river mile 172) a minimum of 95 percent of the time. Lower flows may be permitted at Lime Point only during the months of July, August, and September.

Waters not held in trust by the State in accordance with Policy 32A shall be allocated according to the criteria established by Idaho Code 42-203A.

ATTACHMENT NO. 2 TO MINUTES OF 2-85 MEETING OF WATER RESOURCE BOARD, March 1, 1985

The minimum flows established for the Snake River at the Murphy and Weiser gaging stations are management constraints; they further insure that minimum flow levels of Snake River water will be available for hydropower, fish, wildlife, and recreational purposes. The establishment of a zero minimum flow at the Milner gaging station allows for existing uses to be continued and for some new uses above Milner. The zero flow established at Milner means that river flows downstream from that point to Swan Falls Dam may consist almost entirely of ground-water discharge during portions of low-water years. The Snake River Plain aquifer which provides this water must therefore be managed as an integral part of the river system.

The minimum flows established for Johnson's Bar and Lime Point are contained in the original Federal Power Commission license for the Hells Canyon hydropower complex. By adopting these flows, the Idaho Water Resource Board recognizes the importance of minimum flows to downstream uses and makes their maintenance a matter of state water policy. Article 43 of the power license provides that:

> "The project shall be operated in the interest of navigation to maintain 13,000 cfs flow in the Snake River at Lime Point (river mile 172) a minimum of 95 percent of the time, when determined by the Chief of Engineers to be necessary for navigation. Regulated flows of less than 13,000 cfs will be limited to the months of July, August, and September, during which time operation of the project would be in the best interest of power and navigation, as mutually agreed to by the Licensee and the Corps of Engineers. The minimum flow during periods of low flow or normal minimum plant operations will be 5,000 cfs at Johnson's Bar . . . . "

Snake River flows above the hydropower right at any Idaho Power facility are considered unappropriated and therefore are not held in trust by the state. This distinction is further addressed in Policy 32A.

Policy 32A - Water Held in Trust by the State

It is the policy of Idaho that water held in trust by the state pursuant to Idaho Code 42-203B be reallocated to new uses in accordance with the criteria established by Idaho Code 42-203A and 42-203C.

The agreement between the state of Idaho and Idaho Power Company dated October 25, 1984 provides that Idaho Power's

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claimed water right of 8400 cfs at the Swan Falls dam may be reduced to 3900 cfs. The claimed water right of 8400 cfs is deemed appropriated and the amount above the minimum flow established in Policy 32 up to the 8400 cfs is held in trust by the state. The agreement further provides that Idaho Power's claimed water rights at facilities upstream from Swan Falls shall be considered satisfied when the company receives the minimum flow specified in Policy 32 at the Murphy gaging station. The 8400 cfs claim of the power company has not historically been available during summer months.

The 8400 cfs claimed right is reduced by the agreement to that flow available after satisfying all applications or claims that demonstrate water was beneficially used prior to October 1, 1984 even if such uses would violate the minimum flows established in Policy 32. Any remaining water above these minimum flows may be reallocated to new uses by the state providing such use satisfies existing Idaho law plus criteria the Legislature is requested by the agreement to establish as Idaho Code 42-203C. These additional criteria supplement Policy 1 of the Water Plan which urges that conformance with the State Water Plan be considered evidence of the public interest. The Idaho Water Resource Board recognizes that the specific criteria for defining public interest established by Idaho Code 42-203C are to be used in addition to the criteria set forth in Policy 1 for the reallocation of of hydropower rights.

Policy 32B - Domestic, Commercial, Municipal and Industrial (DCMI)

It is the policy of Idaho that 150 cfs of water for consumptive purposes held in trust by the state pursuant to Policy 32A be reallocated to meet future DCMI uses in accordance with state law.

While most DCMI uses are nonconsumptive or only partially consumptive, future growth in Idaho's population and commercial and industrial expansion will require an assured supply of water.

A continuous flow of 150 cfs provides approximately 108,600 acre-feet of water per year. This volume of water is assigned to consumptive uses within the basin for domestic, commercial, municipal, and other industrial purposes. Industrial purposes include processing, manufacturing, research and development, and cooling.

Adequate records should be kept and reviewed so that this reallocation can be modified as necessary. Increases in the

DCMI allocation, if necessary, will reduce the amount of water available for agricultural uses. The allocation will be reviewed as part of every Water Plan update.

Policy 32C - Agriculture

It is the policy of Idaho that appropriated water held in trust by the state pursuant to Policy 32A, less the amount of water necessary to provide for present and future DCMI uses as set forth in Policy 32B, shall be available for reallocation to meet new and supplemental irrigation requirements which conform to Idaho Code 42-203A, 203B, 203C, and 203D.

The policy allows for new and supplemental agricultural development through the reallocation of water held in trust by the state. The 1982 State Water Plan allocated water for a minimum level of new irrigation development of 850,000 acres plus supplemental water for 225,000 acres by the year 2020 over that which existed in 1975. This policy rescinds the 1982 allocations since there are no acres specified in that the type, location, and amount of use is unknown as is the effect of the evaluation called for in Policy 32A.

During the 8 year period from 1975 to 1983, about 140,000 acres of new development occurred within the basin. While the amount of new acreage varied significantly from year to year, the average was approximately 17,500 acres. Data are not available to estimate the number of acres that received supplemental water during this period. Idaho Code Section 42-203C limits the rate of new development in the basin above Murphy gaging station to 80,000 acres in any four year period. Therefore, the maximum development to the year 2020 above Murphy gaging station assuming no water supply constraint is 700,000 acres. Criteria placed on the reallocation of hydropower rights, limits on the rate of new development, plus the requirement that approval of new storage projects that divert water between November 1 and April 1 from the Snake River between Milner Dam and Murphy gaging station must mitigate the impact of diversions on hydropower generation (Policy 32I), will undoubtedly limit development to less then 700,000 acres.

Policy 32D - Hydropower

It is the policy of Idaho that hydropower use be recognized as a beneficial use of water, and that depletion of flows below the minimum average daily flows set forth in Policy 32 is not in the public interest.

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The 1982 State Water Plan allocated 170,000 acre-feet for consumptive use in cooling thermal power plants. By establishing a minimum daily flow of 3300 cfs at Murphy and 4750 cfs at Weiser, stabilized flows were guaranteed for hydropower generation. The minimum daily flows for hydropower generation are now increased as stated in Policy 32. In addition, this policy specifically recognizes hydropower generation as a beneficial use of water and acknowledges the public interest in maintaining the minimum river flow at key points. Any water depletion for thermal power generation would now come from the block of water allocated to DCMI uses.

Policy 32E - Navigation

It is the policy of Idaho that water sufficient for commercial and recreational navigation is provided by the minimum flows established for the Snake River.

Commercial navigation enroute to Lewiston via the Columbia River and Lower Snake River can be accommodated with the flows leaving Idaho in the Snake River at Lewiston. Above Lewiston, commercial and recreational navigation should be accommodated within the protected flows on the Snake River and tributary streams.

Policy 32F - Aquaculture

It is the policy of Idaho that water necessary to process aquaculture products be included as a component of DCMI as provided in Policy 32B. The minimum flows established for the Murphy gaging station should provide an adequate water supply for aquaculture. It must be recognized that while existing water rights are protected, it may be necessary to construct different diversion facilities than presently exist.

Aquaculture can expand when and where water supplies are available and where such uses do not conflict with other beneficial uses. It is recognized, however, that future management and development of the Snake River Plain aquifer may reduce the present flow of springs tributary to the Snake River, necessitating changes in diversion facilities.

Policy 32G - Fish, Wildlife, and Recreation

It is the policy of Idaho that the minimum flows established under Policy 32 are sufficient and necessary to meet the minimum requirements for aquatic life, fish, and wildlife, and to provide water for recreation in the Snake River below Milner Dam. Streamflow depletion below the minimum flows is not in the public interest.

The policy reiterates the view that the minimum flows established in Policy 32 will protect fish, wildlife, aquatic life and recreation within the Snake River Basin at acceptable levels and that this is in the public interest. State law provides for the Water Resource Board to apply for a water right for unappropriated water for minimum flows necessary "for the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, and water quality." The minimum stream flow legislation, where appropriate, can be used on the Snake River and tributary streams to enhance these values. Tributary streams in the Snake River Basin which the Board has identified as key river segments needing protection are identified in Policy 7.

Policy 32H - Water Quality and Pollution Control

It is the policy of Idaho that the use of water to provide pollution dilution is not a beneficial use of water.

Existing state and federal water quality programs should be sufficient to protect the current high water quality associated with streams within the basin. Any allocation of water for minimum streamflow is directed towards meeting fish, wildlife, and recreational needs, not to the dilution of pollution.

Policy 32I - New Surface Storage

It is the policy of Idaho that applications for large surface storage projects upstream from the Murphy gage be approved when it is determined that those projects are needed to meet new uses after consideration of then existing public interest criteria. Approval of new storage projects that would divert water from the mainstem of the Snake River between Milner and the Murphy Gaging station during the period November 1 to March 31 should be coupled with provisions that mitigate the impact such depletions would have on the generation of hydropower.

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This policy addresses the approval of new surface storage in the basin but does not apply to already approved projects. A study of all existing social, legal and economic constraints on allocation and use of water in existing storage facilities will be made to determine whether new storage projects are needed. An attempt will be made to modify those constraints that are found to prevent reasonably full use of existing storage. Such study shall not delay applications for new storage projects. In addition, permits for these new projects may be issued during the study period, if they are found to be in the public interest. Public interest as used within this policy does not include the provisions of § 42-203 (c) Idaho Code.

"Large surface storage projects" are those which have the potential for significantly impacting existing uses. Projects for which approval is required under § 42-1737, Idaho Code, would be such projects. Smaller projects could also have significant impacts, but stock water ponds, and waste water re-pumping ponds would not be included, for example.

New storage projects that would divert water from the Snake River between the Milner and Murphy gaging stations during the November 1 to April 1 period are subject to the requirement that the impact such depletions have on hydropower generation is mitigated. Mitigate is defined as causing to become less harsh or hostile, and is used here rather than compensate which connotes equivalence. Methodology will be developed by the Water Resource Board for use in calculating impacts on hydropower generation.

Policy 32J - Stored Water For Management Purposes

It is the policy of Idaho that reservoir storage be acquired in the name of the Idaho Water Resource Board to provide management flexibility in assuring the minimum flows designated for the Snake River.

The Department of Water Resources is expected to allocate the unappropriated waters and the power rights held in trust by the state in such a manner as to assure minimum flows at designated key points on the Snake River. The impacts of groundwater use within the basin on the timing of aquifer discharge to the river is such that at some time stored surface water may be necessary to maintain the designated minimum flows.

At this time there is unallocated reservoir storage within the basin which could be acquired by the state. These waters would provide flexibility for management decisions and provide assurance that the established minimum flows can be maintained.

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The state should act to acquire sufficient reservoir storage for this purpose. In the future no unallocated stored water will be available and it may be impossible to acquire sufficient water to satisfy river demands. Until such time as these waters are needed for management purposes, they shall be credited to the Water Supply Bank and funds obtained from their lease or sale shall accrue to the Water Management Account.

PASSED AND APPROVED this 1st of March, 1985.

GENE M. GRAY, Chairman

ATTEST:

JAMES SHAWVER, Secretary

The foregoing is a true and certified copy of the document on file at the department of Water Resources.
Signed this 6th day of Sept 19 85
A. Gleen Saxton

ATTACHMENT NO. 2 TO MINUTES OF 2-85 MEETING OF IDAHO WATER RESOURCE BOARD, March 1, 1985

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Exhibit 12

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Martha O. Hesse, Chairman;
Charles G. Stalon, Charles A. Trabandt,
Elizabeth Anne Moler and Jerry J. Langdon.

Twin Falls Canal Company)
North Side Canal Company, Ltd.) Project No. 2899-003

ORDER ISSUING LICENSE
(Major Project)

(Issued December 15, 1988)

On July 27, 1984, the Twin Falls Canal Company and the North Side Canal Company, Ltd. (CC) filed a joint application for license under Part I of the Federal Power Act (FPA) to construct, operate, and maintain the Milner Hydroelectric Project No. 2899, to be located at the existing Milner Dam and Twin Falls Main Canal on the Snake River in Twin Falls, Cassia, Jerome, and Minidoka Counties, Idaho. Parts of the project would occupy lands of the United States managed by the Bureau of Land Management (BLM) of the Department of the Interior. The project would consist of the Milner Dam and Reservoir, modifications to 6,500 feet of the Twin Falls Main Canal to increase its capacity, a control structure on the canal that would divert the additional flow into a forebay, a penstock, a powerhouse located on the irrigation canal 1.6 miles downstream of the dam and containing a single generating unit rated at 43,650 kilowatts, and a 1.4-mile-long transmission line.

Notice of the application has been published. The Idaho Department of Fish and Game (IDFG) and the Idaho Department of Water Resources (IDWR) became intervenors in the proceeding. The motions to intervene and comments filed by agencies and individuals have been fully considered in determining whether to issue this license. The issues raised by the intervenors are discussed below.

I. Dam Safety and National Environmental Policy Act Compliance

The Commission currently is in the process of preparing an environmental impact statement (EIS) assessing, inter alia, the potential cumulative impacts of the Milner Project No. 2899 and three other proposed hydroelectric projects on the environmental resources of the Snake River Basin. A draft EIS (DEIS) was

issued in November 1987. 1/ Due to new circumstances and new information received after the DEIS was issued, a Notice of Intent to Prepare a Supplement to the DEIS and to hold public meetings was issued on July 15, 1988; public meetings were held in Twin Falls, Idaho, on August 19, 1988. At these meetings, CC informed the Commission that there was a serious concern for the structural integrity of the 85-year-old Milner Dam and that failure of the dam during the irrigation season could result in near total crop failure on the 440,000 acres served by the dam. 2/

Following a meeting with CC and an inspection of Milner Dam, the Commission's Division of Dam Safety and Inspections concluded that there is a high risk of failure at the Milner Dam in the event of a seismic event (earthquake). A complete dam failure could lead to partial or total crop failure, since such a failure would prevent diversion of water into the irrigation canal.

CC intends to use the revenues from the sale of electric power to be generated by the project to obtain the funds necessary to strengthen Milner Dam and upgrade its spillway. CC states that, absent these revenues, funding repair of the dam would result in severe economic hardship to many of the 7,500 CC shareholders who depend on irrigation waters from Milner Dam for their livelihood. According to CC, having the shareholders bear the total cost of repairs could cause some shareholders to lose their farms and would cause significant adverse impacts to a local economy that is already suffering the effects of the general economic problems of the farming industry.

The final EIS (FEIS) for the four projects on the Snake River is not expected to be completed until late summer or early fall of 1989. Thus, waiting for completion of the FEIS before action on the license application for Project No. 2899 could cause a delay of up to two years in starting the repair of Milner Dam, during which time there would be a risk of dam failure. If a license for the Milner Project is issued at this time, the necessary financing and other arrangements could be made so as to complete the dam repairs in one year or less.

1/ Draft Environmental Impact Statement for the Twin Falls (FERC No. 18), Milner (FERC No. 2899), Auger Falls (FERC No. 4797), and Star Falls (FERC No. 5797) Hydroelectric Projects on the Mainstem Snake River, Idaho, Federal Energy Regulatory Commission, Washington, D.C., November 1987.

2/ See the attached Safety and Design Assessment (S&DA) for a more detailed description of the dam safety concerns regarding this project.

Council on Environmental Quality (CEQ) regulations implementing the procedural provisions of the National Environmental Policy Act (NEPA) state that, where emergency circumstances make it necessary to take an action with significant environmental impacts without following CEQ regulations (e.g., without first preparing an FEIS), the agency taking the action should consult with CEQ regarding alternative arrangements. Such arrangements are to be limited to actions necessary to control the immediate impacts of the emergency. 3/ Pursuant to CEQ's regulations, the Commission consulted with CEQ and requested concurrence with a plan to proceed with the licensing of the Milner Project prior to completion of the FEIS on the four projects on the Snake River. 4/ Consistent with the emergency provisions CEQ's regulations, the CEQ approved the Commission's plan to license the hydroelectric facility at the Milner Dam prior to completion of the FEIS. 5/

II. Comprehensive Water Block

Commission staff has proposed development of a Comprehensive Water Block (CWB) for the four projects in the Snake River Basin included in the DEIS. As described in more detail in the Scoping Document Supplement (Supplement) prepared for this proceeding in October 1988, 6/ the objective of the CWB is to provide target flows at the projects when water is available in excess of irrigation needs. The CWB represents the combined amount of water needed to provide target flows for protection and enhancement of environmental resources associated with the four projects addressed in the DEIS. Under the CWB proposal, each of the four projects, if licensed and constructed, would provide a sub-block to the CWB; the size of the individual sub-blocks would be different for each project, due to the fact target flows would be based on what is needed to mitigate impacts at each specific project. The size of the CWB would also vary from year to year depending on the amount of flow in the river and the availability of water in excess of irrigation needs.

3/ See 40 C.F.R. § 1506.11 (1988).

4/ Letter from Martha O. Hesse, Chairman, Federal Energy Regulatory Commission, October 25, 1988).

5/ Letter from A. Alan Hill, Chairman, CEQ, October 27, 1988.

6/ Information regarding the Supplement was published in the Federal Register on October 15, 1988. See 53 Fed. Reg. 42,997. Scoping meetings on the Supplement were held in Boise and Twin Falls, Idaho, on November 2, 1988.

The CWB proposal would require the licensees for the four projects to lease water for the CWB from the Upper Snake Water Supply Bank (Water Bank). The State of Idaho established the Water Bank as a convenient means to allow and account for the rental of water by those irrigators in need of additional water from those who have excess water. Irrigators who estimate that their water storage rights would be in excess of their requirements in any year may place a portion of their storage right in the Water Bank, to be leased by others, with irrigators receiving first priority. Any water that is not leased in any year is lost if all of the upstream storage is refilled in the following year.

IDWR, by letter dated September 30, 1988, stated that it appears that structured reliance on the Water Bank through the CWB mechanism can be successful in meeting prescribed mitigative flows on the mainstem of the Snake River. Furthermore, Commission staff discussions with IDWR staff regarding the operation of the Water Bank revealed that: (1) water has been available for lease from the Water Bank in all years since its creation; (2) Idaho Power Company has leased water for power generation from the Water Bank in every year since its creation; (3) future water availability likely will increase due to increased irrigation efficiencies; (4) it is highly probable that water will be available in the Water Bank in excess of irrigation demand in the future, except in very bad water years; and (5) the cost of water from the bank is currently very reasonable, and is expected to remain so in the foreseeable future.

Under the CWB proposal, each licensee would be responsible for providing project-specific target flows. Target flows to be set for the projects would recognize the physical limitations of the river system so that they would not interfere with irrigation operations and would not flood low-lying areas. Flows to be released for project-specific target flows would be accounted for when the water is released from the upstream American Falls Reservoir and measured below Milner Dam. Thus, the CWB would be an accounting mechanism for licensees to equitably share the responsibility for mitigative flows, since water which is released from American Falls Reservoir would flow through all of the four proposed projects.

As discussed below, we believe the CWB proposal is an appropriate means to provide mitigative flows while recognizing the need to protect irrigation needs in the area. Accordingly, Article 401 of the license requires CC to meet the target flows specified by Article 407 of the license by renting water from the Water Bank when it is available.

III. Environmental Impacts

A. Erosion, Sedimentation, and Slope Stability

Rehabilitation of Milner Dam would involve excavation of rock materials, construction of access roads leading from the excavations to the dam, associated staging areas, and a cofferdam to dewater a small area in the reservoir when reconstructing the spillway. These activities would cause minor erosion, sedimentation, localized movement of loose rock materials, and temporary increases in suspended sediment in Milner Reservoir during placement and removal of cofferdams. In order to ensure that impacts on soils and geologic resources are minimized, Article 402 requires CC to include measures to minimize erosion and sedimentation and to control slope stability when submitting final design specifications for rehabilitation of Milner Dam.

During project construction, localized erosion, sedimentation, and temporary increases in turbidity and suspended sediments would occur until disturbed land surfaces are stabilized. Blasting for the powerhouse and tailrace excavation and construction of the access road could cause localized rockfall and mass movement of loose materials, and placement and removal of cofferdams would temporarily increase suspended sediments and turbidity within the Snake River.

With implementation of a detailed, site-specific erosion, sediment, and slope stability control plan that incorporates CC's proposed mitigation and the mitigation measures recommended in the DEIS, the effects on soil and geologic resources would be minor. 7/ Article 402 requires CC to prepare a detailed, site-specific plan to control erosion, sedimentation, and slope stability that includes control measures proposed by CC and recommended in the DEIS.

B. Water Quality

1. Water Quality Certification

In a letter dated January 27, 1984, CC requested water quality certification pursuant to Section 401(A)(1) of the Clean Water Act from the Idaho Department of Health and Welfare (IDHW). IDHW granted water quality certification for the Milner Project on September 30, 1985. Since IDHW did not act on the certification request within one year from the date it received the request, water quality certification was deemed waived by

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7/ See Section 4.1.1.1 of the DEIS.

Order No. 464. 8/ However, since we believe the three conditions contained in the water quality certificate, which address erosion control, spoil disposal, and storage of fuels and chemicals are necessary, we are including them as part of Article 402 of the license.

2. Milner Reservoir and the Snake River below Milner Dam

The water quality in the Upper Snake River Basin is generally good, and is categorized as Class A by IDHW. Water uses to be protected include domestic and industrial water supply, irrigation, livestock watering, and salmonid fish spawning and rearing.

In the 1960's, Milner Reservoir had poor water quality conditions resulting from municipal and industrial point source discharges. During periods of reduced discharges, low dissolved oxygen concentrations (DO) in Milner Reservoir resulted in major fish kills. Substantial reductions in these point source discharges in the 1970's, however, have contributed to better water quality conditions in the reservoir.

Temperature and DO sampling conducted by CC's consultant in June to September 1983 and in August to December 1987 indicate that Milner Reservoir does not thermally or chemically stratify and that DO and temperature levels in the river below Milner Dam are similar to those in Milner Reservoir. These levels met the state water quality standards at all depths sampled in Milner Reservoir and in the Snake River below Milner Dam.

The Environmental Protection Agency (EPA) reports that in past years the surface waters of Milner Reservoir contained high concentrations of heavy metals. Since 1979, EPA reports that concentrations of zinc, cadmium, and copper in Milner Reservoir and in the Snake River below Milner Dam have ranged from 0 to 50 micrograms per liter (ug/l), from .2 to 2 ug/l, and from 1 to 8 ug/l, respectively. However, these concentrations are below levels reported by EPA that adversely affect freshwater aquatic organisms. 9/

8/ 52 Fed. Reg. 5446 (February 23, 1987), FERC Stats. and Regs. III, ¶ 30,370 (effective May 11, 1987); reh'g denied, 52 Fed. Reg. 13,234 (April 22, 1987), 39 FERC ¶ 61,021 (Order No. 464-A), petitions for reconsideration dismissed, 41 FERC ¶ 61,206 (1987) (Order No. 464-B).

9/ See generally Section 4.2.1 of the DEIS.

(A) Project Construction

Construction activities in Milner Reservoir and in the Snake River below Milner Dam would disturb sediments and other unconsolidated deposits that likely contain heavy metals or other toxic substances. Improper removal and disposal of sediments or unconsolidated deposits could disperse heavy metals or other toxic substances into the water column and would adversely affect the aquatic resources downstream. Although the entire project area need not be tested, Article 403 requires CC to test any sediment or unconsolidated materials within the Snake River and Milner Reservoir that would be dredged or excavated in conjunction with project construction for the presence of any heavy metals or other toxic substances, so that any contaminated materials would be identified, safely removed, and disposed of with minimal adverse effects on water quality and aquatic organisms.

(B) Project Operation

The proposed powerhouse would have the capacity to use flows of from 900 to 4,000 cubic-feet-per-second (cfs). Typically, the flows that pass Milner Dam in the summer are low, not generally exceeding 500 cfs, and the proposed powerhouse would not be expected to operate from approximately mid-June through mid-September.

Operation of the proposed project would not affect the water quality in Milner Reservoir; however, CC's proposed minimum flow of 58 cfs in summer during the irrigation season would likely result in substantial adverse impacts on water temperature and DO within the 1.6-mile-long bypassed reach. The DO and temperature of the water released from Milner Dam during summer would likely change as it flows downstream through the bypassed reach. The magnitude of these changes would depend on a number of factors, with the major controlling factor being the rate of stream discharge through the bypassed reach.

A reduction in the volume of water flowing through the bypassed reach would reduce water velocity and depth and increase the travel time. Consequently, the effect of solar radiation would be intensified and water temperature would increase in summer. Much slower velocities in the bypassed reach could also contribute to the growth of the already abundant aquatic plants. Increased plant respiration and decomposition would cause DO reductions.

Based on the cross-sectional and longitudinal profiles of the river channel below Milner Dam and the available data relating discharge to DO and water temperature, a flow of 200 to 300 cfs would likely have minimal impact on water temperature and

DO in the bypassed reach. Flows within this range would likely provide sufficient water velocity and depth, and in turn reduce the travel time through the bypassed reach, thus minimizing the effect of solar radiation on water temperature. A target flow established within this range would likely provide water quality conditions that are suitable for maintaining a put-and-grow trout fishery. 10/ The target flows required by Articles 407 and 415 during project operation for the maintenance of the fish and recreational resources, respectively, would minimize the impacts of project operation on water temperature, DO, and sedimentation in the bypassed reach.

The DEIS recommended that CC implement a water quality monitoring plan that should include provisions for discharging sufficient water to the bypassed reach to minimize the effects of the proposed project on the water quality of the Snake River during project operation. Water quality impacts would be most critical during low water years and during summer months that coincide with low flows, high nutrient levels, and elevated water temperatures.

CC should implement a water quality monitoring plan along the bypassed reach. Therefore, Article 404 of the license requires CC to monitor the water quality of the Snake River to determine if water temperatures and DO necessary for the survival of a trout fishery within the bypassed reach are being maintained by the target flow released from Milner Dam. If the results of the monitoring required by Articles 404 and 409 show that levels of DO and temperature in the bypassed reach are not sufficient for maintaining a put-and-grow trout fishery, Article 409 requires CC to implement other fishery mitigation.

C. Fishery Resources

1. Existing Environment

(A) Milner Reservoir

Milner reservoir supports both warmwater and coldwater fisheries. The warmwater species include smallmouth bass, largemouth bass, yellow perch, channel catfish, brown bullhead, and black crappie. The coldwater species are rainbow trout, cutthroat trout, brown trout, and mountain whitefish. Also, numerous nongame species inhabit the reservoir. The coldwater species occur primarily at the headwaters of the reservoir. IDFG stocks catchable rainbow trout in the headwaters of Milner Reservoir near Burley, Idaho.

10/ This fishery resource is discussed in Part II C 4, infra.

Milner reservoir has a sandy substrate and is devoid of three dimensional structure such as rocks or boulders. The sandy substrate probably limits the production of aquatic invertebrates typically fed upon by fish. Further, the lack of structure limits warmwater fish production because structure is used by warmwater fish for spawning and for cover. 11/

The Idaho Fisheries Management Plan 12/ states that warmwater fish such as smallmouth bass, and channel and blue catfish will be stocked in the reservoir to meet the demand for the warmwater fishing in Milner Reservoir. The Fisheries Management Plan states that the management direction for Milner Reservoir include improving warmwater fish habitat.

(B) Snake River Bypassed Reach

Game fish use below Milner Dam is seasonal and depends on flow levels. Rainbow trout, cutthroat trout, brown trout, rainbow-cutthroat trout hybrids, mountain whitefish, channel catfish, largemouth and smallmouth bass, and yellow perch have been collected in the Snake River below Milner Dam. Nongame fish such as Utah dace, redside shiners, and mottled sculpins dominated the catch during the low flow period. 13/

Water diversions for irrigation limits trout use of the proposed bypassed reach primarily to the non-irrigation season. Water diversions from April through October for irrigation deliveries significantly reduce the amount of water flowing downstream of Milner Dam. These flow reductions during the irrigation season, along with the likely changes to water quality, increased water temperature and decreased DO concentration, decreases the suitability of the downstream area for trout.

The Fisheries Management Plan for the Snake River below Milner Dam calls for a "yield trout fishery" with an approximate catch rate of 0.5 fish per hour. According to the Fisheries Management Plan, rainbow trout consisting of wild and hatchery fish would support the yield fishery.

11/ See Section 3.3.2.1.1 of the DEIS.

12/ Idaho Department of Fish and Game, 1986, Fisheries Management Plan 1986 - 1990, Boise, Idaho, 274 pp.

13/ See Section 3.3.2.1.2 of the DEIS.

2. Impacts

(A) Project Construction

Constructing the Milner Project and upgrading the dam would cause short-term increases in suspended and dissolved solids which would ultimately be deposited in downstream areas. The siltation could negatively affect mountain whitefish spawning in the bypassed reach, but would have actual little effect, due to the fact that so few fish occur or spawn in the bypassed reach. Siltation from construction activities would have little effect on other aquatic resources, because the siltation would be flushed out during the next high flow period. Further, implementing the erosion control and sedimentation plan required by Article 402 would limit sources of sediment. The potential for toxic substances affecting the downstream aquatic resources would be low because of the sediment testing and sediment removal requirements of Article 403.

(B) Project Operation

Operating the Milner Project would increase the time period for diverting water from the reservoir to the Twin Falls Main Canal. Typically, CC now diverts water during the irrigation season from April through October. With the project operating, CC would divert water all year and would reduce the frequency of spillage over Milner Dam. Fish passing over Milner Dam with the high spillage flows is probably the primary mechanism by which trout populate the bypassed reach. Project operation would substantially increase the number of fish diverted to the canal, where they would enter the project intake and would be killed or injured by the turbines or would no longer be recruited to the bypassed reach or downstream areas.

CC proposes to mitigate for adverse project impacts by enhancing the fish habitat in Milner Reservoir instead of installing a fish screen to mitigate the turbine-induced fish losses. The DEIS agreed with CC's reservoir enhancement proposal, but expressed reservations about the probability for success. 14/ In its motion to intervene, IDFG stated that enhancing the habitat in Milner Reservoir would partially mitigate for turbine-induced fish mortality.

Enhancing the warmwater fish habitat by providing structures for holding and rearing habitat, or increasing spawning areas and stocking warmwater fish in Milner Reservoir as described in the Fishery Management Plan, would adequately mitigate turbine-induced fish losses. Therefore, CC should finance the

14/ See Section 4.2.2.1.2 of the DEIS.

development of the Milner Reservoir warmwater fishery as described in the Fisheries Management Plan. In addition, CC should fund stocking of warmwater fish species in the reservoir in cooperation with the IDFG. Stocking warmwater fish in the reservoir in cooperation with the IDFG and enhancing the reservoir habitat would be consistent with the Fisheries Management Plan. Article 405 requires CC, after consultation with IDFG, to develop, implement, and finance a warmwater fish stocking program and a habitat enhancement plan that is consistent with the Fisheries Management Plan for Milner Reservoir to mitigate the adverse effects of the project on the fishery resources.

CC should consult with IDFG and develop a plan to monitor the effectiveness of the reservoir enhancement structures and the fish stocking program. Specifically, CC should determine if additional warmwater fish stocking is necessary to meet the objectives of the Fisheries Management Plan for Milner Reservoir. The monitoring would also assist in determining the length of time the structures would remain in place and provide fish habitat. We conclude that a five-year monitoring program would provide sufficient information to determine if the mitigative measures are adequate. The monitoring also allows for correcting those that are not working. Therefore, Article 406 requires CC to conduct a reservoir fish habitat and fishery study for at least five years to determine if the fish habitat enhancement structures have remained in place and are functioning as desired and to determine if additional warmwater fish need to be stocked.

3. Instream Flow

CC proposes to release 58 cfs during the irrigation season and 150 cfs during the non-irrigation season. However, CC did not provide a biological rationale for these flow proposals or for the seasonal difference in the flows. The DEIS found that 58 cfs would prevent fish movement in the bypassed reach and would degrade fish food production by increasing channel sedimentation. 15/ The proposed 58 cfs minimum flow would provide slightly improved instream flow conditions, because it would prevent the extreme low flow events that occasionally occur.

Operating the project during the non-irrigation season with the proposed 150 cfs minimum flow would significantly reduce the amount of trout habitat in the 1.6-mile-long bypassed reach according to conventional instream flow methodologies, would severely reduce trout recruitment and use of the bypassed reach during the non-irrigation season, and would reduce invertebrate production. 16/ Proposed project operation would reduce the

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15/ See Section 4.2.2.1.1.3.1 of the DEIS.

16/ Id.

amount of trout habitat and eliminate spillage over the dam much of the time and, therefore, preclude trout movement over the dam to the bypassed reach. Thus, the proposed non-irrigation season minimum flow would conflict with the management direction of the yield fishery, because trout recruitment and suitable trout habitat would not be maintained in the bypassed reach.

The DEIS recommended that CC maintain minimum flows of 58 cfs and 1,260 cfs in the irrigation and non-irrigation seasons, respectively, to protect the downstream fishery resources. 17/ The DEIS also recommended a minimum flow of 300 cfs in the irrigation season to partially mitigate the cumulative adverse impacts to the resident trout and other resources. 18/ Since the DEIS' 300 cfs recommendation to mitigate cumulative impacts superceded the 58 cfs minimum flow for fishery resource protection, the DEIS concluded that minimum flows of 300 cfs in the irrigation season and 1,260 cfs in the non-irrigation season were needed. Flows derived by the Tennant Methodology, 19/ the stream resource maintenance flow study, 20/ and the minimum flows recommended in the DEIS to protect the fishery resources in the bypassed reach during the non-irrigation season range from 720 cfs to 2,190 cfs.

Release of the above flows for fishery protection purposes during the irrigation season would interfere with irrigation and thus could have a severe impact on the farm-based economy of the area. Furthermore, the release of the flows recommended for the non-irrigation season would reduce generation and hence the revenues necessary to repair Milner Dam. We believe that the need to protect irrigation usage and provide sufficient generation outweigh the need to protect the fishery resources. Accordingly, we will not require CC to release the flows

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17/ See Section 4.2.2.1.2 of the DEIS.

18/ See Section 5.1.2 of the DEIS.

19/ D.L. Tennant, 1976, Instream flow regimes for fish, wildlife, recreation, and related environmental resources, Pages 359-373. In Orsborn, J. F., and C. H. Allman, (ed.), Proceedings of the Specialty Conference on Instream Flow Needs, Volume II, American Fisheries Society, Bethesda, Maryland.

20/ T. Cochnauer, 1976, Stream Flow Investigation, Project F-9-R-1, Job I, evaluation of applicability of water surface profile predictive modeling in reference to stream resource maintenance flow (SRMF) determinations, Job II, stream resource maintenance flow determinations on the Snake River, Idaho Department of Fish and Game, Boise, Idaho, 44 pp.

referenced above. However, we are requiring CC, by Article 407, to release a target flow of 200 cfs.

The loss of trout habitat in the non-irrigation season is offset somewhat by eliminating the extreme low flows that have occurred during the irrigation season, thus allowing trout to use the bypassed reach more consistently. A stable flow of 200 cfs would slightly enhance the fishery resources by continually maintaining a limited amount of habitat that would occasionally be eliminated by the low flow events. Therefore, 200 cfs would probably maintain sufficient water quality to maintain a put-and-grow trout fishery in the bypassed reach. As just indicated, Article 407 requires CC to maintain a target flow of 200 cfs below Milner Dam. 21/

The Snake River downstream of the proposed powerhouse would benefit from the 200 cfs target flow. Releases from Milner Dam would prevent the extreme low flow periods. In addition to the releases from Milner Dam, the incentive to operate the powerhouse would provide water to downstream areas that would not typically have occurred during the irrigation season. Therefore, the fishery resources downstream of the bypassed reach would benefit more than those in the bypassed reach.

4. Trout Fishery Enhancement

The primary source of trout to the bypassed reach is recruitment from upstream areas. As mentioned above, proposed operation would reduce spill from Milner Dam and eliminate much of this recruitment.

In order to mitigate for the decreased recruitment to the downstream Snake River fishery and the loss of trout habitat in the Snake River in the non-irrigation season, CC should institute a put-and-grow trout fishery 22/ in the 1.6-mile-long bypassed reach of the Snake River. CC should consult with IDFG to determine the sizes and numbers of trout to stock and to determine the area or areas in which to stock the trout. CC should stock the trout in areas that provide easy and safe access for anglers. This would provide a high value recreational fishery in this area.

21/ The 200 cfs target flow is not a minimum flow, and CC does not have to release the flow unless water is available.

22/ The Idaho Fisheries Management Plan defines a put-and-grow fishery as one where the fish are expected to survive and grow and contribute to the fishery for a extended period of time.

Article 408 requires CC to develop and to implement a put-and-grow trout fishery in the 1.6-mile-long bypassed reach of the Snake River. We conclude that developing this trout fishery would mitigate the lost trout habitat in the Snake River resulting from reduced flows and would mitigate the reduced fish recruitment to the bypassed reach. Enhancing the trout fishery in the bypassed reach through hatchery supplementation would not conflict with the management direction for this section of the Snake River as described in the Fisheries Management Plan.

There is the possibility that the stocked fish would move downstream with the current where they would no longer be available to the anglers or where they could perish due to insufficient habitat or poor water quality. Therefore, CC should conduct a study to determine if the trout move downstream and if the trout are surviving long enough, depending on water temperature and DO concentration, to remain available to anglers.

CC should file annual reports about the survival, growth, and movement of the trout and how the water quality at 200 cfs affects their survival, growth, and movement. If it is determined that the trout stocked in the bypassed reach are not surviving, are not growing sufficiently, or are moving out immediately, then CC should consider stocking trout in other areas of the Snake River such as the head of Milner Reservoir near Burley, Idaho. In conjunction with this study, the results from the water quality monitoring required by Article 404, particularly water temperature and DO, will provide valuable information to determine if 200 cfs provides conditions conducive for establishing a year round trout fishery.

We conclude that a five-year monitoring program would provide sufficient information to determine if the trout stocking program is successful. If the results indicate that the trout stocking program is not successful, the monitoring allows for changing the stocking rates, the size and species of trout stocked, and the stocking location. Article 409 requires CC to conduct a five-year trout monitoring study and to file annual reports on the results of each years studies.

C. Ramping Rate

Rapid alteration of streamflows during project startup would strand fish in the bypassed reach when submerged areas quickly drain, because of rapid decreases in the amount of water available to maintain existing habitat. To protect the fish and other aquatic resources from rapid, project-induced flow reductions, the DEIS recommended that CC limit the maximum rate of change in the flow in the Snake River. 23/

23/ See Section 4.2.2.1.2 of the DEIS.

The ramping rate of one foot per hour recommended to protect whitewater boaters would also provide a measure of protection for fish and invertebrates inhabiting the bypassed reach. We believe that a one foot per hour ramping rate would adequately protect the fishery resources of the bypassed reach during project startup. Article 410 requires CC to implement a ramping rate of one foot per hour and to determine if this rate would adequately prevent stranding of fish and would protect the recreationists using the bypassed reach and downstream areas based on a site specific study. CC should consider structural measures during the design of the powerhouse(s) to facilitate implementing the ramping rate.

D. Raptor Protection

Transmission lines, particularly those in open, relatively treeless areas with few perching sites, may pose an electrocution hazard to raptors and other large birds. 24/ Collisions with the lines may be an additional source of mortality. The U.S. Department of the Interior recommends that the project transmission line be designed and constructed to minimize these sources of avian mortality. CC has agreed to use an appropriate design to prevent electrocution of raptors. To ensure the protection of raptors and other large birds in the project area, Article 411 requires CC, after consultation with the fish and wildlife agencies, to design and construct the transmission line according to accepted guidelines for raptor protection.

E. Revegetation of Disturbed Upland Habitat

During construction of the proposed project, approximately 22 acres of upland shrub-grassland habitat would be disturbed. 25/ CC proposes to reseed the disturbed areas with a mixture of grasses and native shrubs, but does not provide a detailed revegetation plan. As discussed in the DEIS, CC should develop and implement a detailed plan to revegetate disturbed upland areas, with the goal of establishing high quality wildlife habitat. 26/ The plan, required by Article 412, should be developed in consultation with the appropriate agencies, and should contain, at a minimum, a description of plant species to be used, an implementation schedule, a description of planting methods, fertilization and irrigation requirements, and a monitoring program.

24/ See Section 4.3.1.1 of the DEIS.

25/ Id.

26/ See generally Section 4.3 of the DEIS.

F. Wildlife Habitat Enhancement Structures

To enhance the project area for wildlife, CC proposes to: (1) construct two osprey nesting platforms in Milner reservoir; (2) develop artificial burrows for use by burrowing owls; and (3) construct an unspecified number of nesting structures for Canada geese in the project vicinity. CC does not, however, provide final designs, locations, and monitoring plans for these enhancement measures. The proposed measures, if successfully implemented, could enhance wildlife use of the project area. Therefore, Article 413 requires CC to provide a detailed plan for providing the proposed wildlife enhancement measures, including, at a minimum: (1) the final design of the goose nesting structures, osprey-nesting platforms, and burrowing owl burrows; (2) the location of the enhancement features; (3) a schedule for providing the enhancement features; and (4) a description of a program to monitor and maintain the enhancement features.

G. Replacement of Riparian Wetlands and Upland Habitat

Approximately 6.1 acres of riparian wetlands will be eliminated by project development. 27/ CC has identified four sites totalling 18.2 acres along the project canal where wetlands could be created. Of those 18.2 acres, CC proposes to create 10.2 acres to satisfy the wildlife agencies' recommended 1.0 to 1.5 loss to replacement ratio for riparian wetlands. Construction would also result in the permanent loss of 26.6 acres of upland shrub-grassland, including 2.0 acres of BLM's isolated tract No. 23. The IDFG recommends that 26.6 acres of upland habitat, off-site if necessary, be developed and donated to IDFG as mitigation for upland losses. CC has agreed to replace lost upland habitat according to accepted IDFG guidelines.

Rather than develop another mitigative plan using upland habitat, possibly at an off-site location, we believe that it would be more beneficial to wildlife, as well as more practical, to provide additional riparian habitat in the immediate project area. Sufficient mitigation for both upland and wetland losses would be provided by adding 5.3 acres of riparian wetland habitat to the 18.2 acres of potential replacement habitat already identified by CC. This total of 23.5 acres of riparian wetland replacement habitat would include 13.3 acres for replacing 26.6 acres of lost upland habitat. This 1.0 for 2.0 ratio seems reasonable considering the much greater wildlife value of riparian wetlands, the wetlands comparative scarcity in the project area, and the high priority given to the protection of wetlands compared to upland habitat.

27/ See Section 4.3.1.1 of the DEIS.

IDFG agrees with this approach for replacing upland habitat with riparian habitat 28/ CC should have little difficulty providing the additional 5.3 acres by either enlarging the four sites already identified or by developing additional nearby sites along the canals or adjacent to Milner Reservoir. Article 414 requires CC to develop and maintain 23.5 acres of riparian wetland habitat to replace riparian wetlands and upland habitats lost to project development.

H. Socio-economic Considerations

The operation of the 85-year-old Milner Dam is essential for the diversion of Snake River flows to the three gravity canals that provide water to irrigate approximately 440,000 acres of agricultural land in south-central Idaho. 29/ If Milner Dam were to fail during the yearly irrigation season, from April 1 through October 31, area farms that rely on the continuous delivery of water from the three canals would experience a major crop failure, because they would not be able to develop alternative irrigation systems in time to save their cultivated acreage.

Based on 1982 data collected by the Census of Agriculture, irrigated and harvested cropland in Twin Falls and Jerome Counties in Idaho produced agricultural sales of $270 per acre. Thus, the loss of irrigation water for 440,000 acres would result in a $118,800,000 revenue loss for the area's farm sector. Food processing establishments in south central Idaho, such as Universal Frozen Foods, Ore-Ida Foods, and Amalgamated Sugar Company, also would be adversely affected, since they would be unlikely to locate alternative economic sources of potatoes, beans, and sugar beets. Consequently, these companies would decrease their production and local employment. Moreover, employment cutbacks by the area's farms and food processing establishments would cause subsequent reductions in spending at area retail trade and service establishments, with a commensurate decline in their sales, employment, and profits.

I. Whitewater for Boaters

1. Flows

In the 1.6-mile-long reach of the Snake River immediately below Milner Dam, expert whitewater boaters run continuous Class V rapids during high flows that occur in early spring and late

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28/ Personal communication, Dale Turnipseed, IDFG, Jerome, Idaho, November 28, 1988.

29/ Twin Falls Canal Company and North Side Canal Company, Ltd., Response to DEIS, March 30, 1988.

fall. In 1986, about 200 visitor days of whitewater boating occurred in the Milner reach. Much of this use occurs in April and May when the weather is relatively warm and spring runoff is at its peak. The vast majority of boating use consists of kayaking; however, some rafting does occur. Boaters typically put in at a bridge located 0.5 miles downstream of Milner Dam and take out either 1.1 miles below the bridge where the Class V rapids end, or continue 7.0 miles downstream to a take-out point above Star Falls. Most boaters, however, choose to take out at the first location, since the stretch of river below this point is relatively calm, with only a few widely-spaced rapids.

Since the Milner reach has only become known to whitewater boaters within the past few years, the minimum flow needed to maintain the unique Class V experience has not been firmly established, although boaters generally prefer flows between 5,000 and 15,000 cfs. According to the BLM, at flows below 7,500 cfs, the reach is not runnable by rafts, but can be successfully run at flows of 3,000 cfs, or perhaps below, in a kayak. 30/ The Class V experience is apparently completely changed at flows below 3,000 cfs, because many rocks are exposed, creating a whitewater run that can be negotiated only by kayakers skilled at technical maneuvering. 31/

Because of the short length of the Milner reach, the whitewater experience found at certain flows at the Milner Project can be found in greater amounts on other sections of the Snake River and other Idaho rivers. For instance, the North Fork of the Payette River, near Boise, Idaho, provides several miles of continuous Class V rapids. In addition, the 14-mile Murtaugh reach of the Snake River, between Star Falls and Twin Falls Reservoir, provides a day-long Class IV-to-V whitewater run which has been compared favorably to the Colorado River. The Milner reach does not become a unique whitewater resource until very high flows occur (generally 10,000 cfs or above). The large volume of water at these high flows, concentrated in the narrow gorge below Milner Dam, creates Class V waves that are internationally known among expert kayakers.

30/ Personal communication, Jeff Jarvis, Outdoor Recreation Planner, BLM, Boise, Idaho, December 1, 1988; letter from Todd Graeff, Director, Idaho Department of Parks and Recreation, Boise, Idaho, October 10, 1985.

31/ Letter from Delmar D. Vail, State Director, BLM, Boise, Idaho, January 20, 1987; personal communication, Jeff Jarvis, Outdoor Recreation Planner, BLM, Boise, Idaho, December 1, 1988.

The DEIS recommended that bypass flows between 5,000 and 15,000 cfs, when available, be released on as many as 10 weekend days during May and June for whitewater boaters. 32/ Such flows would provide opportunities for expert kayakers to run the 1.6-mile-long Class V rapids below Milner Dam. Based on comments received on the DEIS from the IDWR and CC, and information gathered by the staff during a project site visit and public meetings held in August 1988, we agree that providing these flows at times when such flows are not made available by normal regulation of the storage and release patterns governing flows at Milner Dam would not be feasible.

Between April and October all water at Milner Dam appropriated for use by CC is diverted for irrigation. Providing flows between 5,000 and 15,000 cfs in May and June would require the entire irrigation system for the North Side Canal Company and Twin Falls Canal Company to be readjusted after each flow release. This would adversely affect water delivery to crops in the area. However, when flows exceed system requirements by the magnitude that would allow customary boating use below Milner Dam, such flows could be maintained when available to allow boaters to continue using this unique resource.

Table 1 below shows the occurrence of various whitewater flows both with and without project operation based on IDWR 56-year flow record for the Milner reach. Assuming that the minimum flow needed to boat the Milner reach is approximately 2,000 cfs, whitewater boating opportunities at Milner occur approximately 96 days per year during the boating season. However, project operation would reduce these opportunities by 60 percent, leaving approximately 38 days a year for whitewater boating.

Table 1. Average percent of Occurrence of Flows Below Milner Dam for March, April, May, June, October, and November, with average number of days at flow or greater.

Flow at least (cfs)	6-month percentage of occurrence	Number of days per year	With project 6-month project percentage of occurrence	With project number of days per year

32/ See Section 4.5.1.2 of the DEIS.

15,000	2.9	5.3	0.5	0.9
14,000	4.7	8.6	0.8	0.9
13,000	5.1	9.3	1.3	2.4
12,000	6.5	11.9	1.9	3.5
11,000	8.4	15.4	2.9	5.3
10,000	9.5	17.4	4.7	8.6
9,000	10.6	19.4	5.1	9.3
8,000	12.9	23.6	6.5	11.9
7,000	17.0	31.1	8.4	15.4
6,000	21.0	38.4	9.5	17.4
5,000	24.0	43.9	10.6	19.4
4,000	33.6	61.5	12.9	23.6
3,000	38.4	70.3	17.0	31.1
2,000	52.8	96.6	21.0	38.4

Although project operation would have an adverse effect on the total continuum of whitewater boating opportunities offered at Milner, from low flow technical kayaking to high flow Class V boating, it is important to note the impacts that project operation would have on the unique high flows (10,000 cfs and above). Flows of 10,000 cfs and above occur on the average about 17.4 days. With project operation, the occurrence of these flows would be reduced by almost half (49 percent), leaving about 8.6 days for boating at high flows. This represents a loss to boaters of approximately eight days (8.8 days).

Since these rare high flows are what make the Milner reach important to whitewater boaters, these flows should be preserved. This could be accomplished by requiring CC to stop operating the project on eight days when flows at 10,000 cfs or above are available. To ensure that these flows are available when boaters use the reach, they should be released during April and May for eight hours during daylight hours. Flows below 10,000 cfs, however, would be reduced during project operation. To help mitigate these impacts, when flow conditions available make it impossible for CC to meet their obligation of providing eight days of flows of 10,000 cfs or more, they should release flows between 4,000 and 10,000 cfs until their obligation is met. This would reduce project impacts on mid-range flows and ensure that whitewater flows would be available during years when high flows do not occur.

Article 415 requires CC, upon starting project operation, and in consultation with the appropriate agencies and whitewater boaters, to stop operating the project for eight hours on eight days in April and May when flows of 10,000 cfs or above occur. Article 415 also requires CC to release flows between 4,000 and 10,000 cfs, when available, to meet its eight-day obligation when

eight days of flows of 10,000 cfs or above do not occur during April and May.

Ceasing project operation at the above-mentioned times would result in a yearly loss to irrigators of $8,400 in revenues generated by the project. To determine whether a better arrangement of flow could be provided to more closely match whitewater boater needs and to reduce the impact on project generation, Article 418 requires CC to conduct a study in consultation with the Idaho Whitewater Association (IWA), the National Park Service (NPS), BLM, the U.S. Bureau of Reclamation (BR), IDWR, and the Idaho Department of Parks and Recreation (IDPR). Since boaters may not spend an entire day on the river, it is possible that higher whitewater flows could be maintained in the bypassed reach for less than eight hours according to boaters needs as long as CC meet their obligation for providing the equivalent of eight eight-hour days of project shutdown at flows of 10,000 cfs or above.

To protect downstream recreationists from sudden increases in water level and streamflow, water levels in the project bypassed reach should not increase by more than one foot per hour when providing releases for whitewater boating. In addition, a warning system must be implemented in order to alert recreationists of hazardous situation created by increases in flow. A ramping rate and a warning system would allow fishermen and other recreationists below the dam to have enough time to leave the area before water levels and velocities become unsafe. Article 410 requires CC to file for Commission approval a plan for implementing ramping rates that would ensure the protection of fish resources and downstream recreationists. Article 416 requires CC to file a plan for Commission approval to warn recreationists of increases in water level and streamflow downstream of the dam.

2. Communication Network for Whitewater Boaters

In their March 30, 1988 response to the DEIS, CC proposed to develop a communication network that would quickly inform recreationists of anticipated flow conditions below Milner Dam. Under existing conditions, high flows occur rarely and are unpredictable for boaters. A communication network would partially mitigate for the loss of whitewater boating days caused by project operation by giving boaters more opportunity to plan boating trips to coincide with desirable flows. Article 418 requires CC, after consultation with BR, IDWR, IDPR, BLM, NPS, and IWA, to file for Commission approval a plan to provide a communication network to inform whitewater boaters of available whitewater flows.

J. Fishing Access to the Bypassed Reach

We believe that CC should study the feasibility of stocking the project bypassed reach with trout to provide new opportunities for fishing at the project site. A program to inform the public of fishing opportunities at the project site would be needed since presently the Milner reach receives minimal fishing use. Also, access to be provided at the powerhouse and at the bridge below Milner Dam could attract additional fishing use to the project bypassed reach. To ensure that anglers are adequately informed of fishing opportunities in the bypassed reach, Article 408 requires CC to file for Commission approval a plan that includes notification of anglers of fishing opportunities.

K. Recreation Facilities

CC initially proposed to construct the following recreational facilities: (1) a parking area to accommodate 10 vehicles at the powerhouse; (2) kayaker access at the powerhouse; and (3) a boat dock near the existing boat dock at the BLM's Bicentennial Site on Milner Reservoir. In their March 30, 1988 filing, however, CC proposed for consideration additional facilities. These include: (1) an interpretive center with associated picnic facilities at or near Milner Dam, or an alternate location; (2) an additional water ski dock or docks in Milner Reservoir near Milner Dam; (3) further development of public facilities at the BLM Wildlife Habitat Management area; or (4) other better suited public facilities selected as a result of the consultation process.

Since the construction of the project would provide an opportunity to enhance recreation near Milner Dam, some additional facilities should be provided to allow access for whitewater boaters and fishermen. Other facilities mentioned above, however, may not be needed at this time.

Article 419 requires CC to file for Commission approval a recreation plan prepared in consultation with the IDPR, BLM, NPS, and IWA, that includes, but is not limited to: (1) provisions for a kayaker put-in area at the bridge below Milner Dam and a take-out area below the powerhouse with parking facilities; (2) tailwater fishing facilities; (3) design drawings of the proposed facilities; (4) a construction schedule for the facilities; (5) a plan for monitoring recreational use in the project area to determine if additional recreational facilities will be needed in the future; and (6) documentation of agency consultation. Article 419 also requires that CC, in designing these facilities, consider providing the whitewater take-out area below the final Class V rapid below the powerhouse area and away from tailwater fishing facilities. This would avoid boater interference with fishermen and allow boaters to run an additional Class V rapid.

L. Visual Resource Mitigation

Milner Dam and its associated proposed facilities are visible to visitors to the dam site interpretive area as well as from water users on the river and reservoir. The proposed dam and canal modifications would blend with the existing landscape.

The power generating facilities would be located in an area out of view of Milner Dam and in a visually natural setting within the canyon. The naturalness of the canyon walls is a great asset that should be maintained throughout the installation and operation of the proposed project. The proposed access road to the powerhouse site would cross steep canyon side slopes and its construction would entail earth and rock cuts and fills that would create a linear element in the natural appearing landscape. The proposed penstock would cross over the canyon rim and drop nearly vertical to the powerhouse at the river's edge. This large pipe, with its smooth surfaces, would reflect light and contrast in color, texture, and line, with the existing natural appearing landscape. The proposed powerhouse, substation, transmission line, gantry crane, and tailrace would also contrast with the natural appearing landscape because of their geometric forms. In particular, the transmission line from the powerhouse to the forebay would create a linear element contrasting with the canyon walls.

CC should study the feasibility of placing the transmission line either underground or in a conduit attached to the penstock from the powerhouse to the forebay area. Therefore, to ensure that the proposed facilities are designed to minimize visual impacts, Article 420 requires CC to submit final construction plans and specifications prior to the commencement of any project-related land-disturbing activities.

M. Cultural Resources

Three historic sites listed or considered eligible for inclusion in the National Register of Historic Places are located within or near the impact areas of the project. The listed site is Milner Dam. The eligible sites are the South Side Main Canal and Milner Townsite. Six archeological sites have also been identified in the project vicinity. Based on a review of the archeological report for the project, and a site visit to the project area, the Idaho State Historic Preservation Officer (SHPO) has stated that the sites either are not eligible for inclusion in the National Register or lie outside the area of

potential impacts. 33/ Project construction and rehabilitation of the Dam would require modifications to the dam and the canal. No construction or rehabilitation work would occur in the area of the Townsite.

CC has filed a cultural resources management plan, prepared in cooperation with the SHPO, to mitigate the project's effects on the dam and the canal and to ensure that the townsite would not be affected by construction or rehabilitation work. The plan proposes to document in photographs, drawings, and in a report, according to the standards of the Historic American Engineering Record (HAER), the portions of the dam and the canal that would be altered by the project. The plan proposes to fence portions of the townsite and to prohibit construction activities in the vicinity of the townsite to ensure that no impacts to this site would occur. 34/

The SHPO reviewed the plan and stated the following: (1) the plan minimizes impacts to the dam and the canal and ensures that the townsite would not be impacted; (2) rehabilitation work would not affect the original historical fabric of the dam; (3) this work would not significantly affect the appearance of the dam; and (4) the plan satisfies the historic preservation requirements for consultation with the Advisory Council on Historic Preservation, as required by the National Historic Preservation Act. 35/

The U.S. Department of the Interior (Interior) also reviewed the cultural resources management plan and the cultural resources documentation contained in the application for license, and generally concurs with the plan and the findings of the SHPO. Interior recommends certain revisions to the plan and the cultural resources documentation to ensure that the plan is implemented in a satisfactory manner and that the documentation is complete. Specifically, Interior recommends these actions:

33/ Letters from Dr. Thomas Green, State Archeologist, Idaho State Historical Society, Boise, Idaho, May 17, 1984; and John A. Rosholt, Attorney for Twin Falls Canal Company and North Side Canal Company, Ltd., Nelson, Rosholt, Robertson, Tolman & Tucker, Twin Falls, Idaho, February 11, 1986.

34/ Letter from John A. Rosholt, Attorney for Twin Falls Canal Company and North Side Canal Company, Ltd., Nelson, Rosholt, Robertson, Tolman & Tucker, Twin Falls, Idaho, February 11, 1986.

35/ Letter from Dr. Merle W. Wells, State Historic Preservation Officer, Idaho State Historical Society, Boise, Idaho, February 4, 1986.

(1) completing documentation of the dam, canal, and townsite in accordance with National Register eligibility criteria before determining the specific HAER documentation or avoidance procedures that should be implemented, to ensure that documentation and procedures are directed at the significant historical attributes of these sites; (2) surveying the townsite to precisely determine the boundaries of the site, to ensure that the site is not impacted; (3) avoiding the use of fencing at the townsite so as not to draw the attention of artifact collectors or vandals; and (4) providing further documentation on one archeological site (10-TF-641) to clearly establish that the site is not eligible for inclusion in the National Register. 36/

To ensure that the dam, canal, and townsite are documented and protected in an adequate manner and that the cultural resources documentation of site 10-TF-461 is complete, CC should consult with the SHPO, and also the HAER in the case of the dam and canal, to determine the specific procedures that should be implemented, and should implement the plan with Interior's recommended revisions before beginning land-disturbing or land-clearing activities that would impact these sites. The documentation should be filed in a report or in separate reports, if the documentation or avoidance procedures are undertaken at different times, and filed with the Commission for approval. The reports must contain a letter from the SHPO accepting the documentation and procedures for avoiding impacts. In the case of the dam and the canal, letters from the HAER accepting the documentation must also be included. No rehabilitation work or other construction work at the dam or canal or within the vicinity of the townsite and the archeological site may commence until CC are notified by the Commission that the filing has been approved. Article 421 requires implementation of the revised plan.

The project has the potential to impact archeological and historic sites not previously identified at the project. Buried sites may be encountered during construction. Also, project facilities may be relocated or added to the project at some future date in areas not previously inventoried for sites. Any such archeological or historic sites should be afforded protection in accordance with the National Historic Preservation Act. Article 422 requires the implementation of cultural resources protection measures to avoid or minimize impacts to any such sites that may be impacted by the project. Article 421

36/ Letters from Bruce Blanchard, Director, Environmental Review, Department of the Interior, Washington, D.C., December 17, 1985; and Helene Dunbar, Acting Chief, Interagency Archeological Services, National Park Service, San Francisco, California, February 4, 1986.

requires CC to finalize and implement its cultural resources management plan in a manner acceptable to the Advisory Council on Historic Preservation.

N. Cumulative Impacts

Cumulative impacts of the four proposed projects, including the Milner Project No. 2899, will be fully assessed in the Supplement and FEIS to take into consideration any changes that occur between the DEIS and the FEIS in configuration, operation, and mitigative measures associated with the other three projects. Standard Articles 15 and 17 of the license 37/ reserve sufficient authority for the Commission to order reasonable modifications of the project structures and operations to take into account recommendations made in accordance with the NEPA process.

IV. Recommendations of Federal and State Fish and Wildlife Agencies

Section 10(j) of the FPA, as amended by the Electric Consumers Protection Act of 1986 (ECPA), Pub. L. No. 99-495, requires the Commission to include license conditions, based on recommendations of federal and state fish and wildlife agencies, for the protection, mitigation, and enhancement of fish and wildlife. The concerns raised by the federal and state fish and wildlife agencies have been fully addressed in the DEIS, and the conditions contained in this license are consistent with the recommendations made by those agencies.

V. Comprehensive Plans

Section 10(a)(2)(A) of the FPA, as amended by ECPA, requires the Commission to consider the extent to which a project is consistent with federal or state comprehensive plans (where they exist) for improving, developing, or conserving a waterway or waterways affected by the project. The Commission's interpretation of "comprehensive plan" under Section 10(a)(2)(A) 38/ was revised on rehearing by order issued April 27, 1988. 39/ On rehearing, the Commission instructed the Director, Office of Hydropower Licensing, to request the state and federal agencies to file plans they believe meet the revised guidelines.

37/ See Ordering Paragraph (D) hereof.

38/ Order No. 481, 52 Fed. Reg. 39,905 (October 26, 1987), III FERC Stats. & Regs. ¶ 30,773 (1987).

39/ Order No. 481-A, 43 FERC ¶ 61,120 (April 27, 1988).

The Commission reviewed five plans that address various aspects of waterway management in relation to the proposed project. 40/ With one exception, the proposed project, as conditioned herein, is consistent with those plans.

The Idaho State Water Plan (ISWP) is a Section 10(a)(2)(A) comprehensive plan. In its September 25, 1985 motion to intervene in this proceeding, IDWR indicated that the ISWP specifies that the use of water by hydroelectric projects must be subordinated to future upstream depletionary uses and requested that such a provision be included in any license issued for Project No. 2899. IDWR did not, however, provide any information regarding the timing and extent of those future depletionary uses or how such uses would affect the operation of Project No. 2899.

As we explained in Horseshoe Bend Hydroelectric Company, 41/ in determining whether, and under what conditions, a license should issue, we are required by the comprehensive planning provision of Section 10(a)(1) of the FPA, 16 U.S.C. § 803(a)(1), to consider and balance all aspects of the public interest, including the need to protect environmental and irrigation interests and the need for the power to be produced by the project. In so doing, we prescribe conditions that we believe will provide the appropriate level of energy generation and protection for the environment and irrigation and will not issue a license if the conditions we deem necessary to protect environmental and other resources would render a project financially infeasible.

Inclusion in the license of the unsupported open-ended water subordination clause requested by IDWR would in essence vest in IDWR, rather than the Commission, ultimate control over the operation and continued viability of the project. In other words, the subordination clause, which would reserve to IDWR the right to permit unlimited diversion upstream of the project, could nullify the balance struck by us under the comprehensive planning provisions of Section 10(a)(1) of the FPA in issuing the license. Consequently, inclusion of the open-ended water subordination clause in the license as requested by IDWR would interfere with the exercise of our comprehensive planning

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40/ Idaho Statewide Comprehensive Outdoor Recreation Plan, 1983, IDPR; Idaho State Water Plan, 1986, IDWR; Idaho Fisheries Management Plan, 1986, IDFG; and Northwest Conservation and Electric Power Plan, 1986; and Columbia River Basin Fish and Wildlife Program, 1987.

41/ 42 FERC ¶ 61,072 (1988), appeal pending sub nom. Idaho Power Company v. FERC, No. 88-1078 (D.C. Cir. filed Feb. 3, 1988).

responsibilities under Section 10(a)(1) of the FPA and thus would be inconsistent with the scheme of regulation established by the FPA, which vests in the Commission the exclusive authority to determine whether, and under what conditions, a license should issue. 42/

In light of the above, we will not add the requested open-ended subordination clause to the license for Project No. 2899. However, as we explained in Horseshoe Bend, should IDWR in the future determine that it would be desirable for CC to reduce their use of water for generation to accomodate a specific future upstream water use, IDWR can petition the Commission to have us exercise our reserved authority under Standard Article 12 of the license to require such a reduction. We will provide CC with notice of the request and an opportunity to respond and will act on the request after considering all supporting documents and information submitted by IDWR and CC.

The proposed project is otherwise consistent with the ISWP. The ISWP provides for a zero minimum flow below Milner Dam. The license as conditioned herein is consistent with the zero minimum flow provision of the ISWP, since the license would not require that minimum flows be provided below Milner Dam. Instead, it requires CC to provide any additional water needed to meet the environmentally-desirable target flows by leasing water that is in excess of irrigation requirements from the Water Bank, but only if available, and in accordance with the rules of the Water Bank operation.

The Columbia River Basin Fish and Wildlife Program (Program), developed by the Northwest Power Planning Council (Council) to protect, mitigate, and enhance fish and wildlife resources associated with the development and operation of hydroelectric projects within the Columbia River Basin is a Section 10(a)(2)(A) comprehensive plan. 43/ Responsible federal agencies are required to provide equitable treatment for fish and wildlife resources, consistent with the other purposes for which hydropower is developed and to take into account to the fullest extent practicable the Program.

The Program directs agencies to consult with federal and state fish and wildlife agencies, appropriate Indian Tribes, and the Council during the study, design, construction, and operation of any hydroelectric development in the Basin. At the time the application for Project No. 2988 was filed, the Commission's

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42/ See First Iowa Hydro-Electric Coop. v. FPC, 328 U.S. 152 (1946).

43/ See 43 FERC ¶ 61,120 (1988).

regulations required applicants to initiate prefiling consultation with the appropriate federal and state fish and wildlife agencies and the Tribes and provided these groups with postfiling opportunities to review and to comment on the application. This consultation process has occurred.

The Program states that authorization of new hydroelectric projects should include conditions of development that would mitigate the impacts of the project on fish and wildlife resources. The relevant federal and state fish and wildlife agencies have reviewed and commented on the application. In addition, this license provides for mitigative measures to protect and enhance fish and wildlife resources and is therefore consistent with Section 1200 of the Program. Further, Article 423 of this license reserves to the Commission the authority to require future alterations in project structures and operation in order to take into account to the fullest extent practicable the applicable provisions of the Program.

VI. Project Economics and Need for Power

Commission studies show that the proposed project, operating under its proposed mitigation requirements, would produce approximately 144,300 MWh of energy annually at a levelized cost of about 61.5 mills/kWh. When compared to the levelized cost of alternative energy in the region of about 85 mills/kWh, the levelized net annual benefits of the project power would be approximately $3.4 million. CC's levelized revenues under the terms of their power sales contract are expected to be about $452,000 annually, which would be a significant contribution to their projected financing obligation for the Milner Dam rehabilitation.

The project is financially feasible, because CC have executed a contract for the sale of the project power which obligates the power purchaser to pay the total costs plus two mills/kWh for the project generation, to be escalated by 20 percent every five years.

As discussed in the attached S&DA, a need for power could exist in the region any time from the early 1990s to late 1990s, and that the Milner Project could be useful in meeting a small part of that need for power.

VII. Summary of Findings

The design of this project is consistent with the engineering standards governing dam safety. The project will be safe if constructed, operated, and maintained in accordance with the requirements of this license. Analysis of related issues is provided in the S&DA attached to this order.

As discussed previously and in the attached S&DA, the 200 cfs target flow required by Article 407 would: (1) not jeopardize the feasibility of the project development; (2) provide flows below Milner Dam without sacrificing irrigation water requirements; and (3) reduce CC's annual power revenues, which will be used to help offset the cost of the Milner Dam rehabilitation, by only $13,300 (less than four percent). Thus, the requirement to lease water in excess of irrigation requirements to meet mitigation flow requirements is reasonable, because water is projected to be available for purchase from the Water Bank at a reasonable price that would not eliminate the economic benefits of the project or jeopardize CC's ability to secure financing for the project. Additionally, the target flow may be necessary for the maintenance of a marginal cold-water fishery in the river reach below Milner Dam.

Based on our independent analysis, we conclude that the Milner Project No. 2899 as conditioned herein would not conflict with any planned or authorized development and would be best adapted to comprehensive development of the waterway for the beneficial public uses specified in Sections 4(e) and 10(a)(1) of the FPA.

The Commission orders:

(A) This license is issued to the Twin Falls Canal Company and the North Side Canal Company, Ltd. (licensees), for a period of 50 years, effective the first day of the month in which this order is issued, to construct, operate, and maintain the Milner Hydroelectric Project No. 2899. This license is subject to the terms and conditions of the FPA, which is incorporated by reference as part of this license, and subject to the regulations the Commission issues under the provisions of the FPA.

(B) The project consists of:

(1) All lands, to the extent of the licensees' interests in those lands, enclosed by the project boundary shown by Exhibit G:

Exhibit G-	FERC No. 2899-	Showing
General Map	1	13
Project Boundary Map	2	14
Project Boundary Map	3	15
Project Boundary Map	4	16

Project Boundary Map 5 17

(2) Project works consisting of: (a) the existing Milner Dam, constructed with a trapezoidal-shaped rockfill section at elevation 4,138 feet, the north embankment with a crest length of 480 feet, the middle embankment with a crest length of 404 feet, and the south embankment with a crest length of 462 feet, proposed 15-foot-wide rockfill berms on the downstream slope of the dam, eleven 12-foot-high, 30-foot-wide radial gates proposed for the southern island, and an ungated emergency spillway on the northern island; (b) the existing 1,100-acre reservoir with a gross storage capacity of 26,000 acre-feet at an elevation of 4,130.05 feet; (c) a canal control structure, consisting of six manually-operated gates, 12-feet-wide by 15-feet-high, and one hydraulically operated bascule gate, 24-feet-long by 11-feet-high; (d) new stoplog slots, replacing the existing headworks; (e) a 6,500-foot-long, earth and riprap-lined excavated rock canal, modified to increase the canal capacity from 3,200 cfs to 7,000 cfs; (f) an existing bridge on the Twin Falls Main Canal, raised to an elevation of 4,137.5 feet and lengthened by 60 feet; (g) a new concrete wasteway, providing a water passageway through the right canal embankment of the Twin Falls Main Canal, having a 39-foot-long, 10.5-foot-high, hydraulically operated bascule gate; (h) a forebay, having a maximum capacity of 4,000 cfs; (i) an intake structure at the end of the forebay, consisting of steel trashracks and a 14-foot-wide, 17-foot-high, cable-operated, fixed-wheel gate; (j) a 17-foot-diameter, 385-foot-long steel penstock; (k) an 89-foot-long, 56-foot-wide, 83-foot-deep, semi-outdoor, reinforced concrete powerhouse, containing a single generating unit with a rated capacity of 43.65 megawatts, operating under a head of 151.6 feet; (l) a 170-foot-long tailrace; (m) a 2,300-foot-long access road; (n) a 1.4-mile-long, 138-kilovolt transmission line, tying into the existing Milner substation; (o) 600 feet of river bottom excavation; and (p) appurtenant facilities.

The project works generally described above are more specifically shown and described by those portions of Exhibits A and F recommended for approval in the S&DA.

(3) All of the structures, fixtures, equipment, or facilities used to operate or maintain the project and located within the project boundary, all portable property that may be employed in connection with the project and located within or outside the project boundary, and all riparian or other rights that are necessary or appropriate in the operation or maintenance of the project.

(C) The Exhibit G described above and those sections of Exhibits A and F recommended for approval in the S&DA are approved and made part of the license.

(D) This license is subject to the articles set forth in Form L-2 (October 1975), entitled "Terms and Conditions of License for Unconstructed Major Project Affecting Lands of the United States," except Article 20, and the following additional articles:

Article 201. The licensees shall pay the United States the following annual charges, effective the first day of the month in which this license is issued.

(a) For the purpose of reimbursing the United States for the cost of administration of Part I of the FPA, a reasonable amount, as determined in accordance with the provisions of the Commission's regulations in effect from time to time. The authorized installed capacity for that purpose is 58,200 horsepower.

(b) For the purpose of recompensing the United States for the use, occupancy, and enjoyment of its lands, other than for transmission line right-of-way, a reasonable amount, as determined in accordance with the provisions of the Commission's regulations in effect from time to time.

(c) For the purpose of recompensing the United States for the use, occupancy, and enjoyment of its lands for transmission line right-of-way, a reasonable amount, as determined in accordance with the provisions of the Commission's regulations in effect from time to time.

Article 202. Pursuant to Section 10(d) of the FPA, after the first 20 years of operation of the project under license, a specified reasonable rate of return upon the net investment in the project shall be used for determining surplus earnings of the project for the establishment and maintenance of amortization reserves. One-half of the project surplus earnings, if any, accumulated after the first 20 years of operations under the license, in excess of the specified rate of return per annum on the net investment, shall be set aside in a project amortization reserve account at the end of each fiscal year. To the extent that there is a deficiency of project earnings below the specified rate of return per annum for any fiscal year after the first 20 years of operation under the license, the amount of that deficiency shall be deducted from the amount of any surplus earnings subsequently accumulated, until absorbed. One-half of the remaining surplus earnings, if any, cumulatively computed, shall be set aside in the project amortization reserve account. The amounts established in the project amortization reserve account shall be maintained until further order of the Commission.

The annual specified reasonable rate of return shall be the sum of the annual weighted costs of long-term debt, preferred stock, and common equity, as defined below. The annual weighted cost for each component of the reasonable rate of return is the product of its capital ratio and cost rate. The annual capital ratio for each component of the rate of return shall be calculated based on an average of 13 monthly balances of amounts properly includable in the licensees' long-term debt and proprietary capital accounts as listed in the Commission's Uniform System of Accounts. The cost rates for long-term debt and preferred stock shall be their respective weighted average costs for the year, and the cost of common equity shall be the interest rate on 10-year government bonds (reported as the Treasury Department's 10-year constant maturity series) computed on the monthly average for the year in question plus four percentage points (400 basis points).

Article 203. The licensees shall clear and keep clear to an adequate width all lands along open conduits and shall dispose of all temporary structures, unused timber, brush, refuse, or other material unnecessary for the purposes of the project which result from maintenance, operation, or alteration of the project works. In addition, all trees along the periphery of project reservoirs that may die during operations of the project shall be removed. All clearing of lands and disposal of unnecessary material shall be done with due diligence to the satisfaction of the authorized representative of the Commission and in accordance with appropriate federal, state, and local statutes and regulations.

Article 301. The licensees shall begin construction of the project works within two years from the issuance date of the license and shall complete construction of the project within four years from the issuance date of the license.

Article 302. To ensure completion of construction of the dam safety modifications during the 1989 construction season, the licensees shall file a plan and schedule for the design and construction of the dam safety modifications within 30 days from the issuance date of the license. The plan shall include specific items for activities that are necessary before beginning construction activities.

Article 303. Within 90 days after completion of construction, the licensees shall file for the Commission's approval, revised Exhibits A, F, and G, to describe and show the project as-built, including all facilities determined by the Commission to be necessary and convenient for transmitting all of the project power to the interconnected system.

Article 304. Before the start of construction, the licensees shall review and approve the design of contractor-designed cofferdams and deep excavations and shall ensure that construction of the cofferdams and deep excavations is consistent with the approved design. At least 30 days before starting construction of the cofferdam, the licensees shall submit to the Commission's Regional Director and to the Director, Division of Dam Safety and Inspections, one copy of the approved cofferdam construction drawings and specifications and a copy of the letter(s) of approval.

Article 305. The licensees shall retain a board of two or more qualified, independent, engineering consultants to review the design, specifications, and construction of the project for safety and adequacy. The names and qualifications of the board members shall be submitted for approval to the Director, Division of Dam Safety and Inspections, with a copy to the Commission's Regional Director. Among other things, the board shall assess the following: the geology of the project site and surroundings, the design, specifications, and construction of the reinforcement berms, canal embankments, spillway, powerhouse, electrical and mechanical equipment, and emergency power supply; instrumentation; and construction procedures and progress. Before each meeting, allowing sufficient time for review, the licensees shall furnish to the board, with a copy to the Regional Director and two copies to the Director, Division of Dam Safety and Inspections, the following: documentation showing details and analyses of design and construction features to be discussed; significant events in design and construction that have occurred since the last board of consultants' meeting; drawings; questions to be asked; a list of items for discussion; an agenda; and a statement showing the specific level of review to be performed by the board. Within 30 days after each board of consultants meeting, the licensees shall submit to the Commission copies of the board's report, including the board's recommendations and the licensee's plans for addressing the recommendations.

Article 306. At least 60 days before the start of construction of each major component of the project, such as the dam rehabilitation, spillway reconstruction, all necessary transmission facilities, powerhouse, and water conveyance structures, the licensees shall submit for that component, one copy to the Commission's Regional Director and two copies to the Director, Division of Dam Safety and Inspections, of the final design report, contract drawings and specifications. The Director, Division of Dam Safety and Inspections, may require changes in the plans and specifications to assure a safe and adequate project.

Article 307. The licensees shall develop procedures for the repair of the earthfill sections of Milner Dam in the event there

is excessive leakage. The licensees shall include procedures for the following items: inspection; reservoir drawdown; cofferdam construction; earth embankment repair methods; and other pertinent items. The repair procedure shall be reviewed and approved by the board of consultants required in Article 305. Within one year of issuance of the license, the licensees shall submit one copy to the Commission's Regional Director and two copies to the Director, Division of Dam Safety and Inspections, of a report detailing the procedures. The Director, Division of Dam Safety and Inspections, may require changes in the procedures to assure a safe and adequate project.

Article 308. Within one year of issuance of this license, the licensees shall submit a report evaluating the feasibility of constructing a power plant at Milner Dam to utilize the power potential of the flows released to the bypass reach of the river below the dam and therefore not usable by the proposed power plant to be located approximately 1.6 miles downstream. If the feasibility study shows that developing a power plant at the dam would be economically beneficial, the licensees shall submit a schedule and plans for developing a power plant at the dam in accordance with Article 301.

Article 401. The licensees shall acquire at the earliest possible date each year, by rental on an annual basis from the Upper Snake Water Supply Bank, stored water, to the extent that it is available in excess of irrigation demand, to be released as necessary to meet the target flows specified in Article 407. The licensees may, and are encouraged to, formulate an agreement with any and all of the licensees for projects which, in the future, are licensed to be constructed and operated on the Snake River below American Falls Dam and which have similar requirements to meet recommended flows from short-term water acquisition.

Article 402. The licensees, after consultation with the Soil Conservation Service, the Bureau of Land Management, and the Idaho Department of Fish and Game, and at least 90 days before beginning any project-related land-clearing, land-disturbing, or spoil-producing activities, except for activities specifically required for safety modifications to Milner Dam, shall prepare and file for Commission approval a plan to control erosion, slope stability, and to minimize the quantity of sediment resulting from project construction and operation. The Commission reserves the authority to require changes to the plan.

The plan shall be based on actual-site geological, soil, and groundwater conditions and final project design, and shall include the following: (1) a description of the actual-site conditions; (2) cofferdams, perimeter control measures, measures to divert runoff around disturbed land surfaces and to collect and filter runoff, provisions for energy dissipation, riprap,

measures to stabilize rock cuts, and permanent drainage for access roads; (3) detailed descriptions, functional design drawings, and specific topographic locations of all control measures; (4) specific details of the revegetation plan, including species composition, planting or seeding rates, fertilizer, and mulch; (5) provisions to dispose of spoil materials above the high water mark and store fuels and chemicals used in construction away from the river and reservoir; (6) a specific implementation schedule and details of monitoring and maintenance programs for project construction and operation; and (7) a schedule for periodic review of the plan and for making any necessary revisions to the plan.

The licensees shall include in the filing documentation of consultation with the agencies, copies of agency comments or recommendations on the plan, and specific descriptions of how all of the agency comments and recommendations are accommodated by the plan. The licensees shall allow a reasonable time frame, in no case less than 30 days, for agencies to comment and make recommendations prior to filing the plan.

No project-related land-disturbing, land-clearing, or spoil-producing activities shall begin until the licensees are notified that the plan complies with the requirements of this article, except for activities specifically required for safety modifications to Milner Dam. The licensees shall submit with the plans and specifications required by Article 306 for safety modifications to Milner dam, measures to minimize erosion, sedimentation, and control slope stability.

Article 403. The licensees, after consultation with the Environmental Protection Agency, the Idaho Department of Health and Welfare, the U.S. Fish and Wildlife Service, and the Idaho Department of Fish and Game, and at least 90 days before commencing any project related land-clearing, land-disturbing, or spoil-producing activities within the Snake River and Milner reservoir, shall file for Commission approval, a monitoring plan to conduct tests for heavy metals and other toxic substances in any sediments or other unconsolidated deposits in the Snake River and in Milner reservoir that would be removed or otherwise disturbed by dredging, constructing, or operating project facilities and to safely remove and dispose of any sediment and unconsolidated deposits containing heavy metals or toxic substances. The plan also should include an implementation schedule for the monitoring and comments of the consulted agencies on the monitoring plan and implementation schedule. The filing shall include documentation of agency consultation and any agency comments and recommendations on the plan. The Commission reserves the right to require changes to the plan. The licensees shall not commence any land-clearing or land-disturbing

activities within the Snake River and Milner reservoir until the Commission approves the plan.

Article 404. The licensees, after consultation with the Environmental Protection Agency, the Idaho Department of Health and Welfare, the U.S. Fish and Wildlife Service, and the Idaho Department of Fish and Game, and at least 90 days before beginning project operation, shall file for Commission approval, a water quality monitoring plan that would characterize levels of dissolved oxygen (DO) and water temperature in the bypassed reach from immediately below Milner dam to immediately above the powerhouse discharge during project operation. The plan shall describe in detail the methods and shall identify the time periods and locations for collecting water temperature and DO data, and shall include a schedule for providing the data to the consulted agencies and to the Commission. Further, the plan shall include a provision to determine if water temperature and DO necessary for the survival of a trout fishery within the bypassed reach are being maintained by the target flow required by Article 407. The filing shall include documentation of agency consultation and agency comments on the plan. The Commission reserves the right to require changes to the plan. The licensees shall not begin project operation until the Commission approves the plan.

Article 405. The licensees, after consultation with the Idaho Department of Fish and Game, shall develop, implement, and finance a warmwater fish stocking and habitat enhancement plan consistent with the Idaho Fisheries Management Plan 1986-1990 for Milner reservoir. The plan shall include the species of warmwater fish, numbers and sizes to be stocked, a description of specific enhancement structures, and a map showing the proposed locations of these structures in the reservoir. The licensees shall file the plan with the Commission for approval at least 90 days before beginning commercial operation. The licensees shall give the Idaho Department of Fish and Game at least 30 days to comment on the stocking and habitat enhancement program plan. The filing shall include documentation of agency consultation and any agency comments and recommendations. The Commission reserves the right to require modifications to the plan. The licensees shall not commence commercial operation until the Commission approves the plan.

Article 406. The licensees, after consultation with the Idaho Department of Fish and Game, shall develop a monitoring plan to determine if the habitat enhancement structures placed in Milner reservoir have remained in place and are functioning as desired and to determine if additional warmwater fish need to be stocked in Milner reservoir, required by Article 405, to meet the Fisheries Management Plan goal. The licensees shall conduct the monitoring plan for at least five years. The monitoring plan

shall include a schedule for filing the results of the monitoring and the comments of the Idaho Department of Fish and Game on the results and shall include recommendations for incorporating additional enhancement measures or stocking additional warmwater fish if needed. The licensees shall file the plan with the Commission for approval at least 90 days before beginning commercial operation. The filing shall include documentation of agency consultation and any agency comments and recommendations. The Commission reserves the right to require modifications to the plan. The licensees shall not commence commercial operation until the Commission approves the plan.

Article 407. The licensees shall discharge from Milner Dam a target flow of 200 cubic feet per second as measured at the Milner gage located in the bypass reach. The target flow may be temporarily reduced if required by operating emergencies beyond the control of the licensees or for short periods upon mutual agreement between the licensees and the Idaho Department of Fish and Game. Further, the target flow may be reduced if necessary during any periods where sufficient water is not available through lease from the Upper Snake Water Supply Bank in accordance with Article 401, or from water surplus to irrigation needs.

Article 408. The licensees, after consultation with the Idaho Department of Fish and Game, shall develop a plan to stock trout in the 1.6-mile-long bypassed reach of the Snake River. The plan must include the following: (1) stocking location(s); (2) the number, species, and size of trout to be stocked each year; (3) the estimated annual cost of implementing the program; (4) a communication network to inform anglers of the stocking dates and locations; and (5) the comments of the Idaho Department of Fish and Game on the program. The licensees shall file the plan with the Commission for approval at least 90 days prior to commencing commercial operation. The Commission reserves the right to require modifications to the plan. The licensees shall not commence commercial operation until the Commission approves the plan.

Article 409. The licensees, after consultation with the Idaho Department of Fish and Game, shall file a study plan for Commission approval, at least 90 days prior to commencing commercial operations, to determine if the put-and-grow trout fishery in the bypassed reach, required by Article 408, is successful. The plan shall include provisions for filing annual reports by December 31 of each year on the put-and-grow trout stocking program. The annual report shall include information on the growth, movement, and survival of the trout planted in the bypassed reach, water temperature and DO data collected pursuant to Article 404, and an evaluation of the effects of water temperature and DO on the stocking program and the comments of

the Idaho Department of Fish and Game on the results. The licensees shall give the Idaho Department of Fish and Game at least 30 days to comment on the results of the stocking program prior to filing the annual report. The licensees shall conduct the monitoring program for at least five years and file a final comprehensive report on the success of the stocking program and any recommendations for changing the stocking program, including at a minimum stocking new locations or changing the stocking rate. The Commission reserves the right to require modifications to the trout program based on the monitoring results. The licensees shall not begin commercial operation until the Commission approves the plan.

If the results of the annual monitoring or after the five-year study period show that changes to the stocking program are needed, the licensees also shall file for Commission approval a schedule for implementing the changes to the program along with the comments of the Idaho Department of Fish and Game on the recommended changes. The Commission reserves the right to require modifications to the recommendations for changing the stocking program.

Article 410. The licensees shall limit the maximum rate of change in river elevation (ramping rate) to one foot per hour or less for the protection of aquatic resources and downstream recreationists. Further, the licensees, after consultation with the Idaho Department of Fish and Game and the Idaho Department of Parks and Recreation, shall conduct a ramping rate study after the project is operational. The study shall determine if the one foot per hour rate of change in the Snake River's elevation provides adequate protection for the aquatic resources in the bypassed reach during project startup and to protect downstream recreationists when increasing and decreasing flows. The licensees shall file the results of the study along with any recommendations for changing the ramping rate for Commission approval within one year after the project is operational. Agency comments on the study and any proposed changes to the ramping rate shall be included with the filing. The Commission reserves the right to require modifications to the proposed ramping rate.

Article 411. The licensees shall design and construct the transmission line in accordance with guidelines set forth in "Suggested Practices for Raptor Protection on Power Lines--the State of the Art in 1981," by Raptor Research Foundation, Inc. The licensees after consultation with the U.S. Fish and Wildlife Service, the Idaho Department of Fish and Game, and the Bureau of Land Management in adopting these guidelines shall develop and implement a design that will provide adequate separation of energized conductors, groundwires, and other metal hardware, adequate insulation, and any other measures necessary to protect

raptors from electrocution hazards. Within 90 days after completion of construction of the transmission line, the licensees shall file as-built drawings of the transmission line design with the Commission.

Article 412. The licensees, after consultation with the U.S. Fish and Wildlife Service, the Idaho Department of Fish and Game, the Bureau of Land Management, and the Soil Conservation Service, and at least 90 days prior to commencing any land-disturbing, land-clearing, or spoil-producing activities not specifically required for safety modifications to Milner Dam, shall file for Commission approval a plan to revegetate all disturbed areas with native plant species beneficial to wildlife. The plan shall include at a minimum: (1) a description of the plant species to be used, an indication of each species habitat value and food value, and planting densities; (2) planting methods; (3) fertilization and irrigation requirements; (4) a monitoring program to evaluate the effectiveness of the plantings; (5) a description of procedures to be followed if monitoring reveals that the revegetation is not successful; and (6) an implementation schedule that provides for the revegetation as soon as practicable after completion at a particular site and the filing of periodic monitoring reports. Agency comments shall be included on the filing. The Commission reserves the right to require changes to the plan. The licensees shall not begin any land-clearing or land-disturbing activities not specifically required for safety modifications to Milner Dam until the plan is approved by the Commission.

Article 413. The licensees, after consultation with the U.S. Fish and Wildlife Service, the Idaho Department of Fish and Game, and the Bureau of Land Management, and at least 90 days before beginning any project-related land-clearing or land-disturbing activities not specifically required for safety modifications to Milner Dam, shall file for Commission approval a plan for constructing, maintaining, and monitoring osprey nesting platforms, Canada goose-nesting structures, and artificial burrows for burrowing owls (wildlife enhancement features) in the project area. The plan shall include at a minimum: (1) the final designs for the wildlife enhancement features; (2) the number and location of the wildlife enhancement features; ~~(3) a~~ schedule for providing the wildlife enhancement features; (4) and a program for maintenance and monitoring. Agency comments on the adequacy of the plan shall be included in the filing. The Commission reserves the right to require changes to the plan. The licensees shall not commence any land-clearing or land-disturbing activities not specifically required for safety modifications to Milner Dam, until the plan is approved by the Commission.

Article 414. The licensees, after consultation with the U.S. Fish and Wildlife Service, the Idaho Department of Fish and

Game, the Bureau of Land Management, and the Environmental Protection Agency, and at least 90 days before beginning any project related land-disturbing or land-clearing activities not specifically required for safety modifications to Milner Dam, shall file for Commission approval a plan for developing at least 23.5 acres of riparian wetland habitat to mitigate for the loss of 6.8 acres of riparian wetlands and 26.6 acres of upland habitat. The plan shall include, but shall not be limited to: (1) maps showing the location of all replacement habitat, site boundaries, size of each site, and physical and habitat features; (2) a description of planting methods, fertilization and irrigation requirements, and a planting schedule; (3) a description of the soil and substrate conditions at the replacement sites; (4) a monitoring program that includes goals and criteria for successful establishment of wetland vegetation, sampling procedures, and reporting requirements; (5) procedures to implement if monitoring reveals that establishment of vegetation is not successful; (6) an implementation schedule that provides for habitat replacement as soon as practicable; and (7) a description of the program for the long-term ownership, management, and maintenance of the replacement habitat. Agency comments shall be included in the filing. The Commission reserves the right to require changes to the plan. The licensees shall not commence any land-clearing or land-disturbing activities not specifically required for safety modifications to Milner Dam until the plan is approved by the Commission.

Article 415. The licensees, for a total period of eight days for eight daylight hours each day (64 daylight hours) between April 1 and May 31, shall not operate the main powerhouse, to be located 1.6 miles downstream of Milner dam, when inflow to Milner reservoir, less irrigation withdrawals from Milner Reservoir, is 10,000 cubic feet per second (cfs) or more. When projections of available flows indicate that the flows in April and May will not reach 10,000 cfs, the licensees shall shut down the main powerhouse for eight daylight hours per day for up to eight days, when inflow to Milner reservoir, less irrigation withdrawals from Milner reservoir is between 4,000 and 10,000 cfs. The licensees do not have to shut down the project in the April-May period if the flows do not exceed 4,000 cfs in the period. The timing of the 64-daylight-hour project shutdown to meet the above obligation may be modified by the Commission, based on the results of the whitewater boating study required by Article 418.

Article 416. The licensees, after consultation with the Bureau of Land Management, the National Park Service, the Idaho Department of Parks and Recreation, and the Idaho Whitewater Association, and 90 days before starting project operation, shall file for Commission approval, a plan to warn downstream recreationists of increases in flow downstream of the dam for

whitewater boating. The plan, at a minimum shall include provisions for a warning system (e.g., lights, alarms, warning signs) to alert downstream recreationists of increases in water level and streamflow. Documentation of agency consultation shall be included in the filing. The Commission reserves the right to require changes to the plan.

Article 417. The licensees, after consultation with the Bureau of Reclamation, Bureau of Land Management, the National Park Service, the Idaho Department of Water Resources, the Idaho Department of Parks and Recreation, and the Idaho Whitewater Association, and 90 days before starting project operation, shall file for Commission approval, a plan for a communication network to inform whitewater boaters of available whitewater flows. The plan shall include documentation of agency consultation. The Commission reserves the right to require changes to the plan.

Article 418. The licensees, after consultation with the Bureau of Land Management, the National Park Service, the Bureau of Reclamation, the Idaho Department of Parks and Recreation, the Idaho Department of Water Resources, and the Idaho Whitewater Association, shall conduct a study to determine whether flows required by Article 415 could be modified to more closely match whitewater boater needs and reduce the effects of whitewater releases on project economics. Within six months from the issuance date of this license, the licensees shall file for Commission approval a plan for conducting the whitewater boating study. The licensees shall conduct the study as approved by the Commission and, within 90 days before the start of project operation, the licensee shall file with the Commission, results of the study. Study results must include: (1) an analysis of the range of whitewater flows necessary to maintain the Class V whitewater experience preferred by boaters running the Milner reach; (2) the time of day and week when boaters put in and take out of the Milner reach; (3) the average number of runs boaters make in a given day; (4) a proposed schedule for releasing flows for whitewater boating that describes the range of flows to be provided, the duration of the flows, and time of day and week these flows will be provided; (5) a discussion of recommendations provided by the consulted agencies and entities; and (6) documentation of consultation with the above-named entities. The Commission reserves the right to require changes to the plan.

Article 419. The licensees, after consultation with the Bureau of Land Management, the National Park Service, the Idaho Department of Parks and Recreation, and the Idaho Whitewater Association, and 90 days before starting any project-related land-clearing, land-disturbing, or spoil-producing activities (except rehabilitation of Milner Dam), shall file for Commission approval a recreation plan that includes, but is not limited to: (1) provisions for a whitewater boater put-in area at the bridge

below Milner Dam and a take-out area below the project powerhouse with parking facilities; (2) provisions for a tailwater fishing area below the powerhouse; (3) final design drawings showing the type and location of the proposed facilities; (4) a construction schedule for proposed recreational facilities; (5) a plan for monitoring recreational use in the project area to determine the for additional recreational facilities in the future; and (6) documentation of agency consultation. In the plan, the licensees shall also consider the feasibility of (1) providing the whitewater take-out area below the final Class V rapid below the powerhouse area and (2) locating the take-out area in a location where it does not interfere with tailwater fishing facilities. The Commission reserves the right to require changes to the plan.

Article 420. The licensees, at least 90 days before the start of any land-clearing, land-disturbing, or spoil-producing activities for each segment of the project, shall file for Commission approval, either separately or in combination, the following plans to blend all project features and project related areas of land disturbance with the surrounding landscape:

1. detailed site-grading and revegetation design plans for each soil, gravel, or rock borrow site, and spoil disposal site;

2. a design for eliminating the visual impact of the transmission line from the powerhouse to the forebay area;

3. detailed design drawings which describe the planned vegetation clearing, the specific tower or pole locations and design, and the specifications for the materials to be used in each transmission line facility;

4. designs, alignments, profiles, construction limits, planned vegetation clearing, proposed surfacing, and the construction specifications for all access roads, parking lots, construction laydown areas, canals, and surface or buried penstock routes, including the required rights-of-way; and

5. detailed design drawings which describe the planned architectural features, colors, surface textures, site grading, and landscape plantings for each structure.

The licensee shall include with the filing documentation of consultation with Bureau of Land Management (BLM) and copies of BLM comments and recommendations. The Commission may require changes to the plans. No land-clearing, land-disturbing, or spoil-producing activities shall begin until the licensees are notified that the above plans comply with the requirements of this article.

Article 421. The licensees, after consultation with the Idaho State Historic Preservation Officer (SHPO), the Advisory Council on Historic Preservation (Council), and the Historic American Engineering Record (HAER) of the Department of the Interior, shall finalize and implement the cultural resources management plan as filed by letter dated February 11, 1986, and shall include the revisions recommended by the National Park Service by letter dated February 4, 1986. Within one year from the date of this license, the licensees shall file for Commission approval a report containing the HAER documentation of Milner Dam and the South Side Canal, the procedures for avoiding impacts to Milner Townsite, and the documentation of archeological site 10-TF-461. The documentation and avoidance procedures at these sites may be filed in separate reports as the items are completed. The reports must contain letters from the SHPO, the Council, and in the case of the dam and the canal, also from the HAER, accepting the documentation. No rehabilitation work or land-disturbing or land-clearing work may begin at the historic or archeological sites addressed in the report until the licensees are notified that the filing or filings have been approved. The licensees shall make funds available in a reasonable amount for implementation of the plan. If the licensees, the SHPO, the Council, and the HAER cannot agree on the amount of money to be spent for implementation of the plan, the Commission reserves the right to require the licensees to conduct the necessary work at the licensees' own expense.

Article 422. The licensees, before starting any land-clearing or land-disturbing activities within the project boundaries, other than those specifically authorized in this license, shall consult with the Idaho State Historic Preservation Officer (SHPO), shall conduct a cultural resources survey of the area that will be impacted, and shall file for Commission approval a cultural resources management plan, prepared by a qualified cultural resources specialist. If the licensees discover any previously unidentified archeological or historic sites during the course of construction or developing project works or other facilities at the project, the licensees shall stop all land-clearing and land-disturbing activities in the vicinity of the sites, shall consult with the SHPO, and shall file for Commission approval a new cultural resources management plan, prepared by a qualified cultural resources specialist.

Either management plan shall include the following: (1) a description of each discovered site, indicating whether it is listed or eligible to be listed on the National Register of Historic Places; (2) a description of the potential effect on each discovered site; (3) proposed measures for avoiding or mitigating effects; (4) documentation of the nature and extent of consultation; (5) a schedule for mitigating effects and conducting additional studies, and (6) a copy of a letter from

the SHPO accepting the plan. The Commission may require changes to the plan.

The licensees shall not begin land-clearing or land-disturbing activities, other than those specifically authorized in this license, or resume such activities in the vicinity of a site discovered during construction, until informed by the Commission that the requirements of this article have been fulfilled.

Article 423. The Commission, upon its own motion or upon the recommendation of federal or state fish and wildlife agencies or affected Indian Tribes, reserves the authority to order alterations of project structures and operations to take into account to the fullest extent practicable at each stage of the decision-making process the Columbia River Basin Fish and Wildlife Program developed and amended in accordance with the Pacific Northwest Electric Power Planning and Conservation Act.

Article 424. (a) In accordance with the provisions of this article, the licensees shall have the authority to grant permission for certain types of use and occupancy of project lands and waters and to convey certain interests in project lands and waters for certain types of use and occupancy, without prior Commission approval. The licensees may exercise the authority only if the proposed use and occupancy is consistent with the purposes of protecting and enhancing the scenic, recreational, and other environmental values of the project. For those purposes, the licensees also shall have continuing responsibility to supervise and control the use and occupancies for which they grants permission and to monitor the use of and to ensure compliance with the covenants of the instrument of conveyance for any interests that they convey under this article. If a permitted use and occupancy violates any condition of this article or any other condition imposed by the licensees for the protection and enhancement of the project's scenic, recreational, or other environmental values or if a covenant of a conveyance made under the authority of this article is violated, the licensees shall take any lawful action necessary to correct the violation. For a permitted use or occupancy, that action includes, if necessary, cancelling the permission to use and occupy the project lands and waters and requiring the removal of any noncomplying structures and facilities.

(b) The types of use and occupancy of project lands and water for which the licensees may grant permission without prior Commission approval are these: (1) landscape plantings; (2) non-commercial piers, landings, boat docks, or similar structures and facilities that can accommodate no more than 10 watercraft at a time and where the facility is intended to serve single-family dwellings; and (3) embankments, bulkheads, retaining walls, or

similar structures for erosion control to protect the existing shoreline. To the extent feasible and desirable to protect and enhance the project's scenic, recreational, and other environmental values, the licensees shall require multiple use and occupancy of facilities for access to project lands or waters. The licensees also shall ensure to the satisfaction of the Commission's authorized representative that the use and occupancies for which they grant permission are maintained in good repair and comply with applicable state and local health and safety requirements. Before granting permission for construction of bulkheads or retaining walls, the licensees shall do the following: (1) inspect the site of the proposed construction, (2) consider whether the planting of vegetation or the use of riprap would be adequate to control erosion at the site, and (3) determine that the proposed construction is needed and would not change the basic contour of the reservoir shoreline. To implement this paragraph (b), the licensees, among other things, may establish a program for issuing permits for the specified types of use and occupancy of project lands and waters that may be subject to the payment of a reasonable fee to cover the licensees' costs of administering the permit program. The Commission reserves the right to require the licensees to file a description of their standards, guidelines, and procedures for implementing this paragraph (b) and to require modification of those standards, guidelines, or procedures.

(c) The licensees may convey easements or rights-of-way across or leases of project lands for these purposes: (1) replacement, expansion, realignment, or maintenance of bridges and roads for which all necessary state and federal approvals have been obtained; (2) storm drains and water mains; (3) sewers that do not discharge into project waters; (4) minor access roads; (5) telephone, gas, and electric utility distribution lines; (6) nonproject overhead electric transmission lines that do not require erection of support structures within the project boundary; (7) submarine, overhead, or underground major telephone distribution cables or major electric distribution lines (69-kV or less); and (8) water intake or pumping facilities that do not extract more than 1 million gallons per day from a project reservoir. No later than January 31 of each year, the licensees shall file three copies of a report that briefly describes for each conveyance made under this paragraph (c) during the prior calendar year the type of interest conveyed, the location of the lands subject to the conveyance, and the nature of the use for which the interest was conveyed.

(d) The licensees may convey fee title to, easements or rights-of-way across, or leases of project lands for the following: (1) construction of new bridges or roads for which all necessary state and federal approvals have been obtained; (2) sewer or effluent lines that discharge into project waters, for

which all necessary federal and state water quality certification or permits have been obtained; (3) other pipelines that cross project lands or waters but do not discharge into project waters; (4) nonproject overhead electric transmission lines requiring erection of support structures within the project boundary for which all necessary federal and state approvals have been obtained; (5) private or public marinas that can accommodate no more than 10 watercraft at a time and are located at least one-half mile from any other private or public marina; (6) recreational development consistent with an approved exhibit R or an approved report on recreational resources of an exhibit E; and (7) other uses, if these conditions exist: (i) the amount of land conveyed for a particular use is 5 acres or less; (ii) all of the land conveyed is located at least 75 feet, measured horizontally, from the edge of the project reservoir at normal maximum surface elevation; and (iii) no more than 50 total acres of project lands for each project development are conveyed under this clause (d)(7) in any calendar year. At least 45 days before conveying any interest in project lands under this paragraph (d), the licensees shall submit a letter to the Director, Office of Hydropower Licensing, stating the licensees' intent to convey the interest and briefly describing the type of interest and the location of the lands to be conveyed (a marked exhibit G or K map may be used), the nature of the proposed use, the identity of any federal or state agency official consulted, and any federal or state approvals required for the proposed use. Unless the Director, within 45 days from the filing date, requires the licensee to file an application for prior approval, the licensees may convey the intended interest at the end of that period.

(e) The following additional conditions apply to any intended conveyance under paragraph (c) or (d) of this article:

(1) Before conveying the interest, the licensees shall consult with appropriate federal and state fish and wildlife or recreational agencies and with the State Historic Preservation Officer.

(2) Before conveying the interest, the licensees shall determine that the proposed use of the lands to be conveyed is not inconsistent with any approved exhibit R or an approved report on recreational resources of an exhibit E or if the project does not have an approved exhibit R or an approved report on recreational resources, that the lands to be conveyed do not have recreational value.

(3) The instrument of conveyance shall include covenants running with the land adequate to ensure the following: (i) the use of the lands conveyed shall not endanger health, create a nuisance, or otherwise be incompatible with overall project recreational use; and (ii) the grantee shall take all reasonable

precautions to ensure that the construction, operation, and maintenance of structures or facilities on the conveyed lands occur in a manner that protects the scenic, recreational, and environmental values of the project.

(4) The Commission reserves the right to require the licensees to take reasonable remedial action to correct any violation of the terms and conditions of this article for the protection and enhancement of the project's scenic, recreational, and other environmental values.

(f) The conveyance of an interest in project lands under this article does not in itself change the project boundaries. The project boundaries may be changed to exclude land conveyed under this article only upon approval of revised Exhibit G or K drawings (project boundary maps) reflecting exclusion of that land. Lands conveyed under this article shall be excluded from the project only on a determination that the lands are not necessary for project purposes, such as operation and maintenance, flowage, recreation, public access, protection of environmental resources, and shoreline control, including the preservation of shoreline aesthetic values. Absent extraordinary circumstances, proposals to exclude lands conveyed under this article from the project shall be consolidated for consideration when revised exhibit G or K drawings are filed for approval for other purposes.

(g) The authority granted to the licensees under this article shall not apply to any part of the public lands and reservations of the United States included within the project boundary.

(E) The licensees shall serve copies of any Commission filing required by this order on any entity specified in this order to be consulted on matters related to that filing. Proof of service on these entities must accompany the filing with the Commission.

(F) Within 60 days of the issuance of this order, the licensees shall submit the following information for each county in which federal lands, utilized by the project, are included: (1) the number of nontransmission line acres of U.S. lands; and (2) the number of transmission line right-of-way acres of U.S. lands.

(G) This order is final unless an application for rehearing is filed within 30 days from the date of its issuance, as provided in Section 313 of the FPA. The filing of an application for rehearing does not operate as a stay of the effective date of its issuance or of any other date specified in this order, except as specifically ordered by the Commission. The licensees'

failure to file an application for rehearing shall constitute acceptance of this license.

By the Commission. Commissioner Moler concurred with a separate statement attached.

(S E A L)

Lois D. Cashell

Lois D. Cashell,
Secretary.

Exhibit 13

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OCT 29 1993
Department of Water Resources
Southern Region Office

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Department of Water Resources

CHARLES
BROCKWAY
ENGINEERING

October 29, 1993

Mr. Loren Holmes
Idaho Department of Water Resourses
220 Shoshone Street East
Twin Falls, ID 83301

Subject: Beneficial Use Examination-Milner Power Plant
Permit 01-7011 Twin Falls Canal Company and Northside Canal Company

Dear Loren:
Enclosed is the completed Beneficial Use Field Report for the Milner Power Plant under Permit 01-7011. Please let me know if additional information is required.

Sincerely,
C.E. Brockway P.E.

Enclosure
cc: Glen Brewer, Idaho Power Company
John Rosholt

CHARLES E. BROCKWAY, PHD., P.E.

706 SUNRISE BOULEVARD NORTH

TWIN FALLS, IDAHO 83301

208•733•0938

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STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

BENEFICIAL USE FIELD REPORT

A. GENERAL INFORMATION

Permit No. 01-7011

1. Owner: North Side Canal Company / Twin Falls Canal Company — Phone No. 208 324-2319 / 208 733-6731

Current Address: _____

2. Accompanied by: Randy Hill — EXAM DATE: 10/6/93,10/21/93

Address: Rt. 1 Box 144, Murtaugh ID 83344 — Phone No. 432-6681

Relationship to Permit Holder: Chief Operator of Power Plant for Idaho Power Company

3. Source: Snake River — tributary to Columbia River

B. OVERLAP REVIEW

1. Other water rights with the same place of use: None

2. Other water rights with the same point of diversion: Irrigation diversions from Milner Reservoir (see appended list)

C. DIVERSION AND DELIVERY SYSTEM

1. Point(s) of Diversion:

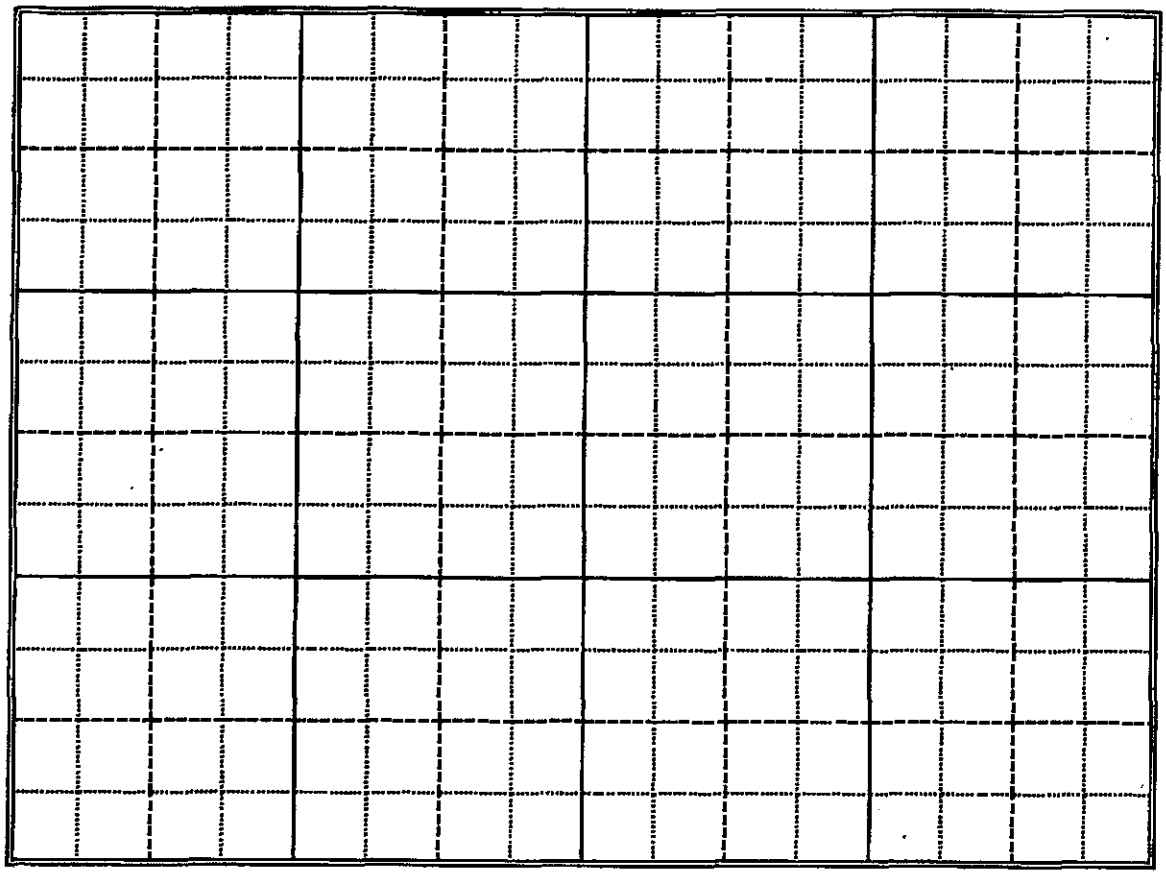
Ident No.	Gov't Lot	¼	¼	¼	Sec.	Twp.	Rge.	County	Method of Determination/Remarks
		NE	SE		29	10S	21E	TwinFalls	USGS Quad - Main Power House
		SW	NW		28	10S	21E	TwinFalls	USGS Quad - Auxilliary Power House

2. Place(s) of Use: Indicate Method of Determination USGS Quad

TWP	RGE	SEC	NE				NW				SW				SE				Totals
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
10S	21E	30			P														
10S	21E	29				P													

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3. **Delivery System Diagram:** Indicate all major components and distances between components. Indicate weir size/ditch size/pipe i.d. as applicable. See attached exhibits A and B.



Scale: 1" = _____.

_X_ Copy of USGS Quadrange Attached Showing location(s) of point(s) of diversion and place(s) of use (required).

____ Aerial Photo Attached (required for irrigation of 10+ acres)

_X_ Photo of Diversion and System Attached

4.

Well or Diversion Identification No.*	Motor Make	Hp	Motor Serial No.	Pump Make	Pump Serial No. or Discharge Size

Code to correspond with No. on map and aerial photo

D. FLOW MEASUREMENTS

1.

Measurement Equipment	Type	Make	Model No.	Serial No.	Size	Calib. Date
Acoustic Flow Meters		See attached narrative				
USGS Stream Gage						

2. **Measurements:** See narrative attached.

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E. NARRATIVE/REMARKS/COMMENTS

See attached narrative

Have conditions of permit approval been met? x yes ___ no

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F. FLOW CALCULATIONS _____ Additional Computation Sheets Attached

Measured Method:

Acoustic flow meter - Data on Hydromet

Unit 1	4398.0 cfs
Unit 2	1091.2 cfs
	5489.2
Unit 3	225.5
Total	5,714.7 cfs

G. VOLUME CALCULATIONS

1. Volume Calculations for Irrigation:

$V_{I.R.}$ = (Acres Irrigated) x (Irrigation Requirement) = _____

$V_{D.R.}$ = [Diversion Rate (cfs)] x (Days in Irrigation Season) x 1.9835 = _____

V = Smaller of $V_{I.R.}$ and $V_{D.R.}$ = _____

2. Volume Calculations for Other Uses:

H. RECOMMENDATIONS

1. Recommended Amounts

Beneficial Use	Period of Use From	Period of Use To	Rate of Diversion Q (cfs)	Annual Volume V (afa)
Hydropower	Jan 1	Dec 31	5714.7	
		Totals:	5714.7	

2. Recommended Amendments

x Change P.D. as reflected above ___ Add P.D. as reflected above ___ None

___ Change P.U. as reflected above ___ Add P.U. as reflected above ___ Other

I. AUTHENTICATION

Field Examiner's Name Charles E. Brockway Date 10/29/93

Reviewer _____ Date Wednesday

JAN 10 1994

REGISTERED PROFESSIONAL ENGINEER
CHARLES E. BROCKWAY
STATE OF IDAHO

WATER RIGHTS EXAMINER'S REPORT NARRATIVE

Permit No. 01-7011 Amended

Owner: North Side Canal Company and Twin Falls Canal Company

Examiner: C.E,. Brockway P.E.

Date: October 26, 1993

The field examination for beneficial use on Permit No 01-7011 was performed on October 6 and October 21, 1993. The examiner was accompanied on the site inspection by Mr. Randy Hill, Chief Operator for the Milner Power Plant.

The hydropower facility consists of two power houses diverting from the Snake River at Milner Dam. The main power house utilizes approximately 1.2 miles of an expanded Twin Falls Canal Company main canal as the forebay whereas the auxiliary power house diverts directly from Milner Reservoir on the north side of the radial gate spillway structure on the north side of the Snake River, see Exhibit A. The Twin Falls Canal Company main canal control gates are located just upstream of the penstock intake structure for the main power plant. No irrigation diversions occur upstream between the penstock intake structure and Milner Reservoir, however, numerous water rights for irrigation diversions from Milner Lake are on file (see attached list). The diversion for the main power house, Units 1 and 2, is from Milner Lake in the NE1/4, SE1/4 Sec 29 through the Twin Falls main canal to a point of rediversion and use in the SW1/4 NE1/4, Sec 30 T10S R21E BM. The diversion for the auxiliary power house, Unit 3, is located in the SW1/4 NW1/4 Sec 28 T10S R21E BM with the power house in the SE1/4 NE1/4 Sec 29, see location map Exhibit A and USGS Quad sheet, Exhibit B.

The main power house includes two Kaplan turbine units, No 1 and No 2 and the auxiliary power house includes one vertical propeller unit with specifications as shown in Table 1.

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$$4{,}000 \frac{ft^3}{sec} \cdot 148\,lb \cdot 62.4 \frac{lb}{ft^3} \cdot 0.001356 \cdot X = 46{,}530$$

$$X = \frac{46530}{4{,}000 \cdot 148 \cdot 62.4 \cdot 0.001356} = 92.88\%\ eff$$

To high?
for combined Turbine/Generator

9/21/95
RM

Table 1 Generating Unit Specifications

Turbine	Unit 1	Unit 2	Unit 3
Serial No.	M220234-1	M220234-2	24
Net Head	148.0 ft	148.0 ft	56.4 ft
Rated Capacity	46,530 kW	11,540 kW	1130 HP.
Rated Discharge	4000 cfs	1000 cfs	200 cfs
Manufacture Date	19900	1990	1992
Manufacture	Toshiba Corp-Tokyo Japan	Toshiba Corp-Tokyo Japan	Hydro West Group Inc. Bellevue WA
Type	VK-1RS Variable blade Kaplan	VK-1RS Variable blade-Kaplan	Vertical Propeller
Minimum Discharge	800 cfs	150 cfs	
Generator			
Serial No.	210-9585	210-9586	911071-01
Rated Capacity	49,000KVA	12,700KVA	833 kW
Power Factor	0.95	0.95	
Normal Speed	200 rpm	400 rpm	604 rpm
Runaway Speed	540 rpm	1070 rpm	
Manufacture Date	1991	1991	1992
Manufacture	E B Power Generation Drammen, Norway	E B Power Generation Drammen, Norway	Ideal Electric Co Mansfield, Ohio
Type	SAV 540/130/36 Synchronous	Synchronous	Polyphase Induction Exposed

A 17 ft diameter and a 9 ft diameter penstock convey water from the forebay to the turbines in the main power house. Each penstock is equipped with an

JAN 10 1994

Accusonic flow meter located just upstream of the turbine units, see Exhibit C. Discharge from the auxiliary power house enters the Snake River below Milner Dam and is measured by the U.S. Geological Survey stream Gage, Snake River at Milner, located below the county road bridge approximately 1/4 mile downstream of the dam. Table 2 shows the specifications of each meter and the manufacturer's specification sheet is included as Exhibit D.

Table 2 Flow Meter Specifications

	Unit 1	Unit 2	Unit 3
Type	Acoustic	Acoustic	Rated Open Channel
Manufacturer	Accusonic Division ORE International Falmouth, Massachusetts	Accusonic Division ORE International Falmouth, Massachusetts	
Model	7410	7410	
Serial No.	479	478	
Rated Accuracy	)0.5 % w/8 paths	)0.5 % w/8 paths	
Service	U.S. Geological Survey Telemetered on Hydromet	U.S. Geological Survey Telemetered on Hydromet	U.S. Geological Survey Telemetered on Hydromet

The acoustic meters are checked by the U.S. Geological Survey using their portable acoustic meter. Periodic measurements are obtained by the U.S. G.S. field office in Twin Falls.

This exam was conducted during efficiency testing of the turbine-generator units. Both Unit 1 and Unit 2 were ramped up beginning the evening of October 20, 1993 and reached maximum generation flows between 1:00 and 2:00 p.m. on October 21, 1993. Unit 3 was operated at essentially constant flow of 225.45 cfs for the entire period. Exhibit E is the hydrograph of the flow of each of the three units obtained from the U.S. Bureau of Reclamation Hydromet system on October 22, 1993 and Exhibit F is the tabular discharge and combined discharge

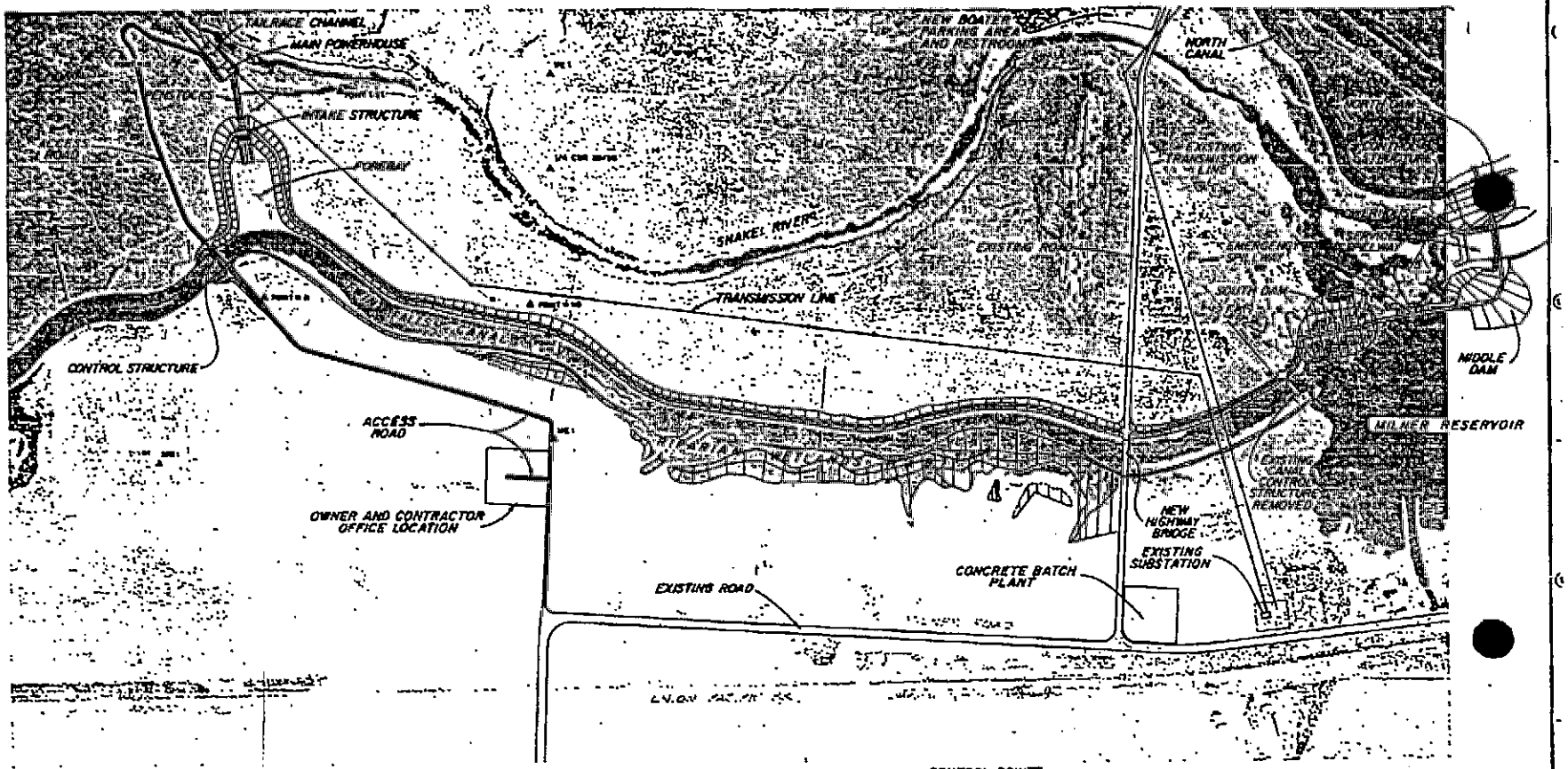
MICROFILMED
JAN 10 1994

for all units for the 24 hour period on October 21, 1993. The maximum combined flow of 5714.7 cfs occurred at 1:30 p.m. on October 21, 1993. No alternative discharge measurement method is available.

The certified USGS measurements are shown on the letter from Mike Campbell, Twin Falls Field Office Chief on Exhibit G. No measurements were made by the USGS during the field exam.

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JAN 10 1994

EXHIBIT A
PERMIT 01-7011
MILNER POWER PLANT



SURVEY CONTROL POINTS

CONTROL POINTS

POINT #	NORTH	EAST	ELEVATION
100	38,330.0000	498,164.9963	4,388.42
101	38,110.0000	498,294.9988	4,392.81
102	38,126.7933	498,078.1119	4,386.11
103	38,345.5748	498,193.1788	4,418.84
104	38,619.3813	498,182.8823	4,398.68
105	38,895.1383	498,239.3883	4,404.81
106	38,488.1868	498,383.8728	4,341.18

NOTE:
1. COMPLETED PROJECT SHOWN.

MORRISON-KNUDSEN ENGINEERS, INC.

IDAHO POWER COMPANY
TWIN FALLS CANAL COMPANY
NORTH SIDE CANAL COMPANY, LTD.

MILNER HYDROELECTRIC PROJECT

PROJECT GENERAL ARRANGEMENT

3773-10-0005

FILED IN OFFICE
JAN 10 1994

EXHIBIT B
PERMIT 01-7011
MILNER POWER PLANT

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OCT 0 1994

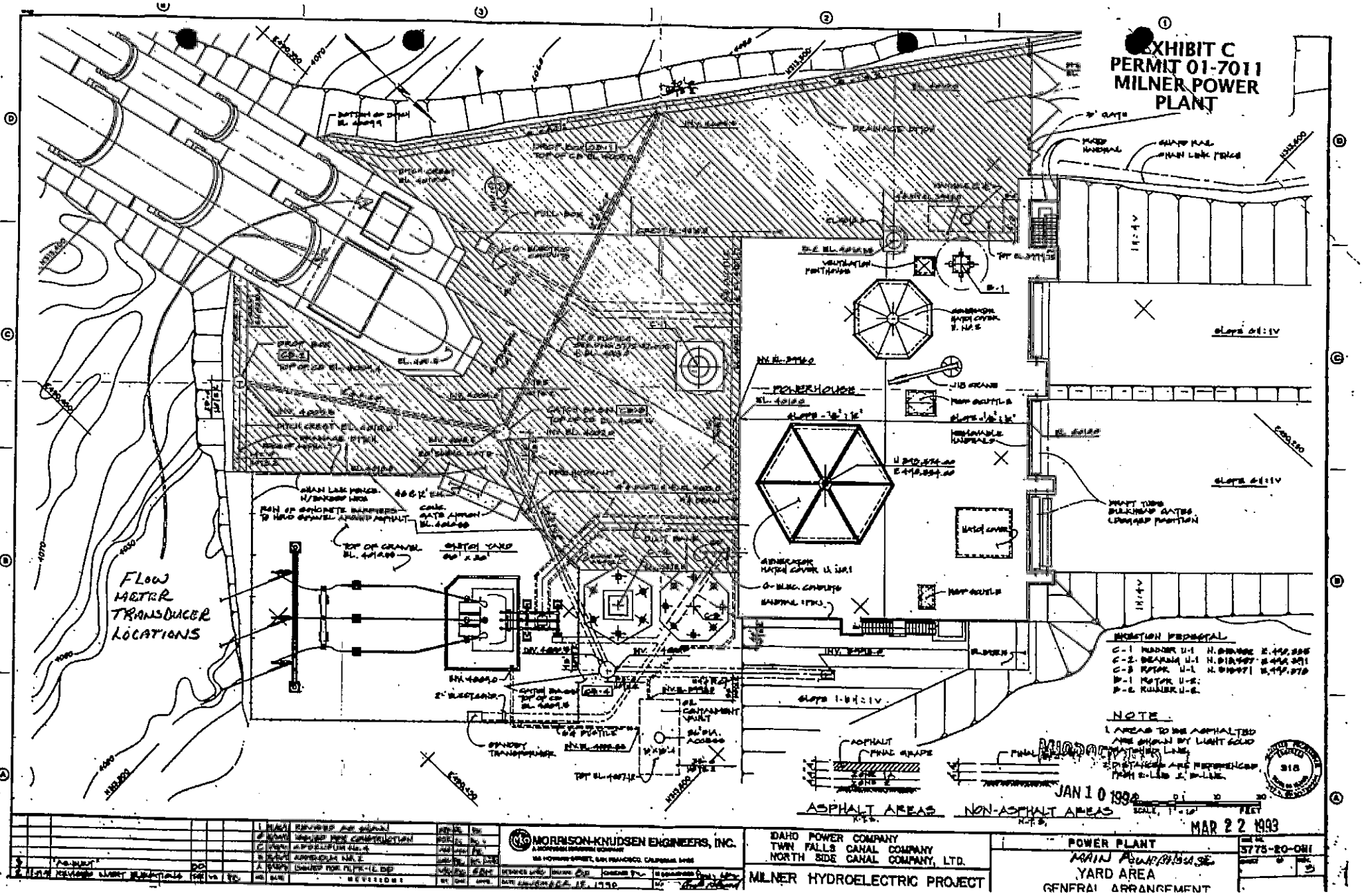
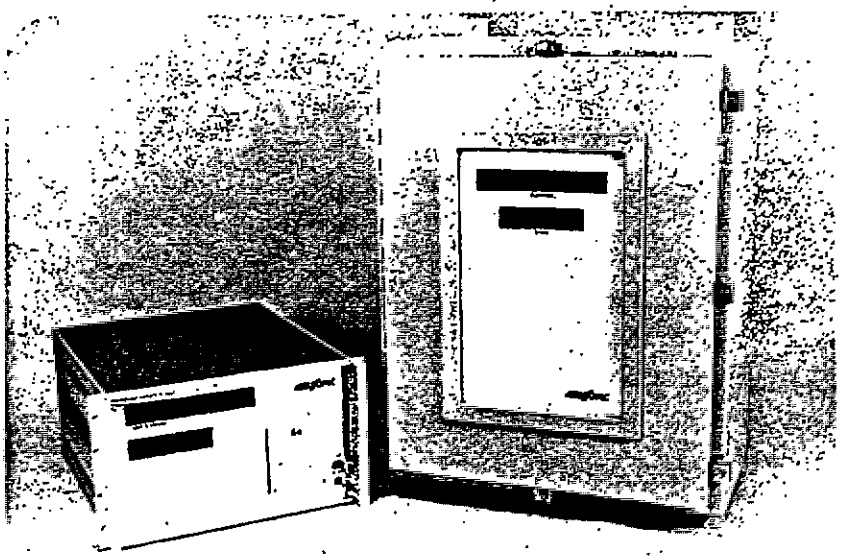

EXHIBIT C
PERMIT 01-7011
MILNER POWER PLANT
FLOW METER TRANSDUCER LOCATIONS
POWERHOUSE
SWITCH YARD
ASPHALT AREAS
NON-ASPHALT AREAS
NOTE
JAN 10 1994
MAR 22 1993
MORRISON-KNUDSEN ENGINEERS, INC.
IDAHO POWER COMPANY
TWIN FALLS CANAL COMPANY
NORTH SIDE CANAL COMPANY, LTD.
MILNER HYDROELECTRIC PROJECT
POWER PLANT
YARD AREA
GENERAL ARRANGEMENT
3775-20-001

EXHIBIT D
PERMIT 01-7011
MILNER POWER PLANT

ACCUSONIC

Leaders in Acoustic Flow Measurement Systems

FLOWMETER CONSOLE
MODEL 7410



System Accuracy

The accuracy of the rate indication and totalization of flow is specified to be plus or minus 0.5 percent of actual flow for all flows with velocity above 1 foot per second and up to maximum flow, provided the flowmeter is installed according to Accusonic specifications in a section of pipe with a minimum of ten diameters of upstream straight pipe. For installations having between four and ten diameters of straight pipe upstream of the meter section, four crossed paths (eight paths total) are required to maintain an accuracy of plus or minus 0.5 percent of flowrate.

To assure the specified accuracy, the flowmeter integrates the four velocities for each measurement plane (one for four path, two for four crossed paths) to calculate flowrate. Where crossed paths are used, the flowmeter software is designed to utilize velocity information from each plane of transducers to quantify and correct for crossflow.

Two Path System

For a two path system installed with eight diameters of straight pipe upstream and two diameters of straight pipe downstream, the accuracy of the rate indication and totalization of flow is specified to be plus or minus 1.5% of actual flow for all flows with velocity above 1 foot per second.

Power Requirement Options
115 VAC ±10%, 50/60 Hz
220 VAC ±10%, 50/60 Hz
100 VAC ±10%, 50/60 Hz
12 VDC +2.7V -1.8V

Enclosure Options
NEMA 4 Wall Mount
NEMA 4X Wall Mount
Shock Mounted Portable
Chassis (for 19" Rack)
19" Rack Assembly

Enclosure Dimensions
NEMA 4 30" h x 24" w x 12" d
Shock Mounted Portable 24" h x 25" w x 27" d
Chassis 10.5" h x 19" w x 22" d

Measurement Options
Open Channel
Pipe Flowing Full
Pipe Flowing Partially Full

Display Options
14 Digit LED
8 Digit LED
- Flowrate
- Totalized Flow
- System Status
- Any Parameter or Variable

Standard Output Options
4-20mA Flowrate
RS-232 ASCII Ten Variable Report Format
Pulsed Totalizer Output

Parameter Entry Options
Keypad
Keyboard
Tape Cassette

Number of Acoustic Paths
1 - 8

Number of Pipes
1 or 2*

Environmental Requirements
Storage:
0° - 140° F
0% - 95% Relative Humidity
Operation:
35° - 140° F**
0% - 95% Relative Humidity

Oscillator Frequency
80 MHz

Power Consumption
35W maximum

* With eight path, clamp-on systems or partially full pipes, only one pipe can be measured.
** Heaters and air-conditioners can be added to certain enclosures to expand this range.

MILPOWER.DOC

JAN 10 1994

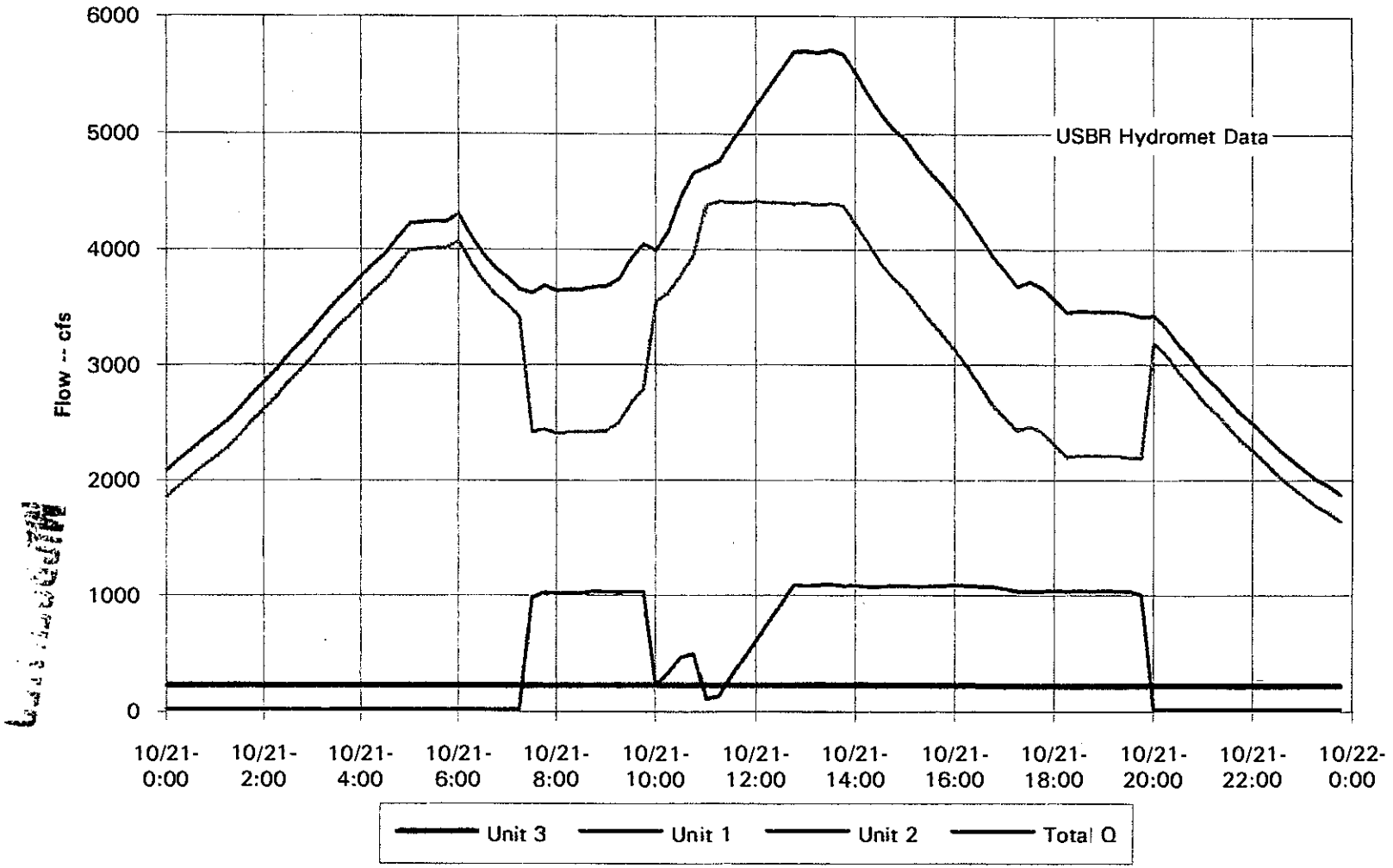
Accusonic Division, ORE International Inc. P.O.Box 709, Falmouth, Massachusetts 02541 U.S.A. Tel. (508) 548-5800 / FAX (508) 540-3835 / Telex 6817399 OREFALUW

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SPECIFICATIONS SUBJECT TO CHANGE WITHOUT NOTICE
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MILNER.XLC

EXHIBIT E
PERMIT 01-7011
MILNER POWER PLANT

Milner Dam -- Milner Hydropower Discharge Oct 21, 1993.



JAN 1 0 1994

EXHIBIT F
PERMIT 01-7011
MILNER POWER PLANT

Milner Hydropower Facility				
Flow data from USBR Hydromet System - October 22, 1993				
		Hydropower Plant		
Date – Time	Unit 3	Unit 1	Unit 2	Total Q
10/21-0:00	225.45	1852.26	14.29	2092
10/21-0:15	225.45	1946.27	14.29	2186.01
10/21-0:30	225.45	2029.3	13.92	2268.67
10/21-0:45	225.45	2119.66	13.92	2359.03
10/21-1:00	225.45	2195.36	13.92	2434.73
10/21-1:15	225.45	2283.27	13.92	2522.64
10/21-1:30	225.45	2393.16	14.29	2632.9
10/21-1:45	225.45	2510.38	14.29	2750.12
10/21-2:00	225.45	2617.82	13.92	2857.19
10/21-2:15	225.45	2721.61	13.92	2960.98
10/21-2:30	225.45	2849.81	13.92	3089.18
10/21-2:45	225.45	2959.7	13.92	3199.07
10/21-3:00	225.45	3074.48	13.92	3313.85
10/21-3:15	225.45	3203.9	10.62	3439.97
10/21-3:30	225.45	3318.68	14.29	3558.42
10/21-3:45	225.45	3413.92	14.29	3653.66
10/21-4:00	225.45	3529.91	13.92	3769.28
10/21-4:15	225.45	3633.7	13.92	3873.07
10/21-4:30	225.45	3730.15	13.92	3969.52
10/21-4:45	225.45	3869.35	13.92	4108.72
10/21-5:00	225.45	3986.56	13.92	4225.93
10/21-5:15	225.45	3996.33	14.29	4236.07
10/21-5:30	225.45	4004.88	13.92	4244.25
10/21-5:45	225.45	4006.1	14.29	4245.84
10/21-6:00	225.45	4065.93	13.92	4305.3
10/21-6:15	225.45	3882.78	13.92	4122.15
10/21-6:30	225.45	3725.27	14.29	3965.01
10/21-6:45	225.45	3601.95	13.92	3841.32
10/21-7:00	225.45	3518.92	13.92	3758.29
10/21-7:15	225.45	3411.47	13.92	3650.84
10/21-7:30	225.45	2418.8	975.09	3819.34
10/21-7:45	225.45	2438.34	1021.24	3685.03
10/21-8:00	225.45	2399.26	1013.55	3638.26
10/21-8:15	225.45	2413.92	1012.82	3652.19
10/21-8:30	225.45	2412.7	1012.45	3650.6
10/21-8:45	225.45	2420.02	1028.57	3674.04
10/21-9:00	225.45	2423.68	1026.74	3675.87
10/21-9:15	225.45	2495.72	1023.44	3744.81
10/21-9:30	225.45	2670.33	1027.11	3922.89
10/21-9:45	225.45	2793.65	1027.11	4046.21
10/21-10:00	225.45	3542.12	224.18	3991.75
10/21-10:15	225.45	3615.38	321.98	4162.81
10/21-10:30	225.45	3785.58	464.47	4455.48
10/21-10:45	225.45	3945.05	493.41	4663.91
10/21-11:00	225.45	*4387.05*	103.3	4715.8

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10/21-11:15	225.45	*4413.92*	131.87	4771.24
10/21-11:30	225.45	*4409.03*	300.37	4934.85
10/21-11:45	225.45	*4400.48*	455.31	5081.24
10/21-12:00	225.45	*4413.92*	605.86	5245.23
10/21-12:15	225.45	*4405.37*	767.03	5397.85
10/21-12:30	225.45	*4404.15*	914.65	5544.25
10/21-12:45	225.45	*4393.16*	1081.32	5699.93
10/21-13:00	225.45	*4400.48*	1079.12	5705.05
10/21-13:15	225.45	*4380.95*	1081.68	5688.08
10/21-13:30	225.45	*4398.04*	1091.21	5714.7
10/21-13:45	225.45	*4377.28*	1076.56	5679.29
10/21-14:00	225.45	*4217.33*	1080.58	5523.36
10/21-14:15	225.45	4045.17	1067.76	5338.38
10/21-14:30	225.45	3877.9	1069.96	5173.31
10/21-14:45	225.45	3746.03	1078.92	5048.4
10/21-15:00	225.45	3652.01	1078.02	4955.48
10/21-15:15	225.45	3514.04	1068.5	4807.99
10/21-15:30	225.45	3377.29	1073.63	4676.37
10/21-15:45	225.45	3253.96	1076.92	4556.33
10/21-16:00	225.45	3120.88	1082.05	4428.38
10/21-16:15	225.45	2973.14	1078.75	4277.34
10/21-16:30	223	2819.29	1075.09	4117.38
10/21-16:45	223	2655.67	1067.76	3946.43
10/21-17:00	223	2540.9	1054.21	3818.11
10/21-17:15	223	2426.13	1029.3	3678.43
10/21-17:30	223	2462.76	1031.87	3717.63
10/21-17:45	223	2412.7	1031.5	3667.2
10/21-18:00	223	2301.58	1035.16	3559.74
10/21-18:15	223	2197.8	1032.6	3453.4
10/21-18:30	223	2208.79	1034.06	3465.85
10/21-18:45	223	2211.23	1030.04	3464.27
10/21-19:00	223	2205.13	1034.43	3462.56
10/21-19:15	223	2208.79	1031.87	3463.66
10/21-19:30	223	2191.69	1031.13	3445.82
10/21-19:45	223	2191.89	997.43	3412.12
10/21-20:00	223	3185.59	14.65	3423.24
10/21-20:15	223	3079.36	13.92	3316.28
10/21-20:30	223	2940.17	13.92	3177.09
10/21-20:45	223	2819.29	13.92	3056.21
10/21-21:00	223	2682.54	13.92	2919.46
10/21-21:15	223	2582.41	13.92	2819.33
10/21-21:30	223	2461.54	13.92	2698.46
10/21-21:45	223	2347.98	14.29	2585.27
10/21-22:00	223	2253.97	13.92	2490.89
10/21-22:15	223	2145.3	13.92	2382.22
10/21-22:30	223	2040.29	13.92	2277.21
10/21-22:45	223	1947.49	13.92	2184.41
10/21-23:00	223	1864.47	13.92	2101.39
10/21-23:15	223	1779	13.92	2015.92

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10/21-23:30	223	1719.17	13.92	1956.09
10/21-23:45	223	1637.36	13.92	1874.28

JAN 1 0 1994

United States Department of the Interior
GEOLOGICAL SURVEY
U.S. Geological Survey, WRD
P.O. Box AC.
Twin Falls, ID 83303
Phone - 734-9168

TAKE PRIDE IN AMERICA

EXHIBIT G
PERMIT 01-7011
MILNER POWER PLANT

October 6, 1993

Randy Hill
Milner Power Plant
Rt #1, Box 144
Murtaugh, ID 83344

Dear Randy:

The following is a list of measurements made on the lower Milner Power Plant:

	UNIT #1	UNIT #2
Nov. 10, 1992	--------	408 cfs
Nov. 12, 1992	4090 cfs	0
Dec. 22, 1992	1040 cfs	0
Jan. 21, 1993	0	6.68 cfs
Feb. 1, 1993	0	566 cfs
Mar. 10, 1993	0	502 cfs
May. 21, 1993	2870 cfs	0
June 8, 1993	3900 cfs	960 cfs
July 29, 1993	1380 cfs	0

Please call if you have any questions.

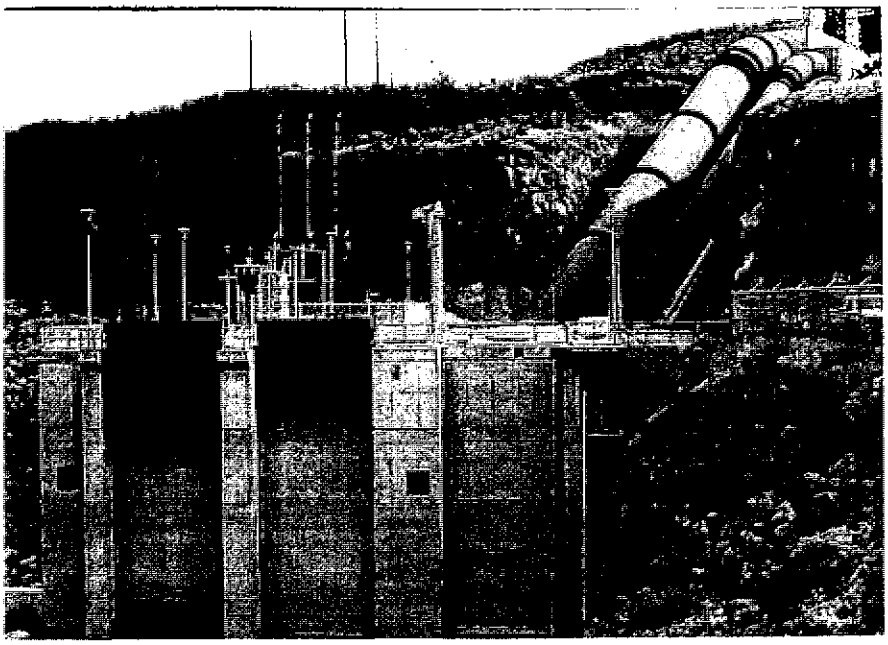
Sincerely,

Mike Campbell

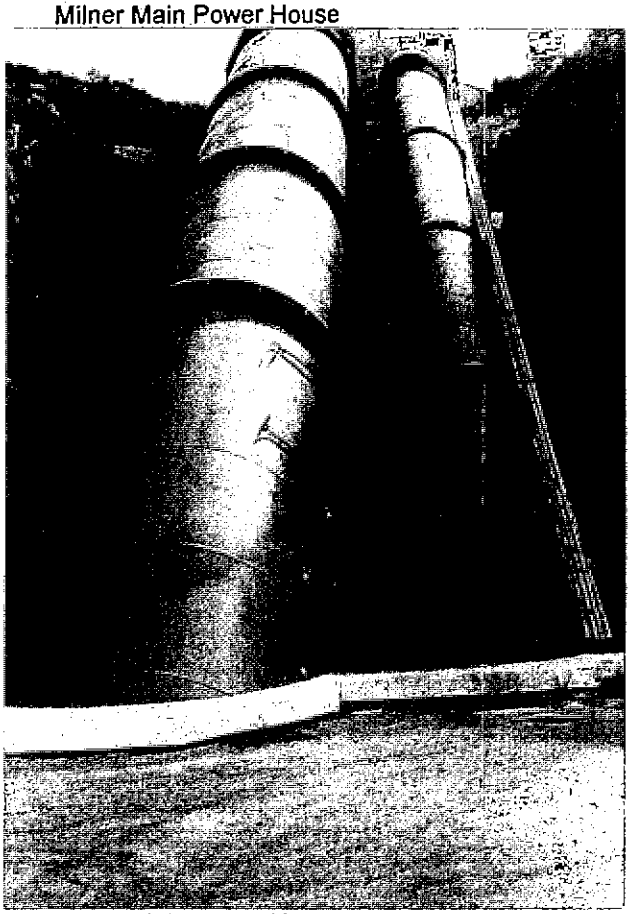
Mike Campbell
Field Office Chief

JAN 1 0 1994

#212

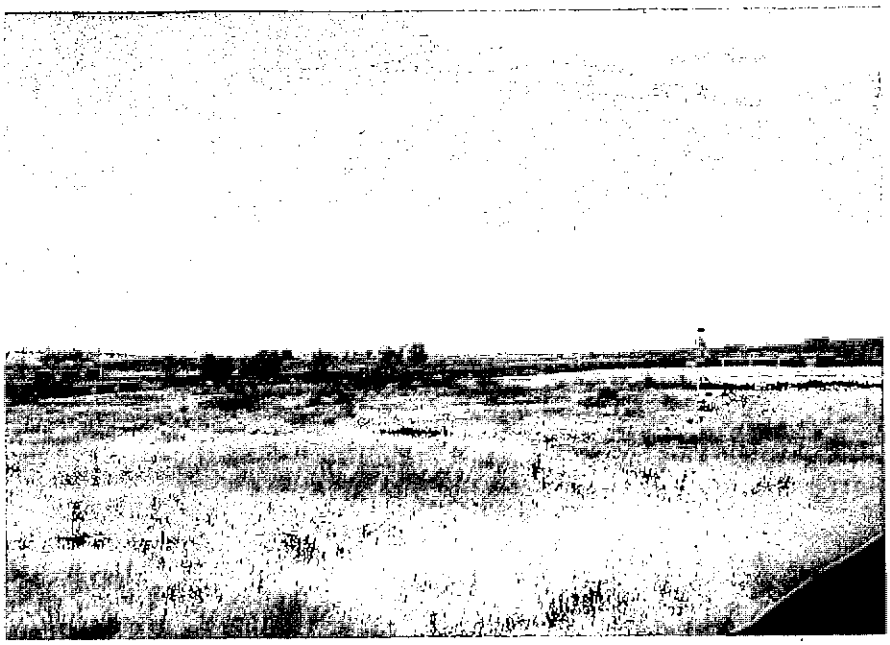


Milner Main Power House



Milner Main Power House
Penstocks and Acoustic Flow Meter Taps

JAN 1 0 1994



Mllner Main Powerf House
Forebay and Twin Falls Canal Co. Gates

JAN 1 0 1994

P.O.D.'s FROM MILNER
T. 10 S. R. 21 E.

S 28	S 29	S 30	S 33
01-04059	01-00212	-0-	-0-
01-00005	01-00213		
01-00016	01-00215		
01-02015	01-00220		
01-07123	01-07011		
01-07084B	01-00004		
01-07011	01-00010		
01-07010B	01-00209		
01-07010C	01-07071		
01-07010A	01-07011		
01-07011	01-07011		
01-07124	01-07063		
01-07022	01-07009		
01-07058	01-07011		
01-07011	01-00017		
01-07011	01-00009		
01-02069	01-02050		
	01-07068		
	01-07072		

10299302.CV.93

JAN 1 0 1994

Exhibit 14

AGREEMENT

This Agreement is made and entered into among the State of Idaho, by and through the Governor, hereinafter referred to as "State"; John V. Evans, in his official capacity as Governor of the State of Idaho; Jim Jones, in his official capacity as Attorney General of the State of Idaho; and Idaho Power Company, a corporation hereinafter referred to as "Company".

1. Effective Date

This Agreement shall take effect upon execution, except as to paragraphs 7, 8, and 11.

2. Executive Commitment

When the parties agree on certain actions to be taken by State, it is their intent to commit the executive branch of Idaho state government, subject to constitutional and statutory limitations, to take those actions.

3. Attorney General

Jim Jones is a party to this Agreement solely by reason of his official position as counsel for the State of Idaho and its agencies in Idaho Power Company v. State of Idaho, Ada County Civil Case No. 62237 and Idaho Power Company v. Idaho Department of Water Resources, Ada County Civil Case No. 81375.

4. Good Faith

When the parties agree to jointly recommend a particular piece of legislation or action by another entity, each party agrees to actively and in good faith support such legislation or action.

The State shall enforce the State Water Plan and shall assert the existence of water rights held in trust by the State and that the Snake River is fully appropriated as needed to enforce the State Water Plan. State and Company shall not take any position before the legislature or any court, board or agency which is inconsistent with the terms of this agreement.

5. Stay Of Current Court And Regulatory Action

A. The parties shall file a motion with the court in Ada County Civil Case Numbers 81375 and 62237, seeking a

The foregoing is a true and certified copy of the document on file at the department of Water Resources
Signed this 4th day of January 20 08

SCANNED
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stay of further proceedings until seven days following the adjournment of the First Regular Session of the 48th Idaho Legislature, except as to preservation of testimony pursuant to the Idaho Rules of Civil Procedure, completion of designated discovery filed by the State of Idaho and dismissal of various defendants by Company. The State shall designate in writing, within fifteen (15) days from the execution of this Agreement, those items of its discovery that must be responded to by Company. The Company shall respond to those items of discovery designated by the State within ninety (90) days from execution of this Agreement.

B. The parties shall request the Federal Energy Regulatory Commission (FERC) to stay any subordination-related decisions in any Company project listed in paragraph 7 licensing or relicensing proceeding pending implementation of this Agreement except as contemplated in paragraph 12 of this Agreement. The parties acknowledge, however, that FERC could independently take action prejudicial to their interests and, in such event, the parties may take reasonable actions necessary to protect their interests. Further, the State shall not file any motions to intervene in Project Numbers 2777 (Upper Salmon) and 2778 (Shoshone Falls); however, by agreeing to this provision, the Company in return waives any defense to the timeliness of a motion to intervene caused by this Agreement in the event this Agreement is not implemented. Company is not agreeing, however, that a motion to intervene would be timely if filed now.

C. The parties shall not attempt to influence any executive agency of the United States to take a particular position regarding subordination in any Company FERC licensing or relicensing proceeding pending implementation of this Agreement.

6. Legislative Program

The parties agree to propose and support the following legislation to implement this Agreement:

A. Enactment of Public Interest Criteria as set forth in Exhibit 1 attached hereto.

B. Funding for a general adjudication of the Snake River Basin generally as set forth in Exhibit 2 attached hereto.

C. Establishment of an effective water marketing system.

D. Funding for hydrologic and economic studies, as set forth in Exhibit 3 attached hereto.

E. Allocation of gains upon sale of utility property as set forth in Exhibit 4 attached hereto.

F. Limitations on IPUC jurisdiction as set forth in Exhibit 5 attached hereto.

G. Rulemaking and moratorium authority for Idaho Department of Water Resources generally as set forth in Exhibit 8 attached hereto.

7. Company's Water Right

State and Company agree that Company's water right shall be as follows (Bracketed names used below refer to Company projects):

A. State Water License Numbers 36-2013 (Thousand Springs), 37-2128 & 37-2472 (Lower Malad), 37-2471 (Upper Malad), 36-2018 (Clear Lake), 36-2026 (Sand Springs), 02-2057 (Upper Salmon), 02-2001A, 02-2001B, 02-2059, 02-2060 (Lower Salmon), 02-2064, 02-2065 (Bliss), 02-2056 (Twin Falls), 02-2036 (Shoshone Falls), 02-2032, 02-4000, 02-4001, and Decree Number 02-0100 (Swan Falls) entitle the Company to an unsubordinated right of 3900 c.f.s. average daily flow from April 1 to October 31, and 5600 c.f.s. average daily flow from November 1 to March 31, both to be measured at the Murphy U.S.G.S. gauging station immediately below Swan Falls. These flows are not subject to depletion. The Murphy gauging station is located at latitude 43° 17' 31", Longitude 116° 25' 12", in NW1/4NE1/4SE1/4 of Section 35 in Township 1 South, Range 1 West, Boise Meridian, Ada County Hydrologic Unit 17050103, on right bank 4.2 miles downstream from Swan Falls Power plant, 7.5 miles NE of Murphy, at river mile 453.5.

B. The Company is also entitled to use the flow of the Snake River at its facilities to the extent of its actual beneficial use but not to exceed those amounts stated in State Water License Numbers 36-2013 (Thousand Springs), 37-2128 & 37-2472 (Lower Malad),

37-2471 (Upper Malad), 36-2018 (Clear Lake), 36-2026 (Sand Springs),02-2057 (Upper Salmon), 02-2001A, 02-2001B, 02-2059, 02-2060 (Lower Salmon), 02-2064, 02-2065 (Bliss), 02-2056 (Twin Falls), 02-2036 (Shoshone Falls), 02-2032, 02-4000, 02-4001, and Decree Number 02-0100 (Swan Falls), but such rights in excess of the amounts stated in 7(A) shall be subordinate to subsequent beneficial upstream uses upon approval of such uses by the State in accordance with State law unless the depletion violates or will violate paragraph 7(A). Company retains its right to contest any appropriation of water in accordance with State law. Company further retains the right to compel State to take reasonable steps to insure the average daily flows established by this Agreement at the Murphy U.S.G.S. gauging station. Average daily flow, as used herein, shall be based upon actual flow conditions; thus, any fluctuations resulting from the operation of Company facilities shall not be considered in the calculation of the minimum daily stream flows set forth herein. This paragraph shall constitute a subordination condition.

C. The Company's rights listed in paragraph 7(A) and 7(B) are also subordinate to the uses of those persons dismissed from Ada County Case No. 81375 pursuant to the contract executed between the State and Company implementing the terms of I.C. §§ 61-539 and 61-540.

D. The Company's rights listed in paragraph 7(A) and 7(B) are also subordinate to those persons who have beneficially used water prior to October 1, 1984, and who have filed an application or claim for said use by June 30, 1985.

E. Company's ability to purchase, lease, own, or otherwise acquire water from sources upstream of its power plants and convey it to and past its power plants below Milner Dam shall not be limited by this agreement. Such flows shall be considered fluctuations resulting from operation of Company facilities.

F. Upon implementation of this Agreement, State and Company shall consent to entry of decrees in Ada County Civil Case Nos. 62237 and 81375 that describe the Company's water right as provided in paragraphs 7(A) through 7(E).

8. Damages Waiver

Company waives any claim against the State or its agencies for compensation or damages it may have or that may arise from any diminution in water available to Company at its facilities as a result of this Agreement. Company waives any claim for compensation or damages from any use approved by the state in accordance with paragraph 7B. Company retains its right to seek injunctions, compensation, damages, or other relief from any future appropriator, as defined in paragraph 7(B), whose use of water violates or will violate the Company's water right of 3900 c.f.s. average daily flow from April 1 to October 31, and 5600 c.f.s. average daily flow from November 1 to March 31, as measured at the Murphy gauging station, and also retains its rights against the state and its agencies as set out in paragraph 7(B).

9. Proposed 1180 Contract

The parties acknowledge that the Governor and the Company have finalized the terms of a contract that would implement the provisions of Senate Bill 1180 of the First Regular Session of the Idaho Legislature, presently codified as §§ 61-539 and 61-540, Idaho Code which is being executed on this date.

10. Agreement Not An Admission

The parties agree that this Agreement represents an attempt to compromise pending litigation, and it shall not be considered an admission, waiver, or abandonment of any issue of fact or law by any party, and no party will assert or contend that paragraphs 7, 8, and 11 have any legal effect until this Agreement is implemented by the accomplishment of the acts described in paragraph 13.

11. Status of State Water Plan

State and Company agree that the resolution of Company's water rights and recognition thereof by State together with the Idaho State Water Plan provide a sound comprehensive plan for the management of the Snake River watershed. Thus, the parties acknowledge that this Agreement provides a plan best adapted to develop, conserve, and utilize the water resources of the region in the public interest. Upon implementation of this agreement, State and Company will present the Idaho State Water Plan and this document to FERC as a comprehensive plan for the management of the Snake River Watershed.

12. Regulatory Approvals

A. Within 45 days of the execution of this Agreement, Company shall file appropriate pleadings or other documents with the Idaho Public Utilities Commission (IPUC), to obtain an order determining that the execution and implementation of this Agreement is in the public interest, and does not constitute an abandonment, relinquishment or transfer of utility property. Such pleadings or other documents shall also provide that the order shall state that any effect upon the Company's hydro generation resulting from execution and implementation of this Agreement shall not be grounds now or in the future for a finding or an order that the Company's rate base or any part thereof is overstated or that any portion of its electrical plant in service is no longer used and useful or not devoted to public service, nor will such effect upon the Company's hydro generation be grounds for a finding or an order reducing the Company's present or future revenue requirement or any present or future rate, tariff, schedule or charge.

In the event the IPUC does not issue an order acceptable to the parties, the parties will seek appropriate remedial legislation.

B. i. Within forty-five (45) days of the execution of this Agreement, the Company shall file with FERC a request for a declaratory ruling that the implementation of this agreement assures a sufficient supply of water for Project Numbers 1975 (Bliss), 2061 (Lower Salmon), 2777 (Upper Salmon), 2055 (C.J. Strike), 2778 (Shoshone Falls), 18 (Twin Falls), 2726 (Upper and Lower Malad), and 503 (Swan Falls).

ii. Within forty-five (45) days of implementation of this Agreement, the Company shall submit this Agreement and the consent decree to FERC in the proceedings for relicensing of Project Numbers 18 (Twin Falls), and 503 (Swan Falls) and the State and Company shall request that FERC recognize this Agreement as a definition of the Company's water rights in those proceedings.

iii. When any project listed in (i) hereof is hereafter due for relicensing proceeding, Company

shall submit this Agreement to FERC in the relicensing proceeding, and the State and Company shall request that FERC recognize this Agreement as a definition of the Company's water right in those proceedings.

C. The Governor and Attorney General on behalf of the State and its agencies shall seek intervention in support of the Company's efforts before the IPUC and FERC, and shall actively support the issuance of acceptable orders by both Commissions, and shall provide authorized witnesses to testify in the proceedings at the request of Company.

D. Company shall, if necessary, file appropriate pleadings or other documents with the Public Utility Commissioner of Oregon for an order similar to that stated in paragraph 12(A). Such filing, if necessary, shall be done within forty-five (45) days of the execution of this Agreement.

13. Conditions on Effectiveness

A. The provisions of paragraphs 7, 8, and 11 shall not be binding and effective until each of the following conditions have been implemented:

i. Amendment of the State Water Plan to implement the provisions of Exhibit 6;

ii. Enactment of the legislative program outlined in paragraph 6;

iii. Issuance of an appropriate order by IPUC as set forth in paragraph 12(A), or enactment of appropriate legislation by the State of Idaho, as set forth in Exhibit 5;

iv. Issuance of an appropriate order by FERC in a form acceptable to the parties as set out in paragraph 12(B)(i);

v. Dismissal with prejudice of the proceeding pending before the IPUC in Case No. U-1006-124;

vi. Issuance of an appropriate order by the Public Utility Commissioner of Oregon if Company has requested one; and

vii. Enactment by the State of Idaho of subordination legislation, as set forth in Exhibits 7A and 7B attached to this Agreement.

B. In the event any of these conditions are not implemented, or should this Agreement be terminated as provided in paragraph 16, then this Agreement shall be void.

14. Authority of Department of Water Resources and Idaho Water Resource Board Not Affected

This Agreement shall not be construed to limit or interfere with the authority and duty of the Idaho Department of Water Resources or the Idaho Water Resource Board to enforce and administer any of the laws of the state which it is authorized to enforce and administer.

15. Waiver, Modification or Amendment

No waiver, modification, or amendment of this Agreement or of any covenants, conditions, or limitations herein contained shall be valid unless in writing duly executed by the parties and the parties further agree that the provisions of this section may not be waived, modified, or amended except as herein set forth.

16. Termination of Contract

This Agreement shall terminate upon the failure to satisfy any of the conditions stated in paragraph 13. The parties shall meet on May 15, 1985, to determine if the contract shall be continued or terminated.

17. Subsequent Changes In Law

This Agreement is contingent upon certain enactments of law by the State and action by the Idaho Water Resource Board. Thus, within this Agreement, reference is made to state law in defining respective rights and obligations of the parties. Therefore, upon implementation of the conditions contained in paragraph 13, any subsequent final order by a court of competent jurisdiction, legislative enactment or administrative ruling shall not affect the validity of this Agreement.

18. Successors

The provisions of this Agreement shall bind and inure to the benefit of the respective successors and assigns of the parties.

19. Entire Agreement

This Agreement sets forth all the covenants, promises, provisions, agreements, conditions, and understandings between the parties and there are no covenants, provisions, promises, agreements, conditions, or understandings, either oral or written between them other than are herein set forth.

20. Effect of Section Headings

The section headings appearing in this Agreement are not to be construed as interpretations of the text but are inserted for convenience and reference only.

21. Multiple Originals

This Agreement is executed in quadruplicate. Each of the four (4) Agreements with an original signature of each party shall be an original.

IN WITNESS WHEREOF, the parties have executed this Agreement at Boise, Idaho, this 25th day of October, 1984.

STATE OF IDAHO

By: _____
JOHN V. EVANS
Governor of the
State of Idaho

IDAHO POWER COMPANY

By: _____
JAMES E. BRUCE
Chairman of the Board
and Chief Executive
Officer

By: _____
JIM JONES
Attorney General of the
State of Idaho

ATTEST:

PETE T. CENARRUSA
Secretary of State

(Seal of the State of Idaho)

(Corporate Seal of Idaho Power Company)

ATTEST:

Secretary of Idaho Power

CERTIFICATE OF SECRETARY

Paul L. Jauregui, as secretary of Idaho Power Company, a Maine Corporation, hereby certifies as follows:

(1) That the corporate seal, or facsimile thereof, affixed to the instrument is in fact the seal of the corporation, or a true facsimile thereof, as the case may be; and

(2) That any officer of the corporation executing the instrument does in fact occupy the official position indicated, that one in such position is duly authorized to execute such instrument on behalf of the corporation, and that the signature of such officer subscribed thereunto is genuine; and

(3) That the execution of the instrument on behalf of the corporation has been duly authorized.

In witness whereof, I, PAUL L. JAUREGUI, as the secretary of Idaho Power Company, a Maine corporation, have executed this certificate and affixed the seal of Idaho Power Company, a Maine Corporation, on this 25th day of October, 1984.

Paul L. Jauregui
Secretary of Idaho Power Company

CERTIFICATE OF SECRETARY OF STATE

OF THE STATE OF IDAHO

PETE T. CENARRUSA, as Secretary of State of the State of Idaho, hereby certifies as follows:

1. That the State of Idaho seal, or facsimile thereof, affixed to the instrument is in fact the seal of the State of Idaho, or a true facsimile thereof, as the case may be; and

2. That the officials of the State of Idaho executing the instrument do in fact occupy the official positions indicated, that they are duly authorized to execute such instrument on behalf of the State of Idaho, and that the signatures of such officials of the State of Idaho subscribed thereunto are genuine; and

3. That the execution of the instrument on behalf of the State has been duly authorized.

IN WITNESS WHEREOF, I, Pete T. Cenarrusa, Secretary of State of the State of Idaho, have executed this Certificate and affixed the seal of the State of Idaho on this 25th day of October, 1984.

PETE T. CENARRUSA
Secretary of State
State of Idaho

STATE OF IDAHO)
) ss.
County of Ada)

On this 25th day of October, 1984, before me, a Notary Public, in and for said County and State, personally appeared JAMES E. BRUCE, and PAUL L. JAUREGUI, known or

identified to me to be the President and Secretary, respectively, of Idaho Power Company, the corporation that executed the foregoing instrument, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

NOTARY PUBLIC FOR IDAHO
Residing at Boise, Idaho

STATE OF IDAHO)
) ss.
County of Ada)

On this 25th day of October, 1984, before me, a Notary Public, in and for said County and State, personally appeared JOHN V. EVANS, known or identified to me to be the Governor of the State of Idaho; JIM JONES, known or identified to me to be the Attorney General of the State of Idaho; and PETE T. CENARRUSA, known to me to be the Secretary of the State of Idaho; and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

NOTARY PUBLIC FOR IDAHO
Residing at Boise, Idaho

Exhibit 1

LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature First Regular Session - 1985

IN THE _____

_____ BILL NO. _____

BY _____

AN ACT

RELATING TO WATER RIGHTS FOR HYDROPOWER PURPOSES; AMENDING SECTION 42-203, IDAHO CODE, BY MAKING CERTAIN ORGANIZATIONAL CHANGES AND BY PROVIDING FOR THE MAILING OF NOTICES TO PAID SUBSCRIBERS; AMENDING CHAPTER 2, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-203C TO PROVIDE THAT THE DEPARTMENT SHALL CONSIDER PUBLIC INTEREST CRITERIA WHEN AN APPLICANT'S APPROPRIATION WOULD SIGNIFICANTLY REDUCE THE AMOUNT OF WATER AVAILABLE FOR A SUBORDINATED POWER USE; AND AMENDING CHAPTER 2, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-203D TO PROVIDE THAT THE DEPARTMENT SHALL REVIEW ALL PERMITS ISSUED PRIOR TO THIS ACT'S EFFECTIVE DATE.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 42-203, Idaho Code be, and the same is hereby amended to read as follows:

42-203. NOTICE UPON RECEIPT OF APPLICATION — PROTEST — HEARING AND FINDINGS -- APPEALS. ~~On and after the passage and approval and effective date of this section~~ (1) Upon receipt of an application to appropriate the waters of this state, the department of water resources, shall prepare a notice in such form as the department may prescribe, specifying; (a) the number of the application; and (b) the

date of filing thereof/; (c) the name and post-office address of the applicant/ (d) the source of the water supply/; (e) the amount of water to be appropriated/ (f) in general the nature of the proposed use/ (g) the approximate location of the point of diversion/ (h) and the point of use/. The department shall also stating in said notice that any protest against the approval of such application, in form prescribed by the department, shall be filed with the department within ten (10) days from the last date of publication of such notice.

(2) The director of the department of water resources shall cause the notice to be published in a newspaper printed within the county wherein the point of diversion lies, or in the event no newspaper is printed in said county, then in a newspaper of general circulation therein. When the application proposes a diversion in excess of 20 c.f.s. or 2,000 acre feet, the director shall cause the notice to be published in the newspaper(s) sufficient to achieve statewide circulation. This notice shall be published at least once a week for two (2) successive weeks.

(3) The director of the department shall cause a copy of the notice of application to be sent by ordinary mail to any person who requests in writing to receive any class of notices of application and who pays an annual mailing fee as established by departmental regulation.

(4) Any person, firm, association or corporation concerned in any such application may, within the time allowed in the notice of application, file with said director of the department of water resources a written protest against the approval of such application, which protest shall state the name and address of protestant and shall be signed by him or by his agent or attorney and shall clearly set forth his objections to the approval of such application. Hearing upon the protest so filed shall be held within sixty (60) days from the date such protest is received. Notice of this hearing shall be given by mailing notice not less than ten (10) days before the date of hearing and shall be forwarded to both the applicant and the protestant, or protestants, by certified mail. Such notice shall state the names of the applicant and protestant, or protestants, the time and place fixed for the hearing and such other information as the director of the department of water resources may deem advisable. In the event that no protest is filed, then the director of the department of water resources may forthwith approve the application, providing the same in all respects conforms with the requirements of this chapter, and with the regulations of the department of water resources.

(5) Such hearing shall be conducted in accordance with the provisions of section 42-1701A(1) and (2), Idaho Code. The director of the department of water resources shall find and determine from the evidence presented to what use or uses the water sought to be appropriated can be and are intended to be applied. In all applications whether protested or not protested, where the proposed use is such (a1) that it will reduce the quantity of water under existing water rights, or (b2) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c3) 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, or (d4) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e5) that it will conflict with the local public interest, where the local public interest is defined as the affairs of the people in the area directly affected by the proposed use/; tThe director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller l¢$$ quantity of water than applied for, or may grant permit upon conditions. The provisions of this section shall apply to any boundary stream between this and any other state in all cases where the water sought to be appropriated has its source largely within the state, irrespective of the location of any proposed power generating plant.

(6) Any person or corporation who has formally appeared at the hearing, ¢¢¢¢¢¢ aggrieved by the judgment of the director of the department of water resources, may seek judicial review thereof in accordance with section 42-1071A(4), Idaho Code.

SECTION 2. That Chapter 2, Title 42, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION to be known and designated as Section 42-203C, Idaho Code, and to read as follows:

42-203C. PUBLIC INTEREST DETERMINATION -- CRITERIA -- WEIGHT -- BURDEN OF PROOF.

(1) If an applicant intends to appropriate water which is or may be available for appropriation by reason of a subordination condition applicable to a water right for power purposes, then the director shall consider, prior to approving the application, the criteria established in section 42-203A, and whether the proposed use would significantly reduce, individually or cumulatively with other uses, the amount of water available to the holder of a water right used for power production and, if so, whether the proposed use is in the public interest.

(2)(a) The director in making such determinations for purposes of this section shall consider:

(i) the potential benefits, both direct and indirect, that the proposed use would provide to the state and local economy;

(ii) the economic impact the proposed use would have upon electric utility rates in the State of Idaho, and the availability, foreseeability and cost of alternative energy sources to ameliorate such impact, to the state and local economy;

(iii) the promotion of the family farming tradition;

(iv) the promotion of full economic and multiple use development of the water respurces of the State of Idaho;

(v) whether the proposed development conforms to a staged development policy of up to 20,000 acres per year or 80,000 acres in any four-year period in the Snake River Basin above the Murphy gauge.

No single factor enumerated above shall be entitled to greater weight by the director in arriving at this determination.

(b) The burden of proof under this section shall be on the protestant.

SECTION 3. That Chapter 2, Title 42, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION to be known and designated as Section 42-203D, Idaho Code, and to read as follows:

42-203D. REVIEW OF PERMITS — OPPORTUNITY FOR HEARING. The department shall review all permits issued prior to the effective date of this section, except to the extent a permit has been put to beneficial use prior to July 1, 1985, to determine whether they comply with the provisions of chapter 2, title 42, Idaho Code. If the department finds that the proposed use does not satisfy the criteria of chapter 2, title 42, Idaho Code, then the department shall either cancel the permit or impose the conditions required to bring the permit into compliance with chapter 2, title 42, Idaho Code. If the department finds that the permit satisfies the criteria established by chapter 2, title 42, Idaho Code, then the department shall enter an order continuing the permit.

The department shall provide an opportunity for hearing in accordance with section 1701A, title 42, Idaho Code and sections 5209 through 5215, title 67, Idaho Code, for each holder of a permit that is either cancelled or made subject to new conditions.

Exhibit 2

LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature First Regular Session - 1985

IN THE _____

_____ BILL NO. _____

BY _____

AN ACT

RELATING TO THE ADJUDICATION OF WATER RIGHTS, AMENDING CHAPTER 14, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-1406A PROVIDING FOR THE COMMENCEMENT OF AN ADJUDICATION OF THE WATER RIGHTS OF THE SNAKE RIVER BASIN; AMENDING SECTION 42-1414, IDAHO CODE, TO MODIFY THE SCHEDULE OF FEES FOR FILING A NOTICE OF CLAIM IN A WATER RIGHTS ADJUDICATION PROCEEDING AND PROVIDING A PROCEDURE FOR COLLECTION OF THE FEES; AMENDING CHAPTER 17, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-1777 PROVIDING FOR THE CREATION OF THE WATER RESOURCES ADJUDICATION ACCOUNT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF IDAHO:

SECTION 1. That Chapter 14, Title 42, Idaho Code, be, and the same is hereby amended by the addition of a NEW SECTION, to be known and designated as Section 42-1406A, Idaho Code, and to read as follows:

42-1406A. SNAKE RIVER BASIN ADJUDICATION - COMMENCEMENT. (1) Effective management in the public interest of the waters of the Snake River Basin requires that a comprehensive determination of the nature, extent and priority of the rights of all users of surface and ground water from that system be determined. Therefore, the director of the department of water resources on or after July 1, 1985 shall petition the district court of Ada County to commence an adjudication of the water rights of the Snake River Basin either through initiation of a new proceeding or the enlargement of an ongoing adjudication proceeding. The petition shall describe:

(a) the boundaries of the entire system within the state to be adjudicated;

(b) the boundaries of any hydrologic sub-basins within the system for which the director intends to proceed separately with respect to the actions required or authorized to be taken pursuant to sections 42-1408 through 42-1413, Idaho Code; and

(c) the uses of water, if any, within the system that are recommended to be excluded from the adjudication proceeding.

(2) Upon issuance of an order by the district court which:

(a) authorizes the director to commence an investigation and determination of the various water rights existing within the system;

(b) defines the system boundaries;

(c) defines the boundaries of any hydrologic sub-basins within the system for which proceedings may advance separately pursuant to sections 42-1408 through 42-1412, Idaho Code; and

(d) defines any uses of water excluded from the adjudication proceeding;

the adjudication shall proceed in the manner provided by the provisions of chapter 14, title 42, Idaho Code, with the exception of sections 42-1406 and 42-1407.

SECTION 2. That section 42-1414, Idaho Code, be, and the same is hereby amended to read as follows:

42-1414. FEES FOR FILING NOTICE OF CLAIM - In order to provide an adequate and equitable cost-sharing formula for financing the costs of adjudicating water rights the department of water resources shall accept no notice of claim required under the provisions of section 42-4109, Idaho Code, unless such notice of claim is submitted with a filing fee based upon the quantity of water claimed which shall be determined on the same basis as the fee for filing an application for a permit to appropriate the public waters of this state as provided in section 42-221/ Idaho Code/ except that where such claim is in connection with a water right established pursuant to a valid permit or license previously issued by the department of water administration of a water right which has previously been adjudicated by a state or federal court/ the claimant shall pay a filing fee of only

ten dollars ($10.00) fee schedule set forth below. Failure to pay the variable water use fee in accordance with the timetable provided shall be cause for the department to reject and return the notice of claim to the claimant. Provided, however, that no filing fee shall be required with any notice of claim when proceedings for adjudication involving such claim were under way when this act, Chapter 153, Laws of 1971, was enacted. The fee schedule set forth below applies to adjudication proceedings commenced or enlarged on or after July 1, 1985 and to adjudication proceedings for which a proposed finding of water rights has not been filed with the appropriate district court by the department of water resources prior to July 1, 1985.

A. Flat fee per claim filed:

1. Claims for domestic and/or stock-watering rights $25.00

2. Claims for all other rights. $50.00

B. Additional variable water use fee for each claim filed:

1. Irrigation use: $ 1.00 per acre.

2. Power: $ 25.00 per c.f.s.

3. Aquaculture: $ 10.00 per c.f.s.

4. Municipal, Industrial, Commercial, Mining, Heating, Cooling: $100.00 per c.f.s.

5. Public: $100.00 per c.f.s.

6. Miscellaneous: flat fee only.

C. Payment of a variable water use fee of more than $1,000.00 may be spread out over as many as five annual equal payments with 10 percent interest accruing on the unpaid balance. All fees collected by the department pursuant to this section shall be placed in the water resources adjudication account established by section 42-1777, Idaho Code.

SECTION 3. That Chapter 17, Title 42, Idaho Code, be, and the same is hereby amended by the addition of a NEW SECTION, to be known and designated as Section 42-1777, Idaho Code, and to read as follows:

42-1777. WATER RESOURCES ADJUDICATION ACCOUNT. - A water resource adjudication account is hereby created and established in the agency asset fund. Fee moneys in the account

are to be utilized by the department of water resources, upon appropriation by the legislature, to pay the costs of the department attributable to the Snake River Basin adjudication provided for by section 42-7406A, Idaho Code.

The state treasurer is directed to invest all moneys in the account. All interest or other income accruing from such investment shall accrue to the account.

Exhibit 3

LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature First Regular Session - 1985

IN THE _____

_____ BILL NO. _____

BY _____

AN ACT

APPROPRIATING MONEYS TO THE OFFICE OF THE GOVERNOR FOR THE DIVISION OF FINANCIAL MANAGEMENT, FOR FISCAL YEAR 1986.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. There is hereby appropriated to the Office of the Governor from the general account the amount of $200,000 to be used for the purpose of conducting hydrologic and economic studies of the Snake River Basin. A technical advisory committee named by the Governor shall oversee the studies.

Exhibit 4

LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature First Regular Session - 1985

IN THE _____

_____ BILL NO. _____

BY _____

AN ACT

AMENDING CHAPTER 5, TITLE 61, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 61-502B TO PROVIDE THAT GAIN UPON SALE OF A PUBLIC UTILITY'S WATER RIGHT SHALL ACCRUE TO THE BENEFIT OF THE RATEPAYERS.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1 - That Chapter 5, Title 61, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 61-502B, Idaho Code, and to read as follows:

61-502B. ALLOCATION OF GAIN UPON SALE OF WATER RIGHT.

The gain upon sale of a public utility's water right used for the generation of electricity shall accrue to the benefit of the ratepayers.

Exhibit 5

MEMORANDUM

SUBJECT: PROPOSED LEGISLATION RELATING TO UTILITIES COMMISSION AND ITS JURISDICTION TO REVIEW REVENUE REQUIREMENT AND OTHER REGULATORY IMPLICATIONS OF SWAN FALLS COMPROMISE.

SECTION 1 -- FINDINGS AND STATEMENT OF PURPOSE.--After hearing testimony from the Office of the Governor, the Office of the Attorney General, the Idaho Public Utilities Commission, the Idaho Department of Water Resources, the Idaho Water Resources Board, the Idaho Department of Fish and Game, other governmental entities and other interested groups and individuals of the State of Idaho, the legislature hereby finds that while portions of the testimony differ, the [describe the settlement and stipulation] is in the public interest for all purposes, including but not limited to, all purposes under the Public Utilities Law, as amended. Implementation of the settlement will resolve continuing controversy over electric utility water rights in the Snake River Basin above Murphy U.S.G.S gaging station. That controversy has rendered the amount of the water available for hydropower uncertain, thus placing at risk both the availability of low-cost hydropower to the ratepayers and the state's ability to manage an increasingly scarce resource. This settlement balances all of the parties' concerns and insures that existing hydropower-generating facilities will remain useful, that ratepayers will not be burdened with excessive costs, and that availability of water for additional domestic, manufacturing, and agricultural uses will judiciously expand.

SECTION 2 -- PUBLIC UTILITIES COMMISSION--JURISDICTION.--The Idaho Public Utilities Commission shall have no jurisdiction to consider in any proceeding, whether instituted before or after the effective date of this act, any issue as to whether any electric utility, (including Idaho Power Company), should have or could have preserved, maintained or protected its water rights and hydroelectric generation in a manner inconsistent with [describe the settlement and stipulation].

SECTION 3 -- IPUC--EFFECT OF AGREEMENT.--In any proceeding before the Idaho Public Utilities Commission, including but not limited to a proceeding in which the commission is setting or reviewing the revenue requirement of any electric utility (including Idaho Power Company), the commission shall accept as reasonable and in the public interest for all purposes, the [describe the settlement and stipulation], including without limitation the effects of implementation of such [describe the settlement and stipulation] on the utility's revenue requirements and hydroelectric generation.

SECTION 4 -- EXEMPTION.--Implementation of the [ ] shall not constitute a sale, assignment, conveyance or transfer within the meaning of §§61-327, 61-328, 61-329, 61-330, and 61-331, I.C., to the extent any of those sections may apply.

EXHIBIT 6

The executive branch of the State of Idaho and the Idaho Power Company agree to recommend that the following positions be incorporated into policy 32 of the state water plan.

1. The minimum daily flow at the Murphy gauging station should be increased to 3,900 c.f.s. from April 1 through October 31 and to 5,600 c.f.s from November 1 to March 31.

2. The minimum daily flow at the Milner gauging station shall remain at zero c.f.s.

3. New storage projects upstream from the Murphy gauge should only be approved after it is determined that existing storage above Murphy is fully utilized.

4. The Idaho Water Resource Board should consider reserving a block of water for future DCMI purposes.

5. There should be an express recognition of the adverse effects of diversions for storage from the mainstream of the Snake River between Milner and Murphy on hydropower production from November 1 to March 31. In this regard, approval of any new storage projects that contemplate the diversion of water during the November 1 to March 31 period from the mainstream of the Snake River between Milner Dam and Murphy Gauge should be coupled with provisions that mitigate the impact such depletions would have on the generation of hydropower.

[The parties are proposing a policy which is neutral on the question of which Company facilities should be considered in mitigation decisions. At any later time the Board considers that question, the parties reserve the right to take any position they deem appropriate.]

Exhibit 7A

LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature First Regular Session - 1985

IN THE _____

_____ BILL NO. _____

BY _____

AN ACT

AMENDING CHAPTER 2, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-203B, TO PROVIDE THAT THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES SHALL HAVE THE AUTHORITY TO SUBORDINATE RIGHTS GRANTED FOR POWER PURPOSES TO SUBSEQUENT UPSTREAM RIGHTS, AND TO LIMIT PERMITS OR LICENSES GRANTED FOR POWER PURPOSES TO A SPECIFIC TERM.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Chapter 2, Title 42, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 42-203B, Idaho Code, and to read as follows:

42-203B. AUTHORITY TO SUBORDINATE RIGHTS -- NATURE OF SUBORDINATED WATER RIGHT AND AUTHORITY TO ESTABLISH A SUBORDINATION CONDITION -- AUTHORITY TO LIMIT TERM OF PERMIT OR LICENSE. The director shall have the authority to subordinate the rights granted in a permit or license for power purposes to subsequent upstream beneficial depletionary uses. A subordinated water right for power use does not give rise to any claim against, or right to interfere with, the holder of subsequent upstream rights established pursuant to state law. The director shall also have the authority to limit a permit or license for power purposes to a specific term.

SECTION 2. This Act does not apply to licenses which have already been issued as of the effective date of this Act.

SECTION 3. An emergency existing therefor, which emergency is hereby declared to exist, this Act shall be in full force and effect on and after its passage and approval.

Section 1:

1. The legislature finds and declares that it is in the public interest to specifically implement the state's power to regulate and limit the use of water for power purposes and to define the relationship between the state and the holder of a water right for power purposes to the extent such right exceeds an established minimum flow. The purposes of the trust established by Sections 2 and 3 of this act are to assure an adequate supply of water for all future beneficial uses and to clarify and protect the right of a user of water for power purposes to continue using the water pending approval of depletionary future beneficial uses. [Further findings will be added]

2. A water right for power purposes which is defined by agreement with the state as unsubordinated to the extent of a minimum flow established by state action shall remain unsubordinated as defined by the agreement. Any portion of the water rights for power purposes in excess of the level so established shall be held in trust by the State of Idaho, by and through the Governor, for the use and benefit of the user of the water for power purposes, and of the people of the State of Idaho. The rights held in trust shall be subject to subordination to and depletion by future upstream beneficial users whose rights are acquired pursuant to state law.

3. Water rights for power purposes not defined by agreement with the state shall not be subject to depletion below any applicable minimum stream flow established by state action. Water rights for power purposes in excess of such minimum stream flow shall be held in trust by the State of Idaho, by and through the Governor, for the use and benefit of the users of water for power purposes and of the people of the State of Idaho. The rights held in trust shall be subject to subordination to and depletion by future upstream beneficial users whose rights are acquired pursuant to state law.

4. The user of water for power purposes as beneficiary of the trust established by Sections 2 and 3 shall be entitled to use water available at its facilities to the extent of the water right, and to protect its rights to the use of the water as provided by state law against depletions or claims not in accordance with state law.

5. The Governor or his designee is hereby authorized and empowered to enter into agreements with holders of water rights for power purposes to define that portion of their water rights at or below the level of the applicable minimum stream flow as being unsubordinated to upstream beneficial uses and depletions, and to define such rights in excess thereof as

being held in trust by the State according to Section 2 above. Such agreements shall be subject to ratification by law. The contract entered into by the Governor and the Idaho Power Company on October 24, 1984, is hereby found and declared to be such an agreement, and the legislature hereby ratifies the Governor's authority and power to enter into this agreement.

Section 2: This Act shall not be construed as modifying, amending, or repealing any interstate compact.

Section 3: The provisions of this Act are hereby declared to be severable. If any provision of this Act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of remaining portions of this Act.

Section 4: An emergency existing therefor, which emergency is hereby declared to exist, this Act shall be in full force and effect on and after its passage and approval.

Exhibit 8

LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature First Regular Session - 1985

IN THE _____

_____ BILL NO. _____

BY _____

AN ACT

AMENDING SECTION 42-1805, IDAHO CODE, TO PROVIDE THAT THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES SHALL HAVE THE POWER TO ESTABLISH RULES AND REGULATIONS.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 42-1805, be, and the same is hereby amended to read as follows:

42-1805. ADDITIONAL DUTIES -- In addition to other duties prescribed by law, the director of the department of water resources shall have the following powers and duties:

(1) To represent the state in all matters pertaining to interstate and international water rights affecting Idaho water resources; and to cooperate with all agencies, now existing or hereafter to be formed, within the state or within other jurisdictions, in matters affecting the development of the water resources of this state.

(2) To prepare a present and continuing inventory of the water resources of this state, ascertain means and methods of conserving and augmenting these and determine as accurately as possible the most effective means by which these water resources may be applied for the benefit of the people of this state.

(3) To conduct surveys, tests, investigations, research, examinations, studies, and estimates of cost relating to availability of unappropriated water, effective use of existing supply, conservation, storage, distribution and use of water.

(4) To prepare and compile information and data obtained and to make the same available to interested individuals or agencies.

(5) To cooperate with and coordinate activities with the administrator of the division of environmental protection of the department of health and welfare as such activities relate to the functions of either or both departments concerning water quality. Such cooperation and coordination shall specifically require that:

(a) The director meet at least quarterly with the administrator and his staff to discuss water quality programs. A copy of the minutes of such meeting shall be transmitted to the governor.

(b) The director transmit to the administrator, reports and information prepared by him pertaining to water quality programs, and proposed rules and regulations pertaining to water quality programs.

(c) The director shall make available to the administrator and the administrator shall make available to the director all notices of hearings relating to the promulgation of rules and regulations relating to water quality, waste discharge permits, and stream channel alteration, as such directly affect water quality, and notice of any other hearings and meetings which relate to water quality.

(6) To perform administrative duties and such other functions as the board may from time to time assign to the director to enable the board to carry out its powers and duties.

(7) To suspend the issuance of licenses or permits of a defined class or in a defined geographic area, as necessary to protect existing uses, ensure compliance with state law or implement the State Water Plan.

(8) To promulgate, adopt, modify, repeal and enforce rules and regulations implementing or effectuating the powers and duties of the department.

The foregoing is a true and certified copy of the document on file at the department of Water Resources
Signed this 1st day of January 08

Exhibit 15

State of Idaho
DEPARTMENT OF WATER RESOURCES
322 East Front Street, P.O. Box 83720, Boise, ID 83720-0098
Phone: (208) 287-4800 Fax: (208) 287-6700 Web Site: www.idwr.idaho.gov

JAMES E. RISCH
Governor
KARL J. DREHER
Director

July 27, 2006

Senator Charles H. Coiner
Idaho State Senate
2138 Hillcrest Drive
Twin Falls, ID 83301

VIA EMAIL AND FIRST CLASS MAIL

Re: Diversions of Natural Flow from the Snake River Under Water Rights for Recharge

Dear Senator Coiner:

I am writing in response to your inquiry regarding whether water diverted from the Snake River for aquifer recharge in 2006 pursuant to a water right permit held by the Idaho Water Resource Board was properly allowed. You initially raised this issue on July 12, 2006, at a meeting of the Idaho Legislature's Natural Resources Interim Committee in Boise.

During his presentation before the Natural Resources Interim Committee, David Blew, the Department of Water Resources Aquifer Recharge Coordinator, stated that water was diverted from the Snake River under the water right permit held by the Water Resource Board from about mid-April until July 21, 2006. You questioned whether the diversions to recharge were improperly out-of-priority, since the water right permit held by the Water Resource Board (right no. 01-07054 having the priority of August 25, 1980) is junior in priority to the water right held by the North Side Canal Company and the Twin Falls Canal Company for power production at the Milner Power Plant (right no. 01-07011 having the priority date of March 30, 1977), which was curtailed on May 16, 2006. You again expressed considerable concern that natural flow may have been diverted out-of-priority for recharge when you telephoned me on July 13.

In response to your concerns, my staff and I have investigated whether the diversions that were made for recharge under the water right permit held by the Water Resource Board were authorized. Based on those investigations, I have determined that the diversions to recharge were made properly in accordance with the water right permit held by the Water Resource Board and the water right permit for power production held by the North Side Canal Company and the Twin Falls Canal Company, as described in the following paragraphs.

Permit No. 01-07011 Held by the North Side and Twin Falls Canal Companies

Application for permit to appropriate water no. 01-07011, as subsequently amended, was first filed on March 30, 1977. The proposed beneficial use was year-round power production using water diverted from the Snake River at a rate of up to 12,000 cfs. The application for permit was approved on June 29, 1977, with proof of beneficial use due on or before June 1, 1982. The due date for submitting proof of beneficial use was extended four times at the request of the North Side and the Twin Falls canal companies, primarily because of delays in the FERC licensing process. The canal companies filed proof of beneficial use of 5,714.7 cfs for power production on October 29, 1993, and the issuance of a license for the water right is pending.

In April of 1987, when the Department was processing the second request for extension of time to submit proof of beneficial use, the Department determined that water right no. 01-07011 should be subordinated pursuant to Idaho Code § 42-203B. The attorney for the North Side and Twin Falls canal companies had concerns with the subordination condition proposed by the Department and suggested alternate language, which was subsequently accepted in its entirety. On December 16, 1987, the second request for extension of time to submit proof of beneficial use was approved with the subordination language proposed by the attorney for the canal companies added as a condition to the permit. That condition states as follows:

> The rights for use of water acquired under this permit shall be junior and subordinate to all other rights for the consumptive beneficial use of water, other than hydropower and groundwater recharge[,] within the the Snake River Basin of the state of Idaho that are initiated later-in-time than the priority of this permit and shall not give rise to any right or claim against any future rights for the consumptive beneficial use of water, other than hydropower and groundwater recharge[,] within the Snake River Basin of the state of Idaho initiated later-in-time than the priority of this permit.

Permit No. 01-07054 Held by the Idaho Water Resource Board

Application for permit to appropriate water no. 01-07054 was filed on June 30, 1980, by Earl Hardy, Thorleif Rangen, John LeMoyne, and John Jones, Jr. The proposed use was year-round ground water recharge using water diverted from the Snake River through the Milner Gooding Canal at a rate of up to 1,200 cfs. On January 15, 1982, the application for permit was assigned to the Lower Snake River Aquifer Recharge District. The application for permit was approved on June 2, 1982, with proof of beneficial use due on or before June 1, 1987. The due date for submitting proof of beneficial use was extended at the request of the Aquifer Recharge District until June 1, 1992, primarily because of ongoing negotiations to obtain access to lands for all of the contemplated recharge sites. Proof of beneficial use for partial development under the permit of 300 cfs for ground water recharge was filed on July 27, 1992, which was 57 days after proof of beneficial use was due. Prior to the submittal of proof of beneficial use, permit no. 01-07054 was lapsed. After proof of beneficial use was submitted, the permit was reinstated, but the priority date was advanced 57 days to August 25, 1980.

On February 16, 1994, the Aquifer Recharge District filed an application to amend permit no. 01-07054 to add the North Side Canal facilities as an additional point of diversion and conveyance system, which application was approved on April 7, 1994. On March 19, 1999, permit no. 01-07054 was assigned to the Idaho Water Resource Board, and the Board has subsequently requested two extensions of time to submit proof of beneficial use for the undeveloped portion of permit no. 01-07054. Proof of beneficial use for the undeveloped portion of the permit is currently due on or before June 1, 2009. There are no subordination conditions associated with permit no. 01-07054.

On March 13, 2006, the Water Resource Board filed an application to place 900 cfs of permit no. 01-07054 into the water bank for the purpose of adding the Aberdeen Springfield Canal facilities as a point of diversion and place of use for ground water recharge. On April 18, 2006, the Water Resource Board amended its water bank application to add numerous other points of diversion and places of use for ground water recharge, including the City of Blackfoot's Jensen Grove.

Distribution of Water to Permit Nos. 01-07011 and 01-07054 During 2006

Water was diverted through the Milner Power Plant under permit no. 01-07011 in calendar year 2006 through May 16. Although preliminary flow records from Idaho Power Company indicate that there was sufficient water available to divert 5,714.7 cfs through the Milner Power Plant and provide a bypass flow of 200 cfs from April 12 through May 12, 2006, preliminary records of diversions through the power plant from the U. S. Bureau of Reclamation indicate that approximately 350± cfs less than 5,714.7 cfs was diverted for power generation.

On May 16, 2006, the U. S. Bureau of Reclamation determined that it was no longer necessary to allow spills past Milner Dam because water from the Snake River could be fully utilized above Milner Dam for the purposes of: (1) supplying all water rights to natural flow above Milner Dam for consumptive demands; (2) continuing to fill reservoir storage space that had not yet filled (e.g., Henrys Lake and Ririe Reservoir); and (3) refill reservoir storage space that had filled but been subsequently evacuated due to flood control releases (e.g., Jackson Lake and Palisades Reservoir). Because permit no. 01-07011 is subordinated to these upstream consumptive uses pursuant to the subordination condition cited on the previous page, the water right for the Milner Power Plant was curtailed until June 27, 2006, when storage releases for uses below Milner Dam began.

During March and April of 2006, canal companies along the Snake River began to divert natural flow pursuant to their various water rights for irrigation. Once those systems were charged for irrigation deliveries, then diversions for recharge were allowed under permit no. 01-07054 at the heading of the North Side Canal and other points of diversion for canals added through the Water Board's lease of the water right permit through the water bank. Diversions for recharge through a canal under permit no. 01-07054 were only allowed to the extent there were no deliveries of water for irrigation along the canal. Based on our analysis of preliminary diversion records, no water was diverted for recharge under permit no. 01-07054 until there was

at least 5,714.7 cfs available for diversion through the Milner Power Plant pursuant to permit no. 01-07011. Diversions for recharge at Jensen Grove did not begin until April 18, 2006, when there was a combined total flow at the Milner Power Plant of 12,700 cfs, based on the preliminary flow records of Idaho Power.

When diversions for power production under permit no. 01-07011 were curtailed on May 16, 2006, pursuant to the previously described subordination condition, diversions for recharge under permit no. 01-07054 were allowed to continue because that permit is not subordinated to any upstream consumptive beneficial uses. Had diversions of water for recharge not occurred after May 16, no additional water would have been available for diversion through the Milner Power Plant because of the subordination provision. Had diversions of water for recharge not occurred after May 16, some additional water would have accrued to storage space that had filled but subsequently evacuated for flood control and filled again. However, permit no. 01-07054 is not subordinated to that second fill of storage.

Distribution of Water to Permit Nos. 01-07011 and 01-07054 in Prior Years

The diversion of water for recharge under permit no. 01-07054 when permit no. 01-07011 is curtailed is in accordance with the subordination condition for permit no. 01-07011. The same situation occurred in at least one other year. In 1995, permit no. 01-07011 was curtailed from March 9 through May 6, while recharge through the Milner Gooding Canal was allowed beginning on April 3 under permit no. 01-07054. Use of the Milner Gooding Canal for recharge was allowed in 1995 pursuant to an interim agreement with the U. S. Bureau of Reclamation providing for use of the canal.

Based on the analysis described above, there is presently no information indicating that the diversions to recharge were not in accordance with the water right permit held by the Water Resource Board and the water right permit for power production held by the North Side Canal Company and the Twin Falls Canal Company*.

Sincerely,

Karl J. Dreher
Director

c: Vince Alberdi – Twin Falls Canal Company
Ted Diehl – North Side Canal Company
Water District 01

* Nothing in this letter should be construed to affect the review of permits no. 01-07011 or no. 01-07054 when such permits are licensed.

Exhibit 16

HOUSE BILL NO. 800

View Bill Status
View Bill Text
View Statement of Purpose / Fiscal Impact

Text to be added within a bill has been marked with Bold and Underline. Text to be removed has been marked with Strikethrough and Italic. How these codes are actually displayed will vary based on the browser software you are using.
This sentence is marked with bold and underline to show added text.
~~This sentence is marked with strikethrough and italic, indicating text to be removed.~~

Bill Status

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HOB00.....................................................by WAYS AND MEANS
WATER RIGHTS - Amends existing law relating to water to revise provisions
regarding rights associated with permits and licenses relating to ground
water recharge.

03/13    House intro - 1st rdg - to printing
03/14    Rpt prt - to Res/Con
03/16    Rpt out - rec d/p - to 2nd rdg
03/17    Rls susp - PASSED - 43-22-5
      AYES -- Anderson, Andrus, Barraclough, Bastian, Bedke, Bell, Bilbao,
      Block, Bolz, Bradford, Cannon, Chadderdon, Clark, Collins, Deal,
      Denney, Eskridge, Field(18), Field(23), Harwood, Henderson, Jaquet,
      Lake, Loertscher, Mathews, McKague, Moyle, Nielsen, Nonini, Pence,
      Raybould, Ring, Roberts, Rydalch, Sayler, Schaefer, Shepherd(8),
      Shirley, Smith(24), Stevenson, Trail, Wills, Mr. Speaker
      NAYS -- Barrett, Bayer, Black, Boe, Brackett, Edmunson, Garrett,
      Hart, Henbest, Kemp, LeFavour, Martinez, Miller, Mitchell,
      Pasley-Stuart, Ringo, Rusche, Shepherd(2), Skippen, Smith(30),
      Smylie, Snodgrass
      Absent and excused -- Crow, Ellsworth, McGeachin, Sali, Wood
   Floor Sponsors - Mr. Speaker & Raybould
   Title apvd - to Senate
03/20    Senate intro - 1st rdg - to Res/Env
03/28    Rpt out - rec d/p - to 2nd rdg
03/29    2nd rdg - to 3rd rdg
03/30    3rd rdg - FAILED - 14-21-0
      AYES -- Burtenshaw, Cameron, Corder, Darrington, Davis, Geddes, Hill,
      Keough, Marley, Pearce, Richardson, Stegner, Stennett, Williams
      NAYS -- Andreason, Brandt, Broadsword, Bunderson, Burkett, Coiner,
      Compton, Fulcher, Gannon, Goedde, Jorgenson, Kelly, Langhorst,
      Little, Lodge, Malepeai, McGee, McKenzie, Schroeder, Sweet, Werk
      Absent and excused -- None
   Floor Sponsors - Burtenshaw & Williams
   Ret'd to House
   Filed in Office of the Chief Clerk
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Bill Text

]]]] LEGISLATURE OF THE STATE OF IDAHO]]]]
Fifty-eighth Legislature Second Regular Session - 2006

IN THE HOUSE OF REPRESENTATIVES

HOUSE BILL NO. 800

BY WAYS AND MEANS COMMITTEE

AN ACT

RELATING TO WATER; AMENDING SECTION 42-234, IDAHO CODE, TO REVISE PRIORITY PROVISIONS REGARDING RIGHTS ASSOCIATED WITH PERMITS AND LICENSES RELATING TO GROUND WATER RECHARGE; AND AMENDING SECTION 42-4201A, IDAHO CODE, TO REVISE PRIORITY PROVISIONS REGARDING RIGHTS ASSOCIATED WITH PERMITS AND LICENSES RELATING TO GROUND WATER RECHARGE AND TO MAKE TECHNICAL CORRECTIONS.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 42-234, Idaho Code, be, and the same is hereby amended to read as follows:

42-234. GROUND WATER RECHARGE PROJECTS -- AUTHORITY OF DEPARTMENT TO GRANT PERMIT. (1) It is the policy of the state of Idaho to promote and encourage the optimum development and augmentation of the water resources of this state. The legislature deems it essential, therefore, that water projects designed to advance this policy be given maximum support. The legislature finds that the projects to recharge ground water basins in Idaho, may enhance the full realization of our water resource potential by furthering water conservation and increasing the water available for beneficial use.

(2) The legislature hereby declares that the appropriation and underground storage of water for purposes of ground water recharge shall constitute a beneficial use and hereby authorizes the department of water resources to issue a permit for the appropriation and underground storage of unappropriated waters in an area of recharge. The rights acquired pursuant to any permit and license obtained as herein authorized shall be secondary to all prior perfected water rights~~, including those water rights for power purposes that may otherwise be subordinated by contract entered into by the governor and Idaho power company on October 25, 1984, and ratified by the legislature pursuant to section 42-203B, Idaho Code~~. Any right so granted shall be subject to depletion for surface storage or direct uses after a period of years sufficient to amortize the investment of the appropriator.

(3) The legislature further recognizes that incidental ground water recharge benefits are often obtained from the diversion and use of water for various beneficial purposes. However, such incidental recharge may not be used as the basis for claim of a separate or expanded water right. Incidental recharge of aquifers which occurs as a result of water diversion and use that does not exceed the vested water right of water right holders is in the public interest. The values of such incidental recharge shall be considered in the management of the state's water resources.

SECTION 2. That Section 42-4201A, Idaho Code, be, and the same is hereby amended to read as follows:

42-4201A. RECHARGE OF GROUND WATER BASINS -- DIRECTOR'S AUTHORITY TO

ISSUE PERMIT. (1) The welfare of the people of the state of Idaho is dependent upon the conservation, development, augmentation and optimum use of the water

resources of this state. The legislature deems it essential therefore that every effort be made to foster and encourage water projects and water use that will augment ground water basin recharge. The legislature hereby acknowledges that certain water uses and proposed projects to recharge water basins in the state by means of the storage of unappropriated waters of the public waters of the state in underground aquifers represents a unique and innovative endeavor to further water conservation and increase the water available for beneficial use.

(2) In view of the public betterment to be achieved by the completion of aquifer recharge projects, the legislature hereby declares that the appropriation and underground storage of water by any person, aquifer recharge district, irrigation district, canal company or water district for purposes of ground water recharge shall constitute a beneficial use and hereby authorizes the department of water resources to issue a permit, pursuant to section 42-203A, Idaho Code, for the appropriation and underground storage of the unappropriated waters of the state. The department of water resources is further authorized to issue a license confirming the right to appropriate such waters for the beneficial use herein established upon compliance with the requirements specified in chapter 2, title 42, Idaho Code. The rights acquired pursuant to any permit and license obtained as herein authorized shall be secondary to all prior perfected water rights~~, including these water rights for power purposes that may otherwise be subordinated by contracts entered into by the governor and Idaho power company on October 25, 1984, and ratified by the legislature pursuant to section 42 203B, Idaho Code~~.

(3) The director of the department of water resources may regulate the amount of water which may be diverted for recharge purposes and may reduce such amount, even though there is sufficient water to supply the entire amount originally authorized by permit or license. To facilitate necessary financing of an aquifer recharge project, the director may fix a term of years in the permit or license during which the amount of water authorized to be diverted shall not be reduced by the director under the provisions of this subsection.

(4) To ~~insure~~ ensure that other water rights are not injured by the operations of an aquifer recharge project, the director of the department of water resources shall have the authority to approve, disapprove, or require alterations in the methods employed to achieve ground water recharge. In the event that the director determines that the methods of operation are adversely affecting existing water rights or are creating conditions adverse to the beneficial use of water under existing water rights, the director shall order the cessation of operations until such alterations as may be ordered by the director have been accomplished or such adverse effects otherwise have been corrected.

Statement of Purpose / Fiscal Impact

REPRINT REPRINT REPRINT REPRINT REPRINT REPRINT

STATEMENT OF PURPOSE

RS 15985C1

The purpose of the legislation is to facilitate diversion of expected flood flows in the spring of 2006 in the upper Snake River Basin into existing canal structures to recharge the Eastern Snake Plain Aquifer. The legislation would make recharge a primary use of water.

As part of the 1984 Swan Falls Agreement, Idaho Power Company agreed to subordinate its hydropower water rights "to subsequent beneficial upstream uses upon approval of such uses by the State in accordance with State law" subject to maintenance of a 3,900 c.f.s. average daily flow from April 1 to October 31, and

5,600 c.f.s. average daily flow from November 1 to March 31, both to be measured at the Murphy U.S.G.S. gauging station immediately below Swan Falls Dam. The Swan Falls Agreement did not impose any limitations on the type of beneficial uses to which the subordination applied.

In 1994, the Legislature enacted recharge legislation that provided use of water for recharge would be secondary to the use of water to satisfy the hydropower water rights subordinated by the Swan Falls Agreement. This legislation would remove this limitation on the use of water for recharge.

FISCAL NOTE

This legislation imposes no fiscal burden on any agency or unit of government.

Contact
Name: Speaker of the House of Representatives Bruce Newcomb
Phone: (208) 332-1000
Representative Dell Raybould
Representative John A. Stevenson
Senator Bart Davis
Senator Don Burtenshaw
Senator J. Stanley Williams

STATEMENT OF PURPOSE/FISCAL NOTE H 800

Exhibit 17

LEGISLATURE OF THE STATE OF IDAHO

Sixtieth Legislature First Regular Session - 2009

IN THE SENATE

SENATE BILL NO. 1185

BY STATE AFFAIRS COMMITTEE

AN ACT

RELATING TO GROUND WATER RECHARGE; AMENDING SECTION 42-234, IDAHO CODE, TO DELETE REFERENCE TO PROJECTS AND TO REFERENCE PERMITS AND LICENSES, TO REVISE A LEGISLATIVE FINDING, TO REVISE A LEGISLATIVE DECLARATION RELATING TO BENEFICIAL USE, TO AUTHORIZE THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES TO ISSUE CERTAIN PERMITS AND LICENSES, TO DELETE REFERENCE TO CERTAIN PRIORITY AND DEPLETION PROVISIONS, TO PROVIDE THAT THE DIRECTOR MAY REGULATE AND REDUCE THE AMOUNT OF WATER WHICH MAY BE DIVERTED FOR RECHARGE PURPOSES, TO PROVIDE THAT THE DIRECTOR MAY FIX A TERM OF YEARS IN CERTAIN PERMITS OR LICENSES DURING WHICH THE AMOUNT OF WATER AUTHORIZED TO BE DIVERTED SHALL NOT BE REDUCED, TO AUTHORIZE THE DIRECTOR TO APPROVE, DISAPPROVE OR REQUIRE ALTERATIONS IN METHODS EMPLOYED TO ACHIEVE GROUND WATER RECHARGE AND TO PROVIDE THAT THE DIRECTOR SHALL ORDER THE CESSATION OF OPERATIONS UNDER CERTAIN CIRCUMSTANCES; REPEALING SECTION 42-4201A, IDAHO CODE, RELATING TO THE DIRECTOR'S AUTHORITY TO ISSUE PERMITS AND LICENSES RELATING TO THE RECHARGE OF GROUND WATER BASINS; AND AMENDING SECTIONS 42-4223, 42-5225 AND 43-343, IDAHO CODE, TO PROVIDE CORRECT CODE REFERENCES.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 42-234, Idaho Code, be, and the same is hereby amended to read as follows:

42-234. GROUND WATER RECHARGE ~~PROJECTS~~ – AUTHORITY OF DEPARTMENT TO GRANT PERMITS AND LICENSES. (1) It is the policy of the state of Idaho to promote and encourage the optimum development and augmentation of the water resources of this state. The legislature deems it essential, therefore, that water projects designed to advance this policy be given maximum support. The legislature finds that the ~~projects~~ use of water to recharge ground water basins in accordance with Idaho, law and the state water plan may enhance the full realization of our water resource potential by furthering water conservation and increasing the water available for beneficial use.

(2) The legislature hereby declares that the appropriation ~~and underground storage~~ of water for purposes of ground water recharge shall constitute a beneficial use ~~and hereby authorizes~~ of water. The director of the department of water resources is authorized to issue ~~a~~ permits and licenses for the ~~appropriation and underground storage of unappropriated waters in an area~~ purpose of ground water recharge, pursuant to the provisions of this chapter and in compliance with other applicable Idaho law and the state water plan. ~~The rights acquired~~

~~pursuant to any permit and license obtained as herein authorized shall be secondary to all prior perfected water rights, including those water rights for power purposes that may otherwise be subordinated by contract entered into by the governor and Idaho power company on October 25, 1984, and ratified by the legislature pursuant to section 42-203B, Idaho Code. Any right so granted shall be subject to depletion for surface storage or direct uses after a period of years sufficient to amortize the investment of the appropriator.~~

(3) The director of the department of water resources may regulate the amount of water which may be diverted for recharge purposes and may reduce such amount, even though there is sufficient water to supply the entire amount originally authorized by permit or license. To facilitate necessary financing of an aquifer recharge project, the director may fix a term of years in the permit or license during which the amount of water authorized to be diverted shall not be reduced by the director under the provisions of this subsection.

(4) To ensure that other water rights are not injured by the operations of an aquifer recharge project, the director of the department of water resources shall have the authority to approve, disapprove or require alterations in the methods employed to achieve ground water recharge. In the event that the director determines that the methods of operation are adversely affecting existing water rights or are creating conditions adverse to the beneficial use of water under existing water rights, the director shall order the cessation of operations until such alterations as may be ordered by the director have been accomplished or such adverse effects otherwise have been corrected.

(5) The legislature further recognizes that incidental ground water recharge benefits are often obtained from the diversion and use of water for various beneficial purposes. However, such incidental recharge may not be used as the basis for claim of a separate or expanded water right. Incidental recharge of aquifers which occurs as a result of water diversion and use that does not exceed the vested water right of water right holders is in the public interest. The values of such incidental recharge shall be considered in the management of the state's water resources.

SECTION 2. That Section 42-4201A, Idaho Code, be, and the same is hereby repealed.

SECTION 3. That Section 42-4223, Idaho Code, be, and the same is hereby amended to read as follows:

42-4223. CONTRACTS TO RECEIVE BENEFITS. Any privately owned electrical generating company, or any person or entity who has acquired or is in the process of acquiring a right to appropriate water downstream from the boundaries of the district may enter into a contract with the board of directors of the aquifer recharge district for the receipt of benefits from the district. The consideration to be paid by any company, person or entity so contracting shall be as specified in the contract. Approval of any such contract by the director of the department of water resources shall be required before the contract shall become effective.

A contract executed and approved as herein provided may be used by the department of water resources as the basis for issuance of a permit to the electrical generating company or downstream appropriator for the appropriation and storage of such water as shall become available thereto as a result of the functioning of the district. Water appropriated under any such permit shall be deemed to be stored water and the use and manner of appropriation thereof shall be subject to all applicable limitations and restrictions imposed by law, including the

provisions of subsection (3) of section 42-4201 or subsection (3) of section ~~42-4201A~~ 42-234, Idaho Code.

Prior to the formation of the aquifer recharge district, any such electrical generating company or downstream appropriator may file with the director of the department of water resources a letter of intent to enter into such a contract.

SECTION 4. That Section 42-5225, Idaho Code, be, and the same is hereby amended to read as follows:

42-5225. AUTHORITY TO CONSTRUCT AND OPERATE GROUND WATER RECHARGE OR STORAGE PROJECT. Any ground water district organized under the laws of this state is authorized in section ~~42-4201A~~ 42-234, Idaho Code, to file an application with the department to acquire water rights or to appropriate the unappropriated waters of the state for the purpose of storing waters in, or recharging, ground water basins within the district to aid in the efficient irrigation of district lands, to serve domestic, commercial, municipal or industrial uses within the district, or to carry out a mitigation plan. Upon approval of the application for permit by the director, the district shall proceed in the manner provided by law to construct and operate the ground water storage or recharge project. The construction and operation of the project shall be subject to such additional conditions and limitations as shall be imposed by the director pursuant to sections 42-203A, 42-222 and ~~42-4201A~~ 42-234, Idaho Code.

SECTION 5. That Section 43-343, Idaho Code, be, and the same is hereby amended to read as follows:

43-343. AUTHORITY TO CONSTRUCT AND OPERATE GROUND WATER RECHARGE PROJECT. Any irrigation district heretofore or hereafter organized under the laws of this state, having received and affirmatively acted upon a petition to construct a ground water recharge improvement project in the manner provided by sections 43-328, 43-329 and 43-330, Idaho Code, is authorized by section ~~42-4201A~~ 42-234, Idaho Code, to file an application with the department of water resources to appropriate the unappropriated waters of the state for the purpose of recharging ground water basins within the district to aid in the efficient irrigation of district lands. Upon approval of the application for permit by the director of the department of water resources, the district shall proceed in the manner provided by the irrigation district laws of the state to construct and operate the recharge project. The construction and operation of the project shall be subject to such additional conditions and limitations as shall be imposed by the director of the department of water resources pursuant to sections ~~42-203~~ 42-203A and ~~42-4201A~~ 42-234, Idaho Code.

Exhibit 18

RECEIVED
APR 11 2006
DEPARTMENT OF
WATER RESOURCES

April 11, 2006

Karl Dreher, Director
Idaho Department of Water Resources
322 E Front Street
P.O. Box 83720
Boise, ID 83720-0098

Re: Water Right Permit Nos. 01-7054, 37-7842, and Water Right Licenses enumerated in the Swan Falls Water Right Agreement, dated October 25, 1984 and ratified by Idaho Code § 42-203B(5)

Dear Director Dreher:

The State of Idaho and Idaho Power Company have entered into the attached Stipulation dated April 11, 2006, which recognizes that the hydropower water rights listed in the Swan Falls Agreement are subordinate to Water Right Permit Nos. 01-7054 and 37-7842. We request that this Stipulation be filed in each of the relevant water right files and that you take such action as is necessary to reflect the Stipulation in each of the enumerated water rights.

Sincerely,

LAWRENCE G. WASDEN,
Attorney General
State of Idaho

JAMES C. TUCKER
Attorney for Idaho Power Company

Attachment

STIPULATION

The Idaho Power Company and the State of Idaho ("State") hereby stipulate and agree, by and through their respective undersigned counsel, as follows:

1) Stipulation Regarding Water Right Permit Nos. 01-7054 and 37-7842: Recognizing that Water Right Permit Nos. 01-7054 and 37-7842 are subject to the Swan Falls Settlement –

   a) The Company agrees that its water rights are subordinated to water rights nos. 01-7054 and 37-7842 pursuant to the terms of the Swan Falls Agreement and will neither contest nor otherwise oppose the exercise of those water rights on the basis of priority, the Swan Falls Agreement, or I.C. §§ 42-234, 42-4201 and 42-4201A. The Company further agrees that those water rights may be exercised in a manner consistent with state law.

   b) The parties agree that all provisions of the Swan Falls Agreement and the implementing legislation shall continue to apply to Water Right Permit Nos. 01-7054 and 37-7842, including I.C. §§ 61-539 and 61-540 for the benefit of Idaho Power Company.

   c) The parties further agree that in the event that the Idaho Water Resource Board (IWRB) seeks to have said permits licensed or decreed, that the Company will not file a protest or objection in such proceedings, but that the State, in recognition of its obligations under the Swan Falls Agreement and state law, through the Idaho Department of Water Resources (IDWR), will appropriately investigate such permits to ensure that they meet applicable requirements and that the licensed or decreed water rights fully comply with state law.

2) Further Proceedings Relating to the Swan Falls Agreement. The parties agree that in the event that there are disagreements or disputes between the parties as to the interpretation or application of the Swan Falls Agreement that they will endeavor to resolve those disagreements through informal discussions and negotiation. In the event that the parties are unable to resolve

any such disagreements to their mutual satisfaction, either party, after notice to the other, may file a petition for declaratory relief with a court of appropriate jurisdiction to have the disagreement resolved and the Swan Falls Agreement interpreted and neither this Stipulation nor I.C. §§ 42-234, 42-4201, or 42-4201A shall act as a bar to the filing of such action.

3) Request for Recognition of the Stipulation. The parties agree to submit this Stipulation in all administrative and judicial proceedings involving the recognition of Water Right Permit Nos. 01-7054 and 37-7842 and to jointly present affidavits and such other evidence as may be required for the recognition of the Stipulation.

4) Defense of Stipulation. The parties agree to jointly support and defend the terms of the Stipulation against any and all objections or other challenges that may arise against the terms of the Stipulation in any administrative or judicial proceeding.

5) Stipulation Does Not Affect Statutory or Regulatory Authority. The parties agree that nothing in this Stipulation shall be construed or interpreted to affect the authority of the State as provided by constitution, statute or regulation. Nor shall this Stipulation be construed or interpreted to affect the rights of any person not a party to the Stipulation.

6) Stipulation Not to be Used Against Parties. Except as provided herein, neither party by entry into this Stipulation waives any legal position or arguments it may have regarding any legal disputes that may exist between the parties. Nothing in this Stipulation shall be construed as an admission against interest or tendered or used as evidence to support or oppose any party's claims or objections in any administrative or judicial proceeding, other than those seeking approval of the Stipulation, for interpretation, enforcement or administration of this Stipulation or for a purpose contemplated by Idaho Rule of Evidence 408.

7) Stipulation is Binding. The terms of this Stipulation shall bind and inure to the benefit of the respective successors of the parties.

8) Mutual Covenants of Authority. The parties represent and acknowledge that each of the undersigned is authorized to execute this Stipulation on behalf of the party they represent.

9) Non-Severability. The provisions of this Stipulation are not severable.

10) Triplicate Originals. This Stipulation is executed in triplicate. Each of the three Stipulations with an original signature of each party shall be an original.

The parties have executed this Stipulation on the date following their respective signatures.

FOR THE STATE OF IDAHO, including THE IDAHO WATER RESOURCE BOARD:

Date: 4/11/06

LAWRENCE G. WASDEN,
Attorney General
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, ID 83711-4449
(208) 334-4126

FOR IDAHO POWER COMPANY:

Date: 4/11/06

JAMES C. TUCKER
Idaho Power Company
P.O. Box 70
Boise, ID 83707
(208) 388-2112

Exhibit 19

Close

IDAHO DEPARTMENT OF WATER RESOURCES
Water Permit Report

08/17/2007

WATER RIGHT NO. 37-7842

Owner Type	Name and Address
Current Owner	STATE OF IDAHO IDAHO WATER RESOURCE BOARD 322 E FRONT ST PO BOX 83720 BOISE, ID 83720-0098 (208)287-4800
Original Owner	EARL HARDY
Original Owner	THORLEIF RANGEN , ID
Original Owner	JOHN R LE MOYNE 901A GRIDLEY ISLAND HAGERMAN, ID 83332 (208)837-4887
Original Owner	JOHN W JONES JR PO BOX 265 HAGERMAN, ID 83332 (208)837-4580

Priority Date: 08/25/1980
Status: Active

Source	Tributary
BIG WOOD RIVER	MALAD RIVER
LITTLE WOOD RIVER	MALAD RIVER

Beneficial Use	From	To	Diversion Rate	Volume

GROUND WATER RECHARGE	01/01	12/31	800 CFS	
Total Diversion			800 CFS	

Location of Point(s) of Diversion:

LITTLE WOOD RIVER	SWSE	Sec. 24	Township 04S	Range 19E	LINCOLN County
BIG WOOD RIVER	SWSE	Sec. 24	Township 04S	Range 19E	LINCOLN County

Place(s) of use: No POUs found for this right

Conditions of Approval:

1.	026	Permit holder shall commence the excavation or construction of diverting works within one year of the date this permit is issued and shall proceed diligently until the project is complete.
2.	007	The right holder shall not assign or sell the permit without first securing the written approval of the Department of Water Resources.
3.	005	Use of water under this right is subject to control by the watermaster of State Water District No. 37 .
4.	001	A measuring device of a type approved by the Department shall be permanently installed and maintained as part of the diverting works.
5.	004	The issuance of this right does not grant any right-of-way or easement across the land of another.
6.		See file for complete place of use descriptions. This permit shall be secondary to all prior water rights including rights held by any privately owned electrical generating company to appropriate waters in the reaches of the Snake River downstream from the Milner diversion for purposes of hydroelectric power generation. Water may not be diverted under this permit until the Board of Directors of the District establish and implement a procedure acceptable to the Director for assuring that the water quality of the Lower Snake Aquifer will not be impaired. Plans for recharge facilities and any conveyance works needed shall be submitted to the department for approval prior to construction.

Dates:
Proof Due Date: 06/01/2009
Proof Made Date:
Approved Date: 06/02/1982
Moratorium Expiration Date:
Enlargement Use Priority Date:
Enlargement Statute Priority Date:
Application Received Date: 07/02/1980
Protest Deadline Date:
Number of Protests: 0

Field Exam Date::
Date Sent to State Off:
Date Received at State Off:

Other Information:
State or Federal:
Owner Name Connector:
Water District Number: 37
Generic Max Rate per Acre:
Generic Max Volume per Acre:
Swan Falls Trust or Nontrust:
Swan Falls Dismissed:
DLE Act Number:
Cary Act Number:
Mitigation Plan: False

Close

Close

IDAHO DEPARTMENT OF WATER RESOURCES
Water Permit Report

08/17/2007

WATER RIGHT NO. I-7054

Owner Type	Name and Address
Current Owner	STATE OF IDAHO IDAHO WATER RESOURCE BOARD 322 E FRONT ST PO BOX 83720 BOISE, ID 83720-0098 (208)287-4800
Original Owner	EARL HARDY
Original Owner	THORLEIF RANGEN , ID
Original Owner	JOHN R LE MOYNE 901A GRIDLEY ISLAND HAGERMAN, ID 83332 (208)837-4887
Original Owner	JOHN W JONES JR PO BOX 265 HAGERMAN, ID 83332 (208)837-4580

Priority Date: 08/25/1980
Status: Active
Water Supply Bank Status: Active

Source	Tributary
SNAKE RIVER	COLUMBIA RIVER

Beneficial Use	From	To	Diversion Rate	Volume

GROUND WATER RECHARGE	1/01	12/31	1200 CFS	
Total Diversion			1200 CFS	

Location of Point(s) of Diversion:

SNAKE RIVER	SWNW	Sec. 28	Township 10S	Range 21E	JEROME County
SNAKE RIVER	SWNW	Sec. 29	Township 10S	Range 21E	JEROME County

Place(s) of use: No POUs found for this right

Conditions of Approval:

1.	The Lower Snake Aquifer Recharge District may not utilize the Milner Gooding Canal until and unless a valid contract is in place with the U.S. Dept. of Interior, Bureau of Reclamation. The permit shall be secondary to all prior water rights including rights held by any privately owned electrical generating company to appropriate waters in the reaches of the Snake River downstream from the Milner diversin for purposes of hydroelectric power generation. The Director may regulate or reduce the rate of diversion under this permit pursuant to requirements of Section 42-04201, Idaho Code. The permit shall not be assigned or sold without first securing the written approval of the Department of Water Resources. The Board of Directors of the District shall establish and implement a procedure acceptable to the Director for assuring that the water quality of the Lower Snake Aquifer will not be impaired. The right holder shall submit plans for recharge facilities and any conveyance works needed to the Department for approval prior to construction. Place of use is within the boundaries of the Lower Snake Plains Aquifer Recharge District.

Dates:
Proof Due Date: 06/01/2009
Proof Made Date:
Approved Date: 06/02/1982
Moratorium Expiration Date:
Enlargement Use Priority Date:
Enlargement Statute Priority Date:
Application Received Date: 06/30/1980
Protest Deadline Date:
Number of Protests: 0
Field Exam Date::
Date Sent to State Off:
Date Received at State Off:

Other Information:
State or Federal:

Owner Name Connector:
Water District Number:
Generic Max Rate per Acre:
Generic Max Volume per Acre:
Swan Falls Trust or Nontrust:
Swan Falls Dismissed:
DLE Act Number:
Cary Act Number:
Mitigation Plan: False

Water Supply Bank:
Lessor Name(s):STATE OF IDAHO
Lease Status: Active
Lease Amount: Part
Rental Availability: None
Date Received: 3/19/2007
Lease Begin Date: 3/19/2007
Expiration Date: 12/31/2007
Close

Form 217

RECEIVED
JUL 27 1992
Department of Water Resources

OFFICE USE ONLY
Amt. of Fee $ N/A
Date
Receipt No.
Receipt by

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

PROOF OF BENEFICIAL USE

The Idaho Department of Water Resources considers this form a statement that the permit holder(s) has/have completed all development that will occur under this permit and that water has been applied according to the provisions of the permit for the beneficial use(s) described below. This form must be accompanied by a license examination fee, when necessary, or a completed field examination report prepared by a certified water right examiner who has been appointed by the department.

1. Permit No. and 01-07054A 37-07842A Telephone No. 837-4887

2. Name(s) of Permit Holder(s): Lower Snake River Recharge District

3. Mailing Address: Box 487 Hagerman, Idaho

4. Source of Water: Snake River

If GROUNDWATER, Well Driller's Name: N/A. Date Drilled:

OPTIONAL:
Pump horsepower: N/A Pressure (psi): Dynamic pumping level (ft.):

5. Extent of Use (as authorized by the permit):

Domestic (No. of households) Stockwater (No. and type of stock)

Irrigation (No. of acres) Other Groundwater Recharge

6. Total rate and/or volume for which proof is submitted 300 cfs OR acre/feet

7. Refer to the approval conditions on your permit and respond accordingly:

Measuring device: Required? ✓ Yes No Installed? ✓ Yes No

OR

Flow Measurement Port: Required? N/A Yes No Installed? N/A Yes No

8. Fee Enclosed: $ (See License Fee Schedule on back of Instruction Sheet)

9. Person to contact to accompany the Department representative during field examination of the water system.

Gerald Martin 208-734-4338
Name Telephone No.

1139 Falls Ave. East, Twin Falls Idaho
Address

APR 18 1994

10. The above information is my true statement of the extent to which the above numbered permit has been developed and I relinquish any undeveloped portion of the permit to the state of Idaho.

RECEIVED
JUL 29 1992

6/12/92 Gerald Martin Project Engineer, CWRE # 001
Date Signature (and title, if on behalf of a company or organization)

Form 219
6/92

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

BENEFICIAL USE FIELD REPORT

RECEIVED
NOV 2 9 1993
Department of Water Resources

A. GENERAL INFORMATION

Permit No. 01-07054
37-07842

1. Owner: Lower Snake River Recharge District Phone No. 837-4887

Current Address: Box 48, Hagerman, Idaho

2. Accompanied by: Gerald Martens EXAM DATE :

Address: 1139 Falls Ave. E, Twin Falls, Idaho Phone No. 734-4888

Relationship to Permit Holder: None

3. Source: Snake River/Big Wood River tributary to See Narrative

B. OVERLAP REVIEW

1. Other water rights with the same place of use: None

2. Other water rights with the same point of diversion: None

C. DIVERSION AND DELIVERY SYSTEM

1. Point(s) of Diversion:

Ident No.	Gov't Lot	¼	¼	¼	Sec.	Twp.	Rge.	County	Method of Determination/Remarks
		SE	NE		22	5S	17E	Lincoln	7.5 minute quadrange

2. Place(s) of Use: Indicate Method of Determination

TWP	RGE	SEC	NE				NW				SW				SE				Totals
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
5S	17E	22			X	X			X	X	X	X		X		X	X		

3. **Delivery System Diagram:** Indicate all major components and distances between components. Indicate weir size/ditch size/pipe I.d. as applicable.

See attached exhibits and recharge structure plans.

Scale: 1" = _____.

____ Copy of USGS Quadrange Attached Showing location(s) of point(s) of diversion and place(s) of use (required).

____ Aerial Photo Attached (required for irrigation of 10+ acres)

____ Photo of Diversion and System Attached

4.

Well or Diversion Identification No.*	Motor Make	Hp	Motor Serial No.	Pump Make	Pump Serial No. or Discharge Size
N/A					

**Code to correspond with No. on map and aerial photo*

D. FLOW MEASUREMENTS

1.

Measurement Equipment	Type	Make	Model No.	Serial No.	Size	Calib. Date
Milner Gooding Canal Measuring Stations 56 and 57						

2. **Measurements:** Water measured in concrete flume above and below diversion. Diversion quantity is mathematical difference. Upstream flow measured at Milner Gooding Canal Diversion Structure 56. Downstream measurement at Milner Gooding Canal Structure No. 57. Rating curves have been established for both stations. See attached letter.

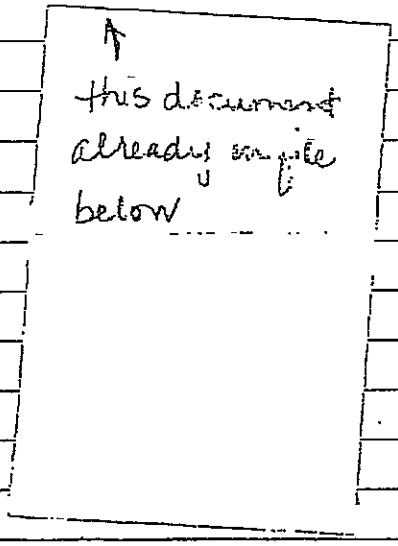
E. NARRATIVE/REMARKS/COMMENTS

Measurement flow records for April 1986, as prepared by Big Wood Canal Company. Attached are flow records.

The Big Wood Canal Co-mingles water from Snake River and Bigwood River upstream of diversion. District routinely replaces water. from one source with water from other sources. At time of proof of Beneficial Use Report the Bigwood water was supplementing Snake River flows to facilitate flows measured at diversion.

Division agreement between Lower Snake River Recharge District and Bureau of Land Management attached for your information.

Attached is a flow summary sheet that tabulates the recharge rate of flow and the maximum potential contribution to total recharge from each potential source.



Have conditions of permit approval been met? X yes ___ no

F. FLOW CALCULATIONS _____ Additional Computation Sheets Attached

Measured Method:

See Section E.

G. VOLUME CALCULATIONS N/A

1. Volume Calculations for Irrigation:

$V_{I.R.}$ = (Acres Irrigated) x (Irrigation Requirement) = _____

$V_{D.R.}$ = [Diversion Rate (cfs)] x (Days in Irrigation Season) x 1.9835 = _____

V = Smaller of $V_{I.R.}$ and $V_{D.R.}$ = _____

2. Volume Calculations for Other Uses:

H. RECOMMENDATIONS

1. Recommended Amounts

Beneficial Use	Period of Use From	Period of Use To	Rate of Diversion Q (cfs)	Annual Volume V (afa)
Groundwater Recharge	1-1	12-31	300 CFS	
		Totals:	300 CFS	

2. Recommended Amendments

___ Change P.D. as reflected above ___ Add P.D. as reflected above ___ None

___ Change P.U. as reflected above ___ Add P.U. as reflected above ___ Other

I. AUTHENTICATION

Field Examiner's Name Gerald Martens Date 11/24/93

Reviewer _____ Date _____

PROFESSIONAL ENGINEER REGISTERED 2133 SEAL STATE OF IDAHO GERALD L. MARTENS

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

WATER SUPPLY BANK LEASE ACCEPTANCE

This is to certify that STATE OF IDAHO
IDAHO WATER RESOURCE BOARD
322 E FRONT ST
PO BOX 83720
BOISE, ID 83720-0098
(208)287-4800

has requested to lease the water right(s) listed below to the Water Supply Bank ("bank") The Idaho Water Resource Board ("Board") being authorized to operate a bank and to contract by and through the Director of the Idaho Department of Water Resources ("Director", department") the acquisition of water rights for the Board's bank, agrees to lease the water right to the bank as follows:

Summary of Water Rights or Portions Leased to the Bank

Right	Lease Rate	Lease Volume	Total Leased Acres
37-7842	800 0 cfs	NA	NA
COMBINED LEASE TOTALS	800.0 cfs	NA	NA

TERM OF LEASE: Lease Begin Date: April 11, 2006
Expiration Date: December 31, 2006

MINIMUM PAYMENT ACCEPTABLE: NA

Detailed Lease Acceptance attached.

Dated this 12TH day of APRIL, 2006

Gary Spackman
Chief, Water Allocation Bureau

WATER RIGHT NO. 37-7842
WATER SUPPLY BANK LEASE ACCEPTANCE

The water right or portion thereof leased to the bank is described as follows:

Lessor: STATE OF IDAHO
IDAHO WATER RESOURCE BOARD
322 E FRONT ST
PO BOX 83720
BOISE, ID 83720-0098
(208)287-4800

Priority Date: 08/25/1980

Source: BIG WOOD RIVER
LITTLE WOOD RIVER

BENEFICIAL USE	From	To	Diversion Rate	Volume
GROUND WATER RECHARGE	1/01	12/31	800 00 CFS	NA
			Total: 800.00 CFS	

LOCATION OF POINT(S) OF DIVERSION:
GROUND WATER RECHARGE

BIG WOOD RIVER	SW1/4SE1/4	Sec. 24,	Twp 04S,	Rge 19E,	LINCOLN County
LITTLE WOOD RIVER	SW1/4SE1/4	Sec. 24,	Twp 04S,	Rge 19E,	LINCOLN County

PLACE OF USE TO BE IDLED UNDER THIS LEASE:

Place of use defined under permit

CONDITIONS OF ACCEPTANCE

1. The water right(s) referenced above is accepted into the bank and rented by the Idaho Water Resource Board There is no rental fee for rental of this right by the Board
2. A right accepted into the bank stays in the bank until the Board releases it, the lease term expires, or upon request from the lessor to change the term of the lease.
3. While a water right is in the bank, forfeiture provisions are stayed
4. Rental of water under this right is subject to the limitations and conditions of approval of the water right
5. Failure of the right holder to comply with the conditions of acceptance is cause for the Director to rescind acceptance of the lease

WATER RIGHT NO. 37-7842
WATER SUPPLY BANK LEASE ACCEPTANCE

CONDITIONS OF ACCEPTANCE

6 Acceptance of a right into the bank does not, in itself, confirm the validity, extent of development, or any elements of the water right permit, or improve the status of the water right permit including the notion of resumption of use. It does not preclude the opportunity for review of the validity of this water right permit in any other department application process.

7 In accordance with Sections 42-248 and 42-1409(6), Idaho Code, all owners of water rights are required to notify the department of any changes in mailing address or change in ownership of all or part of a water right Notice must be provided within 120 days of the change.

8 Upon acceptance of a water right into the Board's water supply bank, the owner of the right may withdraw the right within thirty (30) days of acceptance into the bank if the owner does not agree with the conditions of acceptance.

The water right(s) is leased to the bank subject to all prior water rights and shall be administered in accordance with Idaho law and applicable rules of the Department of Water Resources.

Dated this 12TH day of APRIL, 2006

Gary Spackman

Chief, Water Allocation Bureau

AMENDED

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

WATER SUPPLY BANK RENTAL AGREEMENT

This is to certify that: STATE OF IDAHO
IDAHO WATER RESOURCE BOARD
322 E FRONT ST
PO BOX 83720
BOISE, ID 83720-0098
(208)287-4800

filed an application to rent water from the Water Supply Bank ("bank") The Idaho Water Resource Board ("Board") being authorized to operate a bank and to contract by and through the Director of the Idaho Department of Water Resources ("Director, department") for rental of water from the bank agrees to rent water as follows:

Summary of Water Rights or Portions Rented from the Bank

Right	Rented Rate	Rented Volume	Total Rented Acres
1-7054	900.0 cfs	NA	NA
COMBINED RENTAL TOTALS:	900.00 cfs	NA	NA

TERM OF RENTAL: 03/15/06 to 12/31/06

TOTAL RENTAL FEE: NA

Detailed water right specific limitations and conditions attached

---

The undersigned renter agrees to use the water rented under this agreement in accordance with the Water Supply Bank rules and in compliance with the limitations and conditions of use described in this agreement:

Dated this 13 day of April, 20 06

by Jeff R Bigler
(Print Name)

(Signature)

Chairman, IWRB
(Title if on behalf of company or organization)

Having determined that this agreement satisfies the provisions of Section 42-1763, Idaho Code, and, IDAPA 37.02.03030 (Water Supply Bank Rule 30), for the rental and use of water under the terms and conditions herein provided, and none other, I hereby execute this Rental Agreement on behalf of the Idaho Water Resource Board this 18th day of April, 2006

KARL J DREHER, Director
Department of Water Resources

WATER RIGHT NO(S). 1-7054
WATER SUPPLY BANK RENTAL AGREEMENT

The renter agrees to use the water rented under this agreement in accordance with the Water Supply Bank rules and in compliance with the limitations and conditions of use described below:

Renter: STATE OF IDAHO
IDAHO WATER RESOURCE BOARD
322 E FRONT ST
PO BOX 83720
BOISE, ID 83720-0098
(208)287-4800

Priority Date: 08/25/1980

Source: SNAKE RIVER

BENEFICIAL USE	From	To	Diversion Rate	Volume
GROUND WATER RECHARGE	3/15	12/31	900 00 CFS	NA
			Total: 900.00 CFS	

LOCATION OF POINT(S) OF DIVERSION:

SNAKE RIVER	NW1/4NW1/4	Sec 4,	Twp 02S, Rge 36E, B M.	BINGHAM County
SNAKE RIVER	SW1/4NW1/4	Sec. 28,	Twp 10S, Rge 21E, B.M	JEROME County
SNAKE RIVER	SW1/4NW1/4	Sec 29,	Twp 10S, Rge 21E, B.M	JEROME County
SNAKE RIVER	SW1/4NE1/4	Sec 26,	Twp 01S Rge 36E, B.M	BINGHAM County
SNAKE RIVER	SW1/4NW1/4	Sec 15,	Twp 1N, Rge 37E, B M.	BINGHAM County
SNAKE RIVER	SE1/4SE1/4	Sec 36,	Twp 4N, Rge 40E, B.M	JEFFERSON County
SNAKE RIVER	SE1/4SW1/4	Sec 20,	Twp 4N, Rge 40E, B.M	JEFFERSON County
SNAKE RIVER	NE1/4NW1/4	Sec 29,	Twp 4N, Rge 40E, B M.	JEFFERSON County
SNAKE RIVER	NW1/4SW1/4	Sec 27,	Twp 4N, Rge 40E, B M	JEFFERSON County
SNAKE RIVER	SW1/4SE1/4	Sec 36,	Twp 4N, Rge 40E, B M.	JEFFERSON County
SNAKE RIVER	NE1/4NE1/4	Sec 35,	Twp 4N, Rge 37E, B.M	BONNEVILLE County
SNAKE RIVER	NE1/4NW1/4	Sec 12,	Twp 2N, Rge 37E, B.M	BONNEVILLE County
SNAKE RIVER	NW1/4NE1/4	Sec 15,	Twp 4N, Rge 39E, B M	JEFFERSON County
SNAKE RIVER	NW1/4W1/4	Sec 5,	Twp 3N, Rge 41E, B M	BONNEVILLE County
SNAKE RIVER	NW1/4NW1/4	Sec 31,	Twp 4N, Rge 41E, B M.	JEFFERSON County
SNAKE RIVER	NE1/4SW1/4	Sec 27,	Twp 2S, Rge 36E, B M.	BINGHAM County
SNAKE RIVER	NE1/4SW1/4	Sec 27,	Twp 2S, Rge 35E B.M.	BINGHAM County
SNAKE RIVER	SE1/4NE1/4	Sec 26,	Twp 1S, Rge 36E B M.	BINGHAM County
SNAKE RIVER	NE1/4NE1/4	Sec 27,	Twp 2S, Rge 35E B M.	BINGHAM County
SNAKE RIVER	NE1/4NE1/4	Sec 27,	Twp 2S, Rge 35E B M.	BINGHAM County
SNAKE RIVER	NE1/4NE1/4	Sec 21,	Twp 5N, Rge 38E B.M	JEFFERSON County
SNAKE RIVER	NW1/4NW1/4	Sec 22,	Twp 5N, Rge 38E B.M	JEFFERSON County
SNAKE RIVER	SE1/4NW1/4	Sec 36,	Twp 4N, Rge 37E B.M	JEFFERSON County
SNAKE RIVER	SW1/4SE1/4	Sec 6,	Twp 2S, Rge 36E B M	BINGHAM County

WATER RIGHT NO(S). 1-7054
WATER SUPPLY BANK RENTAL AGREEMENT

RENTER'S PLACE OF USE:

PLACE OF USE OF GROUND WATER RECHARGE IS WITHIN THE FOLLOWING CANAL SYSTEMS:

ABERDEEN SPRINGFIELD CANAL, NORTHSIDE CANAL, PEOPLES CANAL, SNAKE RIVER VALLEY CANAL SYSTEM, ENTERPRISE CANAL, BURGESS CANAL, RUDY CANAL, HARRISON CANAL, FARMERS FRIEND IRRIGATION CANAL, GREAT WESTER CANAL, PORTER CANAL, RIGBY CANAL, PROGRESSIVE CANAL, JENSEN GROVE LAKE, NEW LAVASIDE CANAL, DANSKIN CANAL, TREGO DITCH, BUTTE AND MARKET LAKE CANAL, IDAHO CANAL, RIVERSIDE CANAL

CONDITIONS OF WATER USE

1. The use of water under this agreement shall be subject to the provisions of Section 42-1766, Idaho Code

2 The water right(s) referenced above is accepted into the bank and rented in accordance with a Resolution from the Idaho Water Resource Board dated March 13, 2006 There is no rental fee for rental of this right by the Idaho Water Resource Board

3. Rental of the specified right from the bank does not, in itself, confirm the validity, extent of development, or any elements of the water right permit, or improve the status of the water right permit including the notion of resumption of use It does not preclude the opportunity for review of the validity of this water right permit in any other department application process

4. The right holder shall record the quantity of water diverted and report diversions of water and/or other pertinent hydrologic and system information as required by Section 42-701, Idaho Code

5 Use of water under this agreement does not constitute a dedication of the water to renter's land and upon expiration of this agreement, the points of diversion and place of use of the water shall revert to those authorized under the water right and/or again be available to rent from the bank

6 This rental does not grant any right-of-way or easement to use the diversion works or conveyance works of another party

7 Renter agrees to comply with all applicable state and federal laws while using water under this agreement

8 Renter agrees to hold the Board, the Director and the state of Idaho harmless from all liability on account of negligent acts of the renter while using water

9. Renter acknowledges and agrees that the Director may terminate diversion of water if the Director determines there is not a sufficient water supply for the priority of the right or portion thereof being rented

10 Failure of the right holder to comply with the conditions of this agreement is cause for the Director to rescind approval of the rental agreement

Exhibit 20

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF LICENSING WATER RIGHT PERMIT NO. 01-7011 IN THE NAME OF TWIN FALLS CANAL COMPANY AND NORTH SIDE CANAL COMPANY	)	NOTICE OF INTENT TO ISSUE LICENSE

On June 29, 1977, the Idaho Department of Water Resources ("Department) issued Water Right Permit No. 01-7011 to Twin Falls Canal Company and North Side Canal Company ("Permit Holders") with a priority date of March 30, 1977. Permit No. 01-7011 authorized the year-round diversion of 12,000 cfs from the Snake River at Milner Dam for hydropower purposes and was issued without any subordination condition. Proof of construction of works and application of water to beneficial use was due on or before June 1, 1982.

On March 31, 1982, the Department approved an application for extension of time that extended the proof of beneficial due date to June 1, 1987. On March 4, 1987, the Department approved a second application for extension of time that extended the proof of beneficial due date to November 1, 1990, and added the following subordination condition to the permit:

> The rights for use of water acquired under this permit shall be junior and subordinate to all other rights for the consumptive beneficial use of water, other than hydropower and groundwater recharge within the Snake River Basin of the state of Idaho that are initiated later-in-time than the priority of this permit and shall not give rise to any right or claim against any future rights for the consumptive beneficial use of water, other than hydropower and groundwater recharge within the Snake River Basin of the state of Idaho initiated later-in-time than the priority of this permit.

On October 30, 1990, the Department approved a third application for extension of time that extended the proof of beneficial due date to May 1, 1992. The application for extension stated that the Federal Energy Regulatory Commission ("FERC") issued the Permit Holders and the Idaho Power Company a license for Milner Project No. 2899 on December 15, 1988 (45 FERC ¶ 61,423). On April 28, 1992, the Department approved a fourth application for extension of time that extended the proof of beneficial due date to November 1, 1993.

The Permit Holders submitted proof of beneficial for Permit No. 01-7011 on November 1, 1993, pursuant to Idaho Code § 42-217. The field examination report completed by Charles E. Brockway, P.E. on October 29, 1993, recommends that the water right be licensed for a total diversion rate of 5,714.7 cfs for use at the Milner Power Plant. Proof of beneficial use having been submitted under the permit, the Department is prepared to issue a license for the water right pursuant to Idaho Code § 42-219. Counsel for the Permit Holders has orally requested that the Department issue a license for the water right.

The Department received written requests for notice for an opportunity to be heard on the form of the subordination condition to be included on the license for Water Right No. 01-7011 from the Bingham Ground Water District on January 11, 2007; from the Idaho Ground Water Appropriators, Inc. on February 7, 2007, for and on behalf of its ground water districts and other members, represented by the law firm of Racine Olson Nye Budge & Bailey, Chartered; and from the Mud Lake Water Users, Independent Water Users, Jefferson Canal Co., Monteview Canal Co., and Producer's Canal Co., on April 16, 2007, represented by the law firm of Holden, Kidwell, Hahn & Crapo, P.L.L.C.

NOW THEREFORE NOTICE IS HEREBY GIVEN that the Department will accept and consider written Comments from the Permit Holders and other interested persons or entities addressing the form of the subordination condition that should be included on the license for Water Right No. 01-7011. Any Comments submitted should be addressed to Director, Idaho Department of Water Resources, P.O. Box 83720, Boise, Idaho 83720-0098 and received by the Department or post marked on or before October 10, 2007.

DATED this 5th day of September 2007.

David R Tuthill Jr

DAVID R. TUTHILL, JR.
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of September 2007, I caused a true and correct copy of the foregoing Notice of Intent to Issue License to be sent by U.S. Mail, postage paid to the following:

John A. Rosholt, Esq.
Barker Rosholt & Simpson LLP
113 Main Avenue West, Suite 303
P.O. Box 485
Twin Falls, ID 83303-00485

Randall C. Budge, Esq.
Racine Olson Nye Budge & Bailey
201 East Center Street
P.O. Box 1391
Pocatello, Idaho 83204-1391

Kent W. Foster, Esq.
Robert L. Harris, Esq.
1000 Riverwalk Dr. Suite 200
P.O. Box 50130
Idaho Falls, Idaho 83405

Craig B. Evans, Chairman
Bingham Ground Water District
1725 Riverton Road
P.O. Box 1268
Blackfoot, Idaho 83221

Lyle Swank, Manager
Department of Water Resources
Eastern Regional Office
900 North Skyline Dr., Ste A
Idaho Falls, ID 83402-1718

Allen D. Merritt, Manager
Department of Water Resources
Southern Regional Office
1341 Fillmore Street, Suite 200
Twin Falls, ID 83301-3380

Victoria Wigle
Administrative Assistant to the Director
Idaho Department of Water Resources

Exhibit 21

File in 01-7011

BINGHAM GROUNDWATER DISTRICT

RECEIVED
JAN
DEPARTMENT OF WATER RESOURCES

P.O. BOX 1268
1725 Riverton Road
Blackfoot, Idaho 83221

Phone (208) 684-9634
Fax (208) 785-4299
binghamgroundwtr@cableone.net

Faxed on JAN 9, 2007

Mailed on JAN 9, 2007

January 9, 2007

Idaho Department of Water Resources
Interim Director, David Tuthill
322 E Front St., P.O. Box 83720
Boise, ID 83720-0098
Ph: (208) 287-4800
Fx: (208) 287-6700

Dear Mr. Tuthill:

Re: Milner Hydropower Permit 01-7011

Bingham Groundwater District requests that the above referenced water right be granted license status only if fully subordinated. We also request that we be included as a protestant if there is any action taken by the Idaho Department of Water Resources on this right other than full subordination.

Yours truly,

Craig B. Evans, Chairman, Board of Directors
Bingham Groundwater District

File for 01-.11 Dave

LAW OFFICES OF

RACINE OLSON NYE BUDGE & BAILEY
CHARTERED

201 EAST CENTER STREET
POST OFFICE BOX 1391
POCATELLO, IDAHO 83204-1391

TELEPHONE (208) 232-6101
FACSIMILE (208) 232-6109

www.racinelaw.net

SENDER'S E-MAIL ADDRESS: rcb@racinelaw.net

BOISE OFFICE

101 SOUTH CAPITOL
BOULEVARD, SUITE 208
BOISE, IDAHO 83702
TELEPHONE: (208) 395-0011
FACSIMILE: (208) 433-0167

IDAHO FALLS OFFICE

477 SHOUP AVENUE
SUITE 203A
IDAHO FALLS, ID 83402
TELEPHONE: (208) 528-6101
FACSIMILE: (208) 528-6109

LOUIS F. RACINE (1917-2008)
WILLIAM D. OLSON
W. MARCUS W. NYE
RANDALL C. BUDGE
JOHN A. BAILEY, JR.
JOHN R. GOODELL*
JOHN B. INGELSTROM
DANIEL C. GREEN**
BRENT O. ROCHE
KIRK B. HADLEY
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CAROL TIPPI VOLYN‡‡
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CANDICE M. MCHUGH***

*ALSO MEMBER WY & IL BARS
**ALSO MEMBER UT BAR
***ALSO MEMBER CO BAR
†ALSO MEMBER D. C. BAR
††ALSO MEMBER MO BAR
‡ALSO MEMBER IL BAR
‡‡ALSO MEMBER WA BAR

February 5, 2007

DR

David R. Tuthill, Jr., Director
Idaho Department of Water Resources
322 E. Front Street
P.O. Box 83720
Boise, Idaho 83720-0098

Re: TFCC/NSCC Permit No. 01-7011
Milner Dam Hydro

Dear Mr. Tuthill:

This letter requests that the Idaho Ground Water Appropriators (IGWA), acting for and on behalf of its ground water districts and other members, be advised of any notices, correspondence or actions taken by the Idaho Department of Water Resources (Department) with regards to Permit No. 01-7011, the Milner Dam filing of Twin Falls and North Side Canal Companies.

This Application was originally filed by Twin Falls Canal Company (TFCC) and North Side Canal Company (NSCC) on March 30, 1977 seeking a permit to appropriate 12,000 cfs for power purposes at Milner Dam. Notice of the Application was published May 16 and 26, 1977. At that time, well before the Swan Falls controversy and resulting settlement, there was a widespread assumption and belief that all power rights were subordinate to all upstream depletions. After the publication, we are informed by Department representatives and upstream users that numerous inquiries were made to the Department expressing concerns about the Application and whether protests were needed to protect their interests. In response, Department representatives, including then Eastern Region Manager and District One Watermaster, Ronald D. Carlson, provided assurance that the proposed hydro power water rights were unquestionably subordinated to all upstream uses

and development and that there was no reason to be concerned or protest the Application. Protests were not filed in reasonable reliance upon these representations.

On June 29, 1977, the Department approved Permit No. 01-7011 for power purposes. Appropriate and necessary conditions including subordination were omitted by the Department for reasons unknown. Proof of beneficial use was originally due June 1, 1982. However, the proof of beneficial use due date was changed several times with the latest approval requiring proof of beneficial use on November 1, 1993. Proof of beneficial use was submitted by the applicant on October 30, 1993, and the permit is waiting for action by the Department.

Upon review of this permit file, IGWA believes that any license issued for the above permit must include a condition that is consistent with Policy 32 of the State Water Plan adopted and approved by the Idaho Water Resources Board and codified at Idaho Code §42-1736B and the Department's recommendations in the SRBA that recognize that there is a "zero flow" at Milner Dam (see recommendations for example for water right numbers 2-200, 2-201, 2-223, 2-224, and General Provision No. 4 for Basin 02).

Any license for this water right must include a condition that subordinates this water right to all existing and future uses, including recharge water rights in order to not violate state law or policy and in order to not undermine efforts to effectively manage the Eastern Snake Plain Aquifer. To do otherwise would deprive interested parties and adversely affected right holders of due process and an opportunity to be heard by reason of the above-described representations of the Department at the time of publication. At a minimum, the Application would need to be re-advertised under these irregular and unusual circumstances.

Thus, IGWA respectfully requests that it be advised of any notices, correspondence, or other actions the Department may take with regards to Permit No. 01-7011. Please direct any correspondence or documents to me at Racine, Olson, Nye, Budge & Bailey, Chartered, P.O. Box 1391, Pocatello, Idaho 83204-1391.

Sincerely,

RANDALL C. BUDGE

RCB:rr

cc: IGWA:
Tim Deeg, President
Lynn Tominaga, Executive Director
Executive Committee
Idaho Water Resource board:
Jerry Rigby, Chairman
Hal Anderson, Secretary

Permit 01-7011 File

Law Offices
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

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Arthur W. Holden
(1877-1967)
Roben B. Holden
(1911-1971)
Terry L. Crapo
(1939-1982)
William S. Holden
(1907-1988)

Of Counsel
Fred J. Hahn

APR 16 2007
DEPARTMENT OF
WATER RESOURCES

April 13, 2007

David R. Tuthill, Jr.
Interim Director
Idaho Department of Water Resources
PO Box 83720
Boise, ID 83720-0098

Re: Permit No. 01-7011 – Twin Falls Canal Co. & Northside Canal Co. Hydropower Permit

Dear Director Tuthill:

This letter requests that we, acting on behalf of Mud Lake Water Users, Independent Water Users, Jefferson Canal Co., Monteview Canal Co., and Producer's Canal Co., be advised of any notices, correspondence or actions taken by the Idaho Department of Water Resources with regards to Permit No. 01-7011, the Hydropower Application for Permit filed by Twin Falls and Northside Canal Companies for hyrdropower generated at Milner Dam.

Enclosed with this letter is a similar letter prepared by Randy Budge on behalf of Idaho Groundwater Appropriators (IGWA). We have reviewed this letter, and concur with its contents. Just like IGWA, we believe this permit is significant, particularly to those water users located upgradient to Milner Dam. Thus, we respectfully request we be advised of any notices, correspondence, or other actions the Department may take with regards to Permit No. 01-7011. All correspondence or documents may be sent to Holden, Kidwell, Hahn & Crapo, PLLC, PO Box 50130, Idaho Falls, ID 83405-0130, with attention directed to either Kent W. Foster or Robert L. Harris. We appreciate your attention to this matter. If you have any questions or concerns regarding our request, please do not hesitate to contact us.

Sincerely,

Robert L. Harris

Robert L. Harris
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

Enclosure

c: Mud Lake Water Users, Inc.
Independent Water Users
Jefferson Irrigation District
Monteview Canal Co.
Producer's Irrigation District

G:\WPDATA\RLH\13985 MLWU, etc., 2006 Objections\David R Tuthill ltr 041307 wpd cdv

Exhibit 22

COPY
2007 SEP 28 PM 1 18
Michelle Emerson
BY
DEPUTY CLERK

John A. Rosholt, ISB #1037
John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
Paul L. Arrington, ISB #7198
BARKER ROSHOLT & SIMPSON LLP
113 Main Avenue West, Suite 303
P.O. Box 485
Twin Falls, Idaho 83303-0485
Telephone: (208) 733-0700
Facsimile: (208) 735-2444

Attorneys for Petitioners North Side Canal Company and Twin Falls Canal Company

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME

NORTH SIDE CANAL COMPANY and TWIN FALLS CANAL COMPANY, Petitioners, vs. DAVID R. TUTHILL, JR., in his official capacity as director of the Idaho Department of Water Resources, and THE IDAHO DEPARTMENT OF WATER RESOURCES, Respondents.	CASE NO. CV 2007-1093 PETITION FOR PEREMPTORY WRIT OF MANDATE Fee Category A: $88.00

COME NOW, the Petitioners, North Side Canal Company and Twin Falls Canal Company (hereinafter collectively referred to as the "Petitioners"), by and through their attorneys of record, Barker Rosholt & Simpson LLP, and hereby petitions the Court to issue a writ of mandate compelling the Idaho Department of Water Resources and its Director, David R. Tuthill, Jr. (collectively referred to as the "Respondents"), to void the Director's order dated

September 5, 2007, to close any protest or comment period, and, without delay, to issue a license to the Petitioners, in accordance with the Respondents' statutory duties under Idaho Code § 42-219.

GENERAL ALLEGATIONS

PARTIES

1. Petitioner, North Side Canal Company ("NSCC"), is a non-profit corporation organized and existing pursuant to the Carey Act (43 USC 641, *et seq.*) and the laws of the state of Idaho, with its principal place of business in Jerome, Idaho. NSCC delivers water to its shareholders in Jerome, Gooding, and Elmore Counties.

2. Petitioner, Twin Falls Canal Company ("TFCC"), is a non-profit corporation organized and existing pursuant to the Carey Act (43 USC §§ 641, *et seq.*) and the laws of the state of Idaho, with its principal place of business in Twin Falls County. TFCC delivers water to its shareholders in Twin Falls County.

3. Respondent, David R. Tuthill, Jr., is the Director of the Idaho Department of Water Resources, and a resident of Ada County.

4. Respondent, Idaho Department of Water Resources ("Department"), is the executive department existing under the laws of the state of Idaho pursuant to Idaho Code § 42-1701, *et seq.*, with its state office located at 322 E. Front St., Boise, Ada County, Idaho.

JURISDICTION & VENUE

5. Jurisdiction is proper in this Court pursuant to Idaho Code §§ 1-705 and 7-301, *et seq.* (Writs of Mandate).

6. This Court, sitting in Jerome County, is the proper venue for this matter pursuant to Idaho Code § 5-402, because the Respondents' failure to issue Petitioners' water right license

in accordance with state law affects the property interests of the Petitioners in their respective counties, including Jerome County.

STATEMENT OF FACTS

7. On March 30, 1977, the Petitioners filed an Application for Permit with the Department to appropriate water from the Snake River for year-round power production purposes, at a rate of up to 12,000 cfs, at the Milner power plant. **Attachment A.** The Respondents published notice of the Petitioners' application on May 19th and 26th, 1977. *Id.* The published notice, as provided by Idaho Code § 42-201, stated that "Protests against the granting of the permit must be filed with the Idaho Department of Water Resources on or before June 6, 1977." *Id.* No protests were filed to the application for permit within the statutory timeframe. The Respondents then issued water right permit no. 01-07011 (the "Milner Permit") to the Petitioners on June 29, 1977. **Attachment B.**

8. The Milner Permit was developed pursuant to an agreement between the Petitioners and Idaho Power Company, dated November 9, 1984. **Attachment C.** While proof of beneficial use was originally due on June 1, 1982, delays in the FERC licensing process postponed the Petitioners' ability to submit proof of beneficial use. Therefore, in accordance with the statutory provisions in Idaho Code § 42-204, the Petitioners sought and received extensions of the deadline for submitting proof of beneficial use in 1982, 1987, 1990, and 1992.

9. Petitioners filed proof of beneficial use for 5,714.7 cfs on October 29, 1993. **Attachments E** (Proof of Beneficial Use) & **F** (Beneficial Use Field Report performed by Certified Water Right Examiner, Charles E. Brockway of Brockway Engineering).

10. In 1987, when the Petitioners sought another extension on their pending deadline for submitting proof of beneficial use, the Department became concerned regarding the impact of

the then-recently executed Swan Falls Agreement, as well as Idaho Code § 42-203B,[1] on this permit. In a letter dated April 13, 1987, the Chief of the Operations Bureau, L. Glen Saxton, notified the Petitioners that the Respondents would grant the extension, so long as the right was "junior and subordinate to all other rights for the use of water." Attachment G.[2] Accordingly, Mr. Saxton recommended the following language:

> The rights for the use of water acquired under this permit shall be junior and subordinate to all other rights for the use of water, other than hydropower, within the state of Idaho that are initiated later in time than the priority of this permit and shall not give rise to any right or claim against any future rights for the use of water, other than hydropower, within the state of Idaho initiated later in time than the priority of this permit.

---

[1] Idaho Code § 42-203B provides, in part:

> (1) The legislature finds and declares that it is in the public interest to specifically implement the state's power to regulate and limit the use of water for power purposes and to define the relationship between the state and the holder of a water right for power purposes to the extent such right exceeds an established minimum flow. The purposes of the trust established by subsections (2) and (3) of this section are to assure an adequate supply of water for all future beneficial uses and to clarify and protect the right of a user of water for power purposes subordinated by a permit issued after July 1, 1985, or by an agreement, to continue using the water pending approval of depletionary future beneficial uses.
>
> (2) A water right for power purposes which is defined by agreement with the state as unsubordinated to the extent of a minimum flow established by state action shall remain unsubordinated as defined by the agreement. Any portion of the water rights for power purposes in excess of the level so established shall be held in trust by the state of Idaho, by and through the governor, for the use and benefit of the user of the water for power purposes, and of the people of the state of Idaho; ...
>
> (3) Water rights for power purposes not defined by agreement with the state shall not be subject to depletion below any applicable minimum stream flow established by state action. Water rights for power purposes in excess of such minimum stream flow shall be held in trust by the state of Idaho, by and through the governor, for the use and benefit of the users of water for power purposes and of the people of the state of Idaho. ***The rights held in trust shall be subject to subordination to and depletion by future consumptive upstream beneficial users whose rights are acquired pursuant to state law***, excluding compliance with the requirements of section 42-203C, Idaho Code.
>
> ...
>
> (6) The director shall have the authority to subordinate the rights granted in a permit or license for power purposes to subsequent upstream beneficial depletionary uses. A subordinated water right for power use does not give rise to any claim against, or right to interfere with, the holder of subsequent upstream rights established pursuant to state law. The director shall also have the authority to limit a permit or license for power purposes to a specific term. Subsection (6) of this section shall not apply to licenses which have already been issued as of the effective date of this act.

(emphasis added).

[2] Attachment G was obtained from the Department's website and is an unsigned copy of the Respondent's April 13, 1987 letter. An executed copy, with interjected comments, is attached to the May 8, 1987 letter from the Petitioners' counsel, attached hereto as Attachment H. This copy was also obtained from the Department's website.

Id.

11. Counsel for the Petitioners responded in a letter dated May 8, 1987, and addressed concerns with the recommended language:

> At the time of the issuance of the Hells Canyon license, the subordination was to irrigation of lands and other beneficial consumptive uses in the Snake River Water Shed. In your proposed language, non-consumptive uses such as groundwater recharge could take the total flows of the upper Snake available to the Milner Power Plant and put them underground eliminating any generation at the project. The language would also facilitate a non-consumptive diversion of water above the project for fish propagation or some other non-consumptive purpose with a return of the water below the project. Finally, the language would facilitate a diversion of surplus flows of the Snake River to the Bear River Basin for any purpose.

Attachment H. Included with the May 8, 1987 letter, was a copy of the Respondents' April 13, 1987 letter, with proposed changes to the above-cited recommended language. *Id.*

12. In a letter dated November 18, 1987, the Respondents notified the Petitioners that they "will use the amended language which you suggested in your [May 8, 1987] letter for the subordination condition to be placed as a condition of approval on the extension request." **Attachment I.** The following language was included in the permit at that time (underlined portions constitute the changes from the original language recommended by the Respondents):

> The rights for use of water acquired under this permit shall be junior and subordinate to all other rights for the consumptive beneficial use of water, ***other than hydropower and groundwater recharge*** within the Snake River Basin of the State of Idaho that are initiated later-in-time than the priority of this permit and shall not give rise to any right or claim against ~~any~~ future rights for the consumptive beneficial use of water, ***other than hydropower and groundwater recharge*** within the Snake River Basin of the State of Idaho initiated late-in-time than the priority of this permit.

Id. (emphasis added). This exact language remains a condition on the Milner Permit.

13. On October 29, 1993, the Petitioners submitted proof of beneficial use through an exam by Dr. Charles E. Brockway, a Certified Water Right Examiner. **Attachment F.**

Dr. Brockway reviewed the Petitioners' diversion and water use, and submitted proof of beneficial use for 5,714.7 cfs to the Department. *Id.*

14. The Respondents received Dr. Brockway's beneficial use examination report on November 1, 1993. *Id.* The Respondents acknowledged receipt in a letter dated December 9, 1993. **Attachment J** ("The department acknowledges receipt of the proof of beneficial use form submitted for this permit"). At that time, the Petitioners understood that their right and opportunity to demonstrate beneficial use on the remaining 6,285.3 cfs (12,000 cfs as originally applied for, less the 5,714.7 cfs proven in the beneficial use report) had been foreclosed. Since that time, the Petitioners have been diverting and beneficially using water in accordance with the Milner Permit and the beneficial use examination. On July 27, 2006, then Director Karl J. Dreher indicated in a letter that "the issuance of a license for the water right is pending." **Attachment K.** The Respondents have failed to issue a license as required by Idaho law.

15. In 2006, the Idaho House of Representative attempted to pass House Bill 800 ("HB 800"), to remove language from Idaho Code §§ 42-234 and 42-4201A, which subordinates groundwater recharge to "all prior perfected water rights, including those water rights for power purposes" that were subordinated to future development on the Snake River as a result of the Swan Falls Agreement. **Attachment L.** The Legislature's intent was to subordinate water rights held by Idaho Power Company, and any other rights used for power purposes, including the Petitioners' Milner Permit, to junior priority water rights for groundwater recharge. The bill failed. *Id.*

16. Following the failure of HB 800, a stipulation was entered into between the State and Idaho Power regarding subordination of Idaho Power's water rights relative to two recharge

permits that had previously been assigned to the Idaho Water Resource Board ("Water Board"). **Attachment M.**

A. Permit 37-7842 authorizes a diversion of 800 cfs for ground water recharge and has a priority date of August 25, 1980. **Attachment N.**

B. Permit 01-7054 authorizes a diversion of 1200 cfs for groundwater recharge and has a priority date of August 25, 1980. (These permits are hereinafter, collectively, referred to as the "Recharge Permits"). *Id.*

17. On July 29, 1992, the Lower Snake River Recharge District, the prior owner of the permits, filed proof of beneficial use on the Recharge Permits for a total of 300 cfs. **Attachment N.** The Respondents' subsequent Beneficial Use Field Report, filed on November 29, 1993, confirmed the 300 cfs diversion rate. *Id.*

18. Shortly thereafter, the Attorney General's office contacted counsel for the Petitioners regarding the priority interface between the Water Board's Recharge Permits and the Milner Permit. Since the Recharge Permits are junior in priority to the Milner Permit, the Attorney General's office requested the Petitioners' permission to subordinate the Milner Permit to allow out-of-priority groundwater recharge diversions from the Snake River above Milner. However, given the concerns raised in 1987 by counsel for the Petitioners, along with the questionable viability of the hydropower project in the absence of the water, such subordination was not possible. The development of the project, and the financing obtained for the project, was based upon generation estimates associated with river flows that would be available under the Milner permit as conditioned by the Respondents in 1987, and as "proved up" by the Petitioners in 1993. Moreover, the Federal Energy Regulatory Commission (FERC) issued a license for the Milner hydropower project in 1988 on that basis as well. **Attachment O.**

Although Respondents agreed to the existing subordination condition for the water right permit in November 1987, they subsequently requested FERC to include a different subordination condition on the hydropower license. FERC rejected Respondents' request and held that "inclusion in the license of the unsupported open-ended water subordination clause requested by IDWR would in essence vest in IDWR, rather than the Commission, ultimate control over the operation and continued viability of the project. In other words, the subordination clause, which would reserve to IDWR the right to permit unlimited diversion upstream of the project, could nullify the balance struck by us under the comprehensive planning provisions of Section 10(a)(1) of the FPA in issuing in the license." *Id.* 45 FERC at 62,315.

19. Respondents responded by threatening to impose additional conditions on the Milner Permit, pursuant to Idaho Code § 42-203B, thereby subordinating the Milner Permit to the Water Board's junior priority Recharge Permits, or simply taking the water that would otherwise be available for use under the Milner Permit.

20. In April, 2006, the Water Board's Recharge Permits were placed in the state water supply bank for use at diversion points on the Snake River above Milner Dam. **Attachment N.** Notwithstanding the fact that beneficial use had only been proven for 300 cfs, Respondents approved the placement of a total of 1,700 cfs (800 cfs for permit 37-7842 and 900 cfs for permit 1-7054) into the water bank. *Id.*[3] The Recharge Permits were then apparently leased out of the water bank by the Water Board in the spring of 2006. To the best of Petitioners' knowledge, no Department investigation or order determined whether or not such use would cause injury to other existing water rights, including the Milner Permit. During this time period early season storage and subsequent flood control releases resulted in additional storage in the reservoir

[3] Petitioners are aware of no basis, both as a matter of fact and law, how the Water Board was able to place 1700 cfs into the water bank, where the proof of beneficial use was only filed on a combined total of 300 cfs. (Attachment N). Further, it is not apparent under what authority a permit can be placed in the State Water Bank.

system above Milner Dam. In addition, during this time, the Director or his employees ordered the out-of-priority diversion of natural flow under the Water Board's Recharge Permits – to the detriment of reservoir storage fill and lawful diversion and use pursuant to the Milner Permit. Attachment K. No notice of this event was provided to the Petitioners, the permit holders who were injured by the Respondents' actions.

21. At a July 12, 2006 meeting of the Legislature's Natural Resources Interim Committee, the Water Board provided an update on their recharge efforts above Milner Dam. At that meeting, Senator Chuck Coiner sought an accounting of any deprivation caused to the senior priority Milner Permit as a result of these recharge activities pursuant to the Water Board's junior priority Recharge Permits.

22. The Respondents' answer to Senator Coiner's request (Attachment K) indicates an intent on behalf of the Respondents to apply different conditions on the Milner Permit than those under which the Petitioners had been operating since 1993, different than those conditions which had been agreed to in 1987 and subsequently included on the permit. In particular, Attachment K evidences intent on behalf of the Respondents to unilaterally subordinate the Petitioners' Milner Permit to the Water Board's junior priority Recharge Permits. *Id.*

23. The Respondents *admitted that there was a reduction in flows to fill the Milner permit* while water was being diverted above Milner Dam pursuant to the Water Board's junior priority Recharge Permits. *Id.* However, the Respondents attempted to justify this reduction and attribute it to other conditions:

> Water was diverted through the Milner Power Plant under permit no. 01-07011 in calendar year 2006 through May 16. Although preliminary flow records from Idaho Power Company indicate that there was sufficient water available to divert 5,714.7 cfs through the Milner Power Plant and provide a bypass flow of 200 cfs from April 12 through May 12, 2006, preliminary records of diversions through the power plant from the U.S. Bureau of Reclamation

indicate that approximately 350+/- cfs less than 5,714.7 cfs was diverted for power generation.

On May 16, 2006, the U.S. Bureau of Reclamation determined that it was no longer necessary to allow spills past Milner Dam because water from the Snake River could be fully utilized above Milner Dam for the purposes of: (1) supplying all water rights to natural flow above Milner Dam for consumptive demands; (2) continuing to fill reservoir storage space that had not yet filled (e.g., Henry's Lake and Ririe Reservoir); and (3) refill reservoir storage space that had fill but been subsequently evacuated due to flood control releases (e.g., Jackson Lake and Palisades Reservoir). Because permit no. 01-07011 is subordinated to these upstream consumptive uses pursuant to the subordination condition cited on the previous page, the water right for the Milner Power Plant was curtailed until June 27, 2006, when storage releases for uses below Milner Dam began.

During March and April of 2006, canal companies along the Snake River began to divert natural flow pursuant to their various water rights for irrigation. Once those systems were charged for irrigation deliveries, then diversions for recharge were allowed under permit no. 01-07054 at the heading of the North Side Canal and other points of diversion for canals added through the water Board's lease of the water right permit through the water bank. Diversions for recharge through a canal under permit no. 01-07054 were only allowed to the extent there were no deliveries of water for irrigation along the canal. Based on our analysis of preliminary diversion records, no water was diverted for recharge under permit no. 01-07054 until there was at least 5,714.7 cfs available for diversion through the Milner Power Plant pursuant to permit no. 01-07011. Diversions for recharge at Jensen Grove did not begin until April 18, 2006, when there was a combined flow at the Milner Power Plant of 12,700 cfs, based on the preliminary flow records of Idaho Power.

When diversions for power production under permit no. 01-07011 were curtailed on May 16, 2006, pursuant to the previously described subordination condition, diversions for recharge under permit no. 01-07054 were allowed to continue because that permit is not subordinated to any upstream consumptive beneficial uses. Had diversions of water for recharge not occurred after May 16, no additional water would have been available for diversion through the Milner Power Plant because of the subordination provision. Had diversions of water for recharge not occurred after May 16, some additional water would have accrued to storage space that had filled but subsequently evacuated for flood control and filled again. However, permit no. 01-07054 is not subordinated to that second fill of storage.

Attachment K at 3-4. Further, without any factual or technical verification, the Respondents indicated that any above-Milner diversions made pursuant to the Recharge Permits had no

impact on the water supply at the Milner Power Project. *Id.* at 4 (indicating that "Had diversions of water for recharge not occurred after May 16, no additional water would have been available for diversion through the Milner Power Plant").

24. The Director concluded by determining that "Based on the analysis described above, there is presently no information indicating that the diversions to recharge were not in accordance with the water right permit held by the Water Resource Board and the water and the water right permit for power production held by" the Petitioners. *Id.*

25. Recognizing that they had been diverting and beneficially using water pursuant to the Milner Permit and the beneficial use examination, since 1993, and that all that remained was for the Respondents to issue a license, the Petitioners verbally requested that the Respondents complete the final ministerial step of issuing a license in 2006 and again in the spring of 2007. The Respondents did not issue the license. Rather several months later, in response to the Petitioner's request, the Respondents issued a *Notice of Intent to Issue License*, on September 5, 2007. Attachment P. In that *Notice*, the Respondents indicate that "Proof of beneficial use having been submitted under the permit, ***the Department is prepared to issue a license*** for the water right pursuant to Idaho Code § 42-219. Counsel for the Permit Holders has orally requested that the Department issue a license for the water right." *Id.* at 1 (emphasis added).

26. In the *Notice*, the Respondents cited to three communications, which were never served on the Petitioners, each requesting the opportunity to participate and protest the Milner Permit, should the Respondents decide to issue a license consistent with the Milner Permit and the beneficial use examination. In particular, the entities objected to the 1987 subordination language in the Milner Permit. These communications are as follows:

A. January 9, 2007, letter from Bingham Groundwater District indicating that the Milner Permit should be licensed "only if fully subordinated. We also request that we be included as a protestant if there is any action taken by the Idaho Department of Water Resources on this right other than full subordination." **Attachment Q.**

B. February 5, 2007, letter from Randall C. Budge, representing the Idaho Ground Water Appropriators ("IGWA"), asserting IGWA's intent to protest the water right unless it is fully subordinated to all uses, including groundwater recharge. **Attachment R.**

C. April 13, 2007, letter from Robert L. Harris, representation various water delivery entities, concurring with the content of the February 5, 2007, IGWA letter. **Attachment S.**

27. The Petitioners, as the permit holder in this matter, were specifically and intentionally left off of any service list for these letters. As a result, Petitioners only became aware of these letters approximately eight months later, when the Director referenced them in its September 5, 2007 *Notice*.

28. In response to these letters, the Respondents decided to reopen a new protest or comment period on the Milner Permit and begin an unprecedented process not provided for by statute or administrative rule, specifically as it relates to the 1987 subordination language:

> NOW THEREFORE NOTICE IS HEREBY GIVEN that the Department will accept and consider written Comments from the Permit Holders and other interested persons or entities ***addressing the form of the subordination condition that should be included on the license*** for Water Right No. 01-7011. Any Comments submitted should be addressed to [the] Director ... and [be] received by the Department or post marked on or before October 10, 2007.

Attachment P at 2 (emphasis added). In other words, after failing to take any action on the Milner Permit for over twelve years, the Respondents were now prepared to "accept and

consider" comments from any "interested persons or entities," thus forcing the Petitioners to re-justify and re-defend the Milner Permit, even though the permit conditions were complied with, proof of beneficial use was submitted in 1993, and the statutory protest period had expired decades earlier.

29. Chapter 2, Title 42, Idaho Code, along with the Department's Water Appropriation Rules, IDAPA 37.03.08 (**Attachment T**), provide the procedures for acquiring a new water right permit and license, as well as any applicable protest periods. *See* I.C. § 42-205(1) ("No permit shall be issued ... for power purposes ... except in accordance with the provisions of this act").

30. Once an applicant has complied with the provisions of chapter 2, Title 42, Idaho Code, the Department ***must*** issue a license to the applicant:

> (1) Upon receipt by the department of water resources of all the evidence in relation to such final proof [of beneficial use], ***it shall be the duty of the department to carefully examine the same, and if the department is satisfied that the law has been fully complied with and that the water is being used at the place claimed and for the purpose for which it was originally intended, the department shall issue to such user or users a license confirming such use***.

I.C. § 42-219 (emphasis added). According to the Beneficial Use Examination Rules, promulgated by the Respondents, a license is "issued by the director ... confirming the extent of diversion and beneficial use of the water that has been made ***in conformance with the permit conditions***." IDAPA 37.03.02.010.15 (emphasis added).

31. Chapter 2, Title 42, Idaho Code requires the filing of an application. I.C. § 42-202 (setting forth the contents of the application). Next, the Department will review the application and, if approved, will issue a permit to the applicant, at which time, the applicant will be given five years to complete the diversion works and put the water to a beneficial use. I.C. §

42-204. By the end of the five years, the applicant must provide the Department with proof that water has been applied to a beneficial use as well as the extent of that beneficial use. *Id.*; I.C. § 42-217. However, as happened in this case, an applicant may request an extension of the five year deadline under certain conditions. I.C. § 42-204. Before the end of the five year period, or the extended period if applicable, the applicant must provide proof of beneficial use to the Respondents to verify the point of diversion, the capacity of the diversion works, and the quantity of water actually diverted and put to beneficial use. I.C. § 42-217. This analysis may be performed by an employee of the Department, or, as happened in this case, by a Certified Water Right Examiner. I.C. § 42-217a. After the applicant has complied with all legal requirements, it becomes the Respondents' ministerial duty to issue a license. *See* I.C. § 42-219.

32. The applicant and other interested parties may protest an application for permit. I.C. § 42-203A(4); Appropriation Rule 40.03. However, such protests "will only be considered if received by the department after receipt of the application by the department and prior to the expiration of the protest period announced in the advertisement." I.C. § 42-203A(4); Appropriation Rule 40.03.a.ii. The Department will not accept late or general statements of protest (i.e. blanket protests) against appropriations. Rule 40.03.a.iii.

33. According to the letters sent by IGWA (February 5, 2007) and Mr. Harris (April 13, 2007), both IGWA and Mr. Harris' clients were aware of the Milner Permit application in 1977, when statutory notice of the application was originally published. However, they failed to either protest the application or move to intervene in the administrative action within the statutory prescribed deadline. (**Attachments R & S**) (While Mr. Harris' letter does not specifically state that his clients were aware of the Milner permit proceedings, he does state that he has read the IGWA letter and "concur[s] with its contents").

34. Since 1993, when the Respondents received the Petitioners' proof of beneficial use, the Petitioners have diverted and beneficially used water, in accordance with the Milner Permit and the beneficial use examination performed by Dr. Brockway. In the fourteen years since 1993 the Respondents have never notified Petitioners that their diversion or use of water failed, in any way, to comply with the law.

35. By complying with the statutory provisions and proving up beneficial use in 1993, the Petitioners' Milner Permit represents a valid, enforceable and vested water right under Idaho law. The Respondents' attempt to modify or add conditions that would now restrict the use of the water right at this point in time constitutes an unconstitutional and prohibited taking of Petitioners' property without just compensation.

COUNT ONE (WRIT OF MANDATE)

36. Petitioners repeat and re-allege the allegations set forth in paragraphs 1-35 of their *Petition for Peremptory Writ of Mandate*.

37. As a direct and proximate result of Respondents' failure and refusal to issue a license for the Milner Permit pursuant to Idaho Code § 42-219, Petitioners have and will continue to suffer irreparable damage, in that the Respondents have subordinated Petitioners' Milner Permit to junior priority groundwater recharge permits upstream of Milner Dam, contrary to the express terms of the Milner Permit. Moreover, the Respondents have indicated that they intend to force the subordination of the Milner Permit by altering or amending the express language of the Milner Permit – even though that language was negotiated and agreed to between Respondents and counsel for Petitioners almost twenty years ago. As a direct and proximate result of the refusal of Respondents to fulfill their statutory duties and responsibilities pursuant to Idaho Code § 42-219, Petitioners have been irreparably damaged, and will have no

plain, adequate or speedy remedy at law. Respondents' failure to respond and fulfill its statutory duties is clearly erroneous as a matter of law.

38. As a direct and proximate result of Respondents' September 5, 2007 *Notice of Intent to Issue License* order, which provides that the Respondents will allow and consider further protests or comments from third parties, even though the Petitioners have diverted and applied water to beneficial use pursuant to the Milner Permit and beneficial use examination since 1993, and even though the law does not allow for such additional protests or comments at this ministerial stage in the licensing process, Petitioners will continue to suffer irreparable damage, in that they will be forced to re-justify and re-defend their application for permit, even though the statutory protest period expired over 25-years ago. As a direct and proximate result of Respondents' decision to allow and consider further protests or comments from third parties, Petitioners will be irreparably damaged, and will have no plain, adequate or speedy remedy at law.

39. Respondents' failure and continued refusal to perform their statutory duties of issuing a license to Petitioners, and their decision to now accept and consider further protests or comments, has deprived Petitioners of the certainty necessary to protect their interests in the Milner Permit. Respondents' failure to act in a timely manner in issuing a license for the Milner Permit does not justify the unlawful process they are undertaking, reopening a protest period that has long been expired.

40. Petitioners are being unlawfully precluded from using and enjoying their property to the full extent based on Respondents' attempts to force the subordination of the Milner Permit, contrary to the express conditions of the Milner Permit. In light of Respondents' subordination

attempts, Petitioners do not have a plain, speedy or adequate remedy in the ordinary course of law.

41. Petitioners are entitled to issuance of a Writ of Mandate pursuant to Idaho Code § 7-302 in order to compel Respondents to perform their duties under Idaho Code § 42-219 to issue a license to Petitioners and to prohibit the unlawful actions Respondents are taking as provided by the September 5, 2007 *Notice of Intent to Issue License* order.

TAKINGS CLAIM

42. Petitioners repeat and re-allege the allegations set forth in paragraphs 1-41 of their *Petition for Peremptory Writ of Mandate.*

43. Respondents' actions and refusal to issue a license to Petitioners in conformance with the permit, and decision to accept protests or comments and subordinate the Milner Permit to junior priority rights for groundwater recharge diminishes and deprives Petitioners of the priority and the water supply of their water right, and are therefore void as an unconstitutional taking of Petitioners' water right.

44. In the event that Respondents actions are confirmed, Petitioners are entitled to just compensation pursuant to the constitutions of the State of Idaho and United States.

REQUEST FOR ATTORNEYS FEES

45. As a further direct and proximate result of the Respondents' refusal to issue a license, and the Respondents' decision to accept and consider new protests-comments on the Milner Permit, Petitioners have been required to employ the services of the law firm Barker Rosholt & Simpson LLP, and have also incurred various costs and will continue to incur various court cots and attorney fees. Therefore, under Idaho law, including but not limited to, Idaho

Code §§ 12-117 and 12-121, the Respondents should be required to pay to Petitioners their reasonable costs and attorney fees.

PRAYER FOR RELIEF

WHEREFORE, North Side Canal Company and Twin Falls Canal Company pray for the issuance of a Writ of Mandamus and/or order of the Court directed to the Respondents ordering as follows:

1. For a Peremptory Writ of Mandamus and/or order compelling Respondents to close all protest or comment periods pertaining to the Milner Permit, and, without delay, to issue a license to Petitioners as required by Idaho Code § 42-219;

2. For an order compelling Respondents to appear and show cause before the Court why the Respondents issued the September 5, 2007 *Notice*, why Respondents reopened a new protest or comment period applicable to the Milner Permit, why Respondents have not issued a license for the Milner Permit 14 years after proof of beneficial use was filed, and why the Court should not enter its Writ of Mandamus, ordering Respondents to carry out their statutory duties by issuing a license for the Milner Permit.

3. For an order declaring Respondents' actions are unconstitutional, contrary to law, and violate the Petitioners' water right and constitutional rights.

4. In the event the Respondents' action are affirmed, Petitioners are entitled to just compensation in an amount to be determined at trial.

3. For an order awarding Petitioners their damages incurred as result of present and past actions of the Respondents and reasonable costs and attorney fees; and

4. For such other and further relief as the Court deems just and equitable.

DATED THIS 28th day of September, 2007.

BARKER ROSHOLT & SIMPSON LLP

John A. Rosholt
John K. Simpson
Travis L. Thompson
Paul L. Arrington

Attorneys for Petitioners North Side Canal Company and Twin Falls Canal Company

VERIFICATION

STATE OF IDAHO)
) ss.
County of Jerome)

Ted Diehl, Manager of North Side Canal Company, being first duly sworn on his oath, deposes and states:

That he is the Manager of North Side Canal Company, petitioner in the above-entitled matter, that he has read the above and foregoing *Verified Complaint and Petition for Writ of Mandate*, knows the contents thereof, and the facts stated he believes to be true.

TERRY WALTERS NOTARY PUBLIC STATE OF IDAHO

Ted Diehl, Manager
North Side Canal Company

SUBSCRIBED & SWORN to before me this 27 day of September, 2007.

Notary Public for Idaho
Residing at: Jerome, Idaho
My Commission Expires: 2-20-2013

STATE OF IDAHO)
) ss.
County of Twin Falls)

Vince Alberdi, Manager of Twin Falls Canal Company, being first duly sworn on his oath, deposes and states:

That he is the Manager of Twin Falls Canal Company, petitioner in the above-entitled matter, that he has read the above and foregoing *Verified Complaint and Petition for Writ of Mandate*, knows the contents thereof, and the facts stated he believes to be true.

Vince Alberdi, Manager
Twin Falls Canal Company

SUBSCRIBED & SWORN to before me this 28 day of September, 2007.

JESSICA FORBIS NOTARY PUBLIC STATE OF IDAHO

Notary Public for Idaho
Residing at: Twin Falls
My Commission Expires: 4/3/12

Exhibit 23

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF LICENSING WATER RIGHT PERMIT NO. 01-7011 IN THE NAME OF TWIN FALLS CANAL COMPANY AND NORTH SIDE CANAL COMPANY	)	**FINAL ORDER**

On September 5, 2007, the Director of the Idaho Department of Water Resources ("Director" or "Department") issued a *Notice of Intent to Issue License* ("Notice") for water right permit no. 01-7011. Based upon the files of the Department in this matter and the Director's understanding of applicable law, the Director finds, determines and orders as follows:

FINDINGS OF FACT

I. Procedural Background

1. The North Side Canal Company and the Twin Falls Canal Company ("Canal Companies") filed with the Department on March 30, 1977, application for permit no. 01-7011 to appropriate 12,000 cfs of the public waters of the state of Idaho from the Snake River to be diverted at Milner Dam and conveyed to a power plant adjacent to the Snake River downstream from Milner Dam, to be used for hydropower generation purposes.

2. The Department published notice of application for permit no. 01-7011 on May 19 and 26, 1977, in accordance with the requirements of chapter 2, title 42, Idaho Code, and no timely protests to the application were filed in response to the published notice.

3. The Department issued water right permit no. 01-7011 (the "Milner Permit") to the Canal Companies on June 29, 1977, authorizing the diversion at Milner Dam of up to 12,000 cfs of water from the Snake River for hydropower purposes. The permit required that proof of beneficial use was to be submitted by June 1, 1982. The permit contained a condition requiring installation of a measuring device but did not contain a subordination condition.

4. On September 14, 1977, the Canal Companies filed an application for amendment of the Milner Permit to "include additional alternate points of beneficial use for power purposes." The Department approved the requested application for amendment of the permit on September 28, 1977.

5. On March 31, 1982, the Department approved an application for extension of time that extended the due date for proof of beneficial use to June 1, 1987.

6. On February 26, 1987, the Canal Companies filed a second request for extension of time. On approximately November 18, 1987, the Department approved the second extension of time request, extending the due date for proof of beneficial use to November 1, 1990. The extension of time approval states that it is approved with the following condition added to the permit:

> The rights for use of water acquired under this permit shall be junior and subordinate to all other rights for the consumptive beneficial use of water, other than hydropower and groundwater recharge within the Snake River Basin of the state of Idaho that are initiated later-in-time than the priority of this permit and shall not give rise to any right or claim against any future rights for the consumptive beneficial use of water, other than hydropower and groundwater recharge within the Snake River Basin of the state of Idaho initiated later-in-time than the priority of this permit.

IDWR approval of *Request for Extension of Time* filed February 26, 1987. *See* Letter from former IDWR Director R. Keith Higginson to John Rosholt dated November 18, 1987.

7. On October 30, 1990, the Department approved a third application for extension of time that extended the due date for proof of beneficial use to May 1, 1992. The application for extension stated that the Federal Energy Regulatory Commission ("FERC") issued the Canal Companies and the Idaho Power Company a license for Milner Project No. 2899 on December 15, 1988 (45 FERC ¶ 61,423). The FERC found that the issuance of a license for the project is consistent with the zero minimum flow below the Milner Project required by the Idaho State Water Plan, "since the license would not require that minimum flows be provided below Milner." *Id.* at 28.

8. On April 28, 1992, the Department approved a fourth application for extension of time that extended the proof of beneficial due date to November 1, 1993.

9. The Canal Companies submitted proof of beneficial use for the Milner Permit on November 1, 1993, pursuant to Idaho Code § 42-217. The field examination report completed by Charles E. Brockway, P.E. on October 29, 1993, recommended that the water right be licensed for a total diversion rate of 5,714.7 cfs at Milner Dam for hydropower use at the power plant located below Milner Dam.

10. Proof of beneficial use having been submitted under the permit, the Department is prepared to issue a license for the water right pursuant to Idaho Code § 42-219. Counsel for the Canal Companies has orally requested that the Department issue a license for the water right.

11. The Department received written requests for notice for an opportunity to be heard on the form of the subordination condition to be included on the license for water right no. 01-7011 from the Bingham Ground Water District on January 11, 2007; from the Idaho Ground

Water Appropriators, Inc. on February 7, 2007, for and on behalf of its ground water districts and other members, represented by the law firm of Racine Olson Nye Budge & Bailey, Chartered; and from the Mud Lake Water Users, Independent Water Users, Jefferson Canal Co., Monteview Canal Co., and Producer's Canal Co., on April 16, 2007, represented by the law firm of Holden, Kidwell, Hahn & Crapo, P.L.L.C.

12. Following the request from the Canal Companies that a license be issued, the Department issued a *Notice of Intent to Issue License*, dated September 5, 2007, in which it stated that it was prepared to issue a license for the water right, pursuant to Idaho Code § 42-219. In the *Notice*, the Department advised the Permit Holders that it would accept and consider written comments from interested parties "addressing the form of the subordination condition that should be included on the license." Such comments were to be postmarked no later than October 10, 2007.[1]

13. In response to the *Notice of Intent to Issue License*, the Department received written Comments from 39 water distribution entities addressing the form of the subordination condition that should be included on the license for water right no. 01-7011.

14. On September 28, 2007, the Canal Companies filed a *Petition for Peremptory Writ of Mandate* ("Petition") in district court, requesting an order prohibiting the Director from considering comments submitted pursuant to the *Notice* and compelling the Director to issue a license in conformance with the permit. The Department responded by filing a motion to dismiss which was granted on January 25, 2008.[2] The dismissal order of the district court was not appealed.

15. In their *Petition*, the Canal Companies alleged that based upon their compliance with the terms of the permit and the submission of proof of beneficial use in 1993, the permit represented a valid, enforceable and vested water right under Idaho Law. *Petition* at 15. The Canal Companies further alleged that the Department's "attempt to modify or add conditions that would now restrict the use of the water right at this point in time constitutes an unconstitutional and prohibited taking of [Canal Companies'] property without just compensation." *Id.*

16. The district court rejected the Canal Companies' argument that the issuance of the license by the Department following submission of proof of beneficial use is simply a ministerial act. *Writ Dismissal Order* at 10. The district court ruled:

> Simply because there is a prior agreement in place with respect to the form of the subordination remark does not make the duty to issue the license ministerial. If a determination is made contrary to the terms of the agreement then the issue of the effect and enforceability of the agreement can still be raised with the Director and through judicial review if necessary.

Id.

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[1] See Conclusion of Law 2, infra.

[2] North Side Canal Co., et al v. Tuthill, (5th Jud. Dist., Gooding Co. Case No. CV 2007-1093) (*Order Granting Motion to Dismiss Petition for Writ of Mandate* Jan. 25, 2008) (hereinafter "Writ Dismissal Order").

17. Canal Companies thereafter submitted to the Department a copy of their *Petition*, including the accompanying exhibits, as their comments for consideration by the Director in this matter. Letter to Director David R. Tuthill, Jr. from John K. Simpson (Jan. 31, 2008).

18. Canal Companies seek to have water right no. 01-7011 licensed with the same subordination condition as that in the Milner Permit, which subordinates water right 01-7011 "to all other rights for the consumptive beneficial use of water, other than hydropower and groundwater recharge within the Snake River Basin of the state of Idaho."[3]

19. If the Director were to issue the license for water right no. 01-7011 with the subordination condition sought by the Canal Companies, the right holder would be entitled to seek administration, including curtailment, of junior-priority recharge water rights diverting above Milner Dam.

20. In most years, requiring that a flow of 5,714 c.f.s. be available at Milner Dam before junior-priority recharge water rights located above Milner Dam would be allowed to divert would foreclose most recharge diversions upstream from Milner Dam for purposes of recharging the Snake River Plain aquifer.

II. The 1928 Constitutional Amendment

21. The constitutional debates over section 3 of article XV of the Idaho Constitution reflect that the delegates recognized that if hydropower uses of the state's water were not limited, hydropower potentially could preclude agricultural development.[4]

22. Renewed concerns involving the use of water for hydropower purposes in the 1920s led to an amendment of section 3, article XV of the Idaho Constitution adopted in 1928, which provides that "the state may regulate and limit the use [of water] for power purposes." Idaho Const. Art. XV, § 3 (including "Compiler's notes" for the 1928 amendment).

23. In 1985, in response to the Swan Falls controversy, the Idaho Legislature authorized the Director to subordinate a water right license for hydropower purposes to "subsequent upstream beneficial depletionary uses." Idaho Code § 42-203B(6).

III. The State Water Plan

24. Section 7 of Article XV of the Idaho Constitution was ratified in 1964 and amended in 1984, and provides for a "State Water Resource Agency" empowered to "formulate and implement a state water plan for optimum development of water resources in the public interest."

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[3] Water right permit no. 01-7011.

[4] II PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF IDAHO 1889, 1125-26 (I.W. Hart ed., 1912).

> There shall be constituted a Water Resource Agency, composed as the Legislature may now or hereafter prescribe . . . . [T]he State Water Resource Agency shall have power to formulate and implement a state water plan for optimum development of water resources in the public interest. The Legislature of the State of Idaho shall have the authority to amend or reject the state water plan in a manner provided by law.

Idaho Const. Art. XV, § 7.

25. In 1965 the Idaho Legislature thus established the Idaho Water Resource Board: "Pursuant to the provisions of article 15, section 7, of the constitution of the state of Idaho, there is hereby established as the constitutional water agency within the department of water resources the Idaho water resource board . . . ." Idaho Code § 42-1732. The Legislature has authorized the Idaho Water Resource Board to formulate "a comprehensive state water plan," subject to legislative approval:

> The board shall, subject to legislative approval, progressively formulate, adopt and implement a comprehensive state water plan for conservation, development, management and optimum use of all unappropriated water resources and waterways of this state in the public interest. . . . The comprehensive state water plan shall be based upon studies and public hearings in affected areas at which all interested parties shall be given the opportunity to appear, or to present written testimony in response to published proposals for such policy programs and proposed designations.

Idaho Code § 42-1734A(1).

26. The "comprehensive state water plan" contemplated by the Idaho Constitution and Idaho Code § 42-1734A(1) is entitled the "Idaho State Water Plan," and was first adopted and published in 1976. In the 1976 Idaho State Water Plan, the Idaho Water Resource Board established, "after considering all current and potential uses of water on the main stem Snake River," an average daily protected flow of "0 cfs" at the U.S.G.S. Milner gaging station below Milner Dam. 1976 Idaho State Water Plan at 116 (Policy 32).[5]

27. In 1978, the Idaho Legislature enacted Idaho Code § 42-1736B, which provides, in part: "All future filings, permits and decrees on the unappropriated waters of this state shall be determined with respect to the effect such filings, permits and decrees will have on the minimum daily flow of the affected stream or river . . . ." Idaho Code § 42-1736B~~(1)~~.

28. The 1982 revision of the Idaho State Water Plan reaffirmed the "0 cfs" minimum flow at Milner Dam. 1982 Idaho State Water Plan at 42 (Policy 32). The 1982 Idaho State Water Plan also provided that: "Applications for future water permits shall not be approved if

[5] *See Idaho Power Co. v. State*, 104 Idaho 570, 574, 661 P.2d 736, 740 (1983) ("The state water plan was adopted by the Water Resource Board December 29, 1976, and was effective as the date of its adoption, without any legislative action.").

they are in conflict with the State Water Plan adopted by the Idaho Water Resource Board in the public interest." *Id.* at 21 (Policy 1).

29. In 1985, the Idaho Water Resource Board adopted amendments to the Idaho State Water Plan that were intended to implement the Swan Falls Agreement. The amendments provided, in part: "It is the policy of Idaho that the ground water and surface water of the [Snake River] basin be managed to meet or exceed a minimum average daily flow of zero measured at the Milner gaging station." "A Resolution" at 1, *In the Matter of Policy 32 of the State Water Plan* (Idaho Water Resource Board, Mar. 1, 1985). The 1985 amendments also provided: "The zero flow established at Milner means that river flows downstream from that point to Swan Falls Dam may consist almost entirely of ground-water discharge during portions of low-water years. The Snake River Plain aquifer which provides this water must therefore be managed as an integral part of the river system." *Id.* at 2. The Idaho Legislature ratified these amendments in 1985. 1985 Idaho Sess. Laws 514.[6]

30. The 1986 revision of the Idaho State Water Plan included the 1985 amendments substantially unchanged, although the policies were re-numbered. 1986 Idaho State Water Plan at 35 (Policy 5A). The 1986 revision of the Idaho State Water Plan also provided:

> It is the policy of Idaho that approval of applications to appropriate the waters of the state shall be subject to the requirement that the use is in the public interest as set forth in the State Water Plan and by state law. Having been adopted as being in the public interest, the State Water Plan shall be considered when establishing the public interest for water allocations.

Id. at 20 (Policy 1B). The Idaho Legislature approved the 1986 Idaho State Water Plan. Sen. Con. Res. No. 108, 1987 Idaho Sess. Laws 818-19.

31. In 1988, the Idaho Legislature enacted Idaho Code § 42-1734B, which provides, in part, that all state agencies "shall exercise their duties in a manner consistent with the comprehensive state water plan. These duties include but are not limited to the issuance of . . . licenses . . . ." Idaho Code § 42-1734B(4).

32. The 1992 revision of the Idaho State Water Plan provided: "*The state recognizes that the exercise of water rights above Milner Dam has and may reduce the flow at the dam to zero.*" 1992 Idaho State Water Plan at 28 (Policy 5A) (emphasis in original). The explanatory text following Policy 5A stated: "The zero flow at Milner Dam is not a target or a goal to be achieved, and may not necessarily be desirable. It is, rather, a recognition of the current condition in which zero flow passes Milner Dam during certain periods of time." *Id.* Like the 1986 revision of the Idaho State Water Plan, the 1992 revision again provided that "[t]he Snake River Plain aquifer which provides this water [Snake River flows downstream from Milner Dam] must therefore be managed as an integral part of the river system." *Id.* Also like the 1986 revision, the 1992 revision of the State Water Plan provided:

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[6] Chapter 204 (Senate Bill 1205).

> *It is the policy of Idaho that approval of applications to appropriate the waters of the state shall be subject to the requirement that the use is in the public interest as set forth in the State Water Plan and by state law.*
>
> Having been adopted as being in the public interest, the State Water Plan shall be considered when establishing the public interest for water allocations.

Id. at 16 (Policy 1B) (emphasis in original). The 1992 revision of the Idaho State Water Plan was submitted to the Idaho Legislature for review and became effective sixty days following submission without legislative action pursuant to Idaho Const. Art. 15, § 7.

33. The current "Idaho State Water Plan" was adopted by the Idaho Water Resource Board in 1996. Through legislation ratifying the 1996 revision of the Idaho State Water Plan, the Legislature amended Policy 5B of the Plan to add: "The exercise of water rights above Milner Dam has and may reduce the flow at the dam to zero." 1997 Idaho Sess. Laws 67, 71. The language added by the Legislature is part of the Idaho State Water Plan's policy for "Snake River Minimum Flows." Idaho State Water Plan at 17 (Policy 5B).

34. Findings of Fact later determined to be Conclusions of Law are herein made as Conclusions of Law.

CONCLUSIONS OF LAW

1. Paragraphs 21 through 33 of the Director's findings of fact are incorporated herein by this reference in their entirety and made a part of the Director's conclusions of law. A threshold issue raised by the Canal Companies is whether the Director may consider comments submitted in response to the *Notice of Intent to Issue License*. The Canal Companies have asserted that the Director acted outside the scope of his authority by reopening the administrative record to comments after the protest period closed.[7] Although the comments submitted are included in the agency record, they were not considered by the Director. As addressed below, the form of the subordination condition in the license for water right no. 01-7011 is controlled by and is based solely on provisions of state law and the Idaho State Water Plan.

2. The Director is statutorily authorized to issue water right licenses, but prior to issuing a license must be "satisfied that the law has been fully complied with":

> Upon receipt by the department of water resources of all the evidence in relation to such final proof, it shall be the duty of the department to carefully examine the same, and *if the department is satisfied that the law has been fully complied with* and that the water is being used at the place claimed and for the purpose for which it was originally intended, the department shall issue to such user or users a license confirming such use.

Idaho Code § 42-219(1) (emphasis added).

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[7] *Writ Dismissal Order* at 5. The district court held that, "The *Notice* did not reopen a protest period nor did it give those submitting comments party status." *Id* at 9.

3. Several statutory provisions specific to water right permits for power purposes are contained in Idaho Code §§ 42-206 through -209 requiring approval by the Director of any sale, transfer, assignment or mortgage of a permit to appropriate water for power purposes and setting forth consequences for failure to comply. Although the file for permit no. 01-7011 contains several documents suggesting that an interest in the permit may have been assigned, pledged or mortgaged as security for financing of the project or for other purposes, no document assigning, pledging or mortgaging the permit has been submitted by the Canal Companies or otherwise made available to the Department. For example, the file reflects that orders from FERC relating to the Milner project have been issued to Idaho Power Company and Milner Dam, Inc., although neither entity is shown in the Department file to hold any interest in permit no. 01-7011. *See Order Approving Transfer of License*, Project No. 2899 (FERC May 2 1989) ("Approval of the transfer is contingent upon transfer of the title of the properties under license ...."); *Order Approving Transfer of License*, Project No. 2899 (FERC February 10, 1992) (Transferring Canal Companies interest in FERC license to Milner Dam, Inc.).

4. The Director's licensing determinations must be consistent with the Idaho State Water Plan:

> All state agencies shall exercise their duties in a manner consistent with the comprehensive state water plan. These duties include, but are not limited to the issuance of permits, *licenses*, and certifications; provided, however, that nothing in this chapter shall be construed to affect the authority of any state agency with respect to activities not prohibited by the comprehensive state water plan.

Idaho Code § 42-1734B(4) (emphasis added).

5. The Idaho State Water Plan provides, in part: "It is the policy of Idaho to insure that public interests, existing water rights, related settlement agreements, and the future water and energy needs of the State are considered *in hydropower licensing*." Idaho State Water Plan at 14 (Policy 4D) (emphasis added). The Idaho State Water Plan expressly recognizes that "[h]ydropower water rights may be limited to a specific term and subordinated to upstream depletionary uses [Idaho Code, 42-203B(6) and (7)]." *Id.* (brackets in original).

6. The Director is statutorily authorized to subordinate a water right license for hydropower purposes to "subsequent upstream beneficial depletionary uses" and "to limit a permit or license for power purposes to a specific term":

> *The director shall have the authority to subordinate the rights granted in a permit or license for power purposes to subsequent upstream beneficial depletionary uses*. A subordinated water right for power use does not give rise to any claim against, or right to interfere with, the holder of subsequent upstream rights established pursuant to state law. *The director shall also have the authority to limit a permit or license for power purposes to a specific term.*

Subsection (6) of this section shall not apply to licenses which have already been issued as of the effective date of this act.

Idaho Code § 42-203B(6) (emphasis added).

7. The Director in exercising authority to limit a permit or license for power purposes to a specific term of years shall designate the number of years through which the term of the license shall extend considering multiple factors, including the term of the approved FERC license for the project. Idaho Code § 42-203B(7). The Director determines the expiration of the FERC Milner Project License on November 30, 2038 to be the appropriate term for the license of water right no. 01-7011.

8. Idaho Code § 42-203B(6), enacted in 1985, was an implementation of the State's constitutional authority to "regulate and limit" water rights for power purposes. *See* Idaho Code § 42-203B(1) ("The legislature finds and declares that it is in the public interest to specifically implement the state's power to regulate and limit the use of water for power purposes . . . ."). 1985 Idaho Sess. Laws, ch. 17, § 2, p. 25-26; *see also Miles v. Idaho Power Co.*, 116 Idaho 635, 637, 778 P.2d 757, 759 (1989) ("Subsequently, our legislature enacted legislation to implement the [Swan Falls] agreement. *See* 1985 Idaho Sess. Laws, ch. 14-17 . . . .").

9. Idaho Constitution, Article XV, § 3 provides: "The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, *except that the state may regulate and limit the use thereof for power purposes.*" Emphasis added.

10. There is an extensive record of legislative history associated with the enactment of Idaho Code § 42-203B. *See, e.g.*, "Statement of Purpose" for 1985 Senate Bill 1008 ("This legislation would implement the state's authority under the 1928 amendment to Article 15, Section 3 of the Idaho Constitution to limit and regulate the use of water for power purposes . . . . Future hydropower water rights could be subordinated to future upstream beneficial uses").

11. Upon passing the legislation that enacted and codified the provisions of Idaho Code § 42-203B(6), the Idaho Senate unanimously adopted a "Statement of Legislative Intent" for the bill. JOURNAL OF THE STATE SENATE, ORGANIZATIONAL SESSION AND FIRST REGULAR SESSION OF THE FORTY-EIGHTH LEGISLATURE OF THE STATE OF IDAHO, 1985 at 58. The "Statement of Legislative Intent" states, in part: "*The Director of the Department of Water Resources is empowered as to all future licenses to subordinate the rights granted in either a permit or a license to subsequent upstream beneficial depletionary uses*, to ensure the availability of water for such uses." *Id.* at 60 (emphasis added).

12. When explaining the legislation that became Idaho Code § 42-203B(6) to members of the Senate Resources and Environment Committee, the proponents of the legislation stated that the provision was intended "to make sure that as best we can foresee we do not get ourselves into another Swan Falls situation in the future." Minutes, Senate Resources and Environment Committee, January 18, 1985, p. 9 (Pat Kole); *see also id.* ("The primary reason I see [section 203B(6)] there is to avoid Swan Falls reoccurring again.") (Ken Dunn).

13. The Idaho Legislature has provided that:

> For the purposes of the determination and administration of rights to the use of the waters of the Snake river or its tributaries downstream from Milner dam, no portion of the waters of the Snake river or surface or ground water tributary to the Snake river upstream from Milner dam shall be considered.

Idaho Code § 42-203B(2).

14. The subordination condition in the Milner Permit would permit a flow of 5,714 c.f.s. to pass from the Snake River upstream of Milner Dam to the Snake River downstream from Milner Dam and thereby potentially preclude future uses of water for recharge upstream from Milner Dam. The subordination condition in the Milner Permit would therefore impermissibly circumvent Idaho Code § 42-203B(2), as quoted above. Through this statute, the Legislature directed that for purposes of determining and administering hydropower water rights below Milner Dam, the waters above Milner Dam shall not be considered. If licensed with the subordination condition of the Milner Permit, water right no. 01-7011 would authorize the Canal Companies to demand that flows arising upstream from Milner Dam be delivered directly to the Snake River downstream from Milner Dam, albeit through diversion and conveyance works rather than by spilling the upstream flows over Milner Dam itself. The effect would be the same, however: the subordination condition in the Milner Permit would authorize water rights administration that would deliver flows of the Snake River arising upstream from Milner Dam directly to the Snake River downstream from Milner Dam. The subordination condition in the Milner Permit would effectively bridge the statutory divide the Legislature expressly created in Idaho Code § 42-203B(2), and undermine the Legislature's unambiguous directive that the Snake River upstream from Milner Dam and the Snake River downstream from Milner Dam be administered as separate sources and systems. Thus, including the subordination condition of the Milner Permit in the license for water right no. 01-7011 would be contrary to the plain language of Idaho Code § 203B(2).

15. For similar reasons, the subordination condition in the Milner Permit impermissibly conflicts with the Idaho Legislature's determination that "[t]he exercise of water rights above Milner Dam has and may reduce the flow at the dam to zero," and with the identical language in Policy 5B of the Idaho State Water Plan. 1997 Idaho Session Laws 71; Idaho State Water Plan at 17. Much of the time in most years, the Milner Permit subordination condition would require flows arising upstream of Milner Dam and otherwise available for recharge to instead be delivered to the Snake River downstream from Milner Dam. The result is that water rights for recharge above Milner Dam would not be allowed to divert unless water right no. 01-7011 was first being satisfied, requiring a flow of 5,714 cfs to be available for diversion around Milner Dam for delivery to the downstream power plant on the Snake River below the dam. Thus, including the subordination condition of the Milner Permit in the license for water right no. 01-7011 would be contrary to the plain language of section 1 of chapter 38 of the 1997 Idaho Session Laws, and would not be consistent with Policy 5B of the Idaho State Water Plan.

16. Policy 1J of the Idaho State Water Plan provides: "It is the policy of Idaho that managed recharge be encouraged, pursuant to state law." Idaho State Water Plan at 7. The Legislature has expressly ratified this policy. 1997 Idaho Session Laws 68. The subordination

condition in the Milner Permit would interfere with and potentially preclude diversions of water upstream from Milner Dam for meaningful recharge of the Snake River Plain aquifer much of the time in most years. Thus, including the subordination condition of the Milner Permit in the license for water right no. 01-7011 would discourage recharge and therefore would not be consistent with Policy 1J of the Idaho State Water Plan.

17. Policy 5H of the Idaho State Water Plan provides: "It is the policy of Idaho to seek to maintain spring flows in the American Falls and Thousand Springs reaches of the Snake River which will sustain beneficial uses of surface and ground water supplies in accordance with state law." Idaho State Water Plan at 19. The Legislature has expressly ratified this policy. 1997 Idaho Session Laws 71. Further, the "Comment" to Policy 5H of the Idaho State Water Plan states:

> Spring discharge in the American Falls and Thousand Springs reaches of the Snake River are vital to the Snake River Basin and Idaho economy. The springs near American Falls provide an important part of Snake River flow appropriated by Magic Valley appropriators. In the Thousand Springs reach, spring flow is the only practical source of water for many of the state's aquaculture facilities. During portions of low-water years, river flows downstream from Milner Dam to the Murphy gaging station consist almost entirely of ground-water discharge from the Thousand Springs reach. *Maintaining these discharges should be the goal of water managers. Managed recharge of the aquifers and continued efforts to efficiently use ground water are two strategies for maintaining spring discharges in these reaches.*

Idaho State Water Plan at 19 ("Comment" to Policy 5H) (emphasis added).

18. Similarly, the "Comment" to Policy 1J of the Idaho State Water Plan states: "*Managed aquifer recharge may enhance spring flows and maintain desirable aquifer levels. Managed recharge should be monitored to document the beneficial effects on the state's water resources and to minimize any concerns or issues.*" Idaho State Water Plan at 7 ("Comment" to Policy 1J) (emphasis added); *see also* Idaho State Water Plan at 6 ("Aquifers, in turn, serve as underground reservoirs, and can stabilize stream discharges during dry periods.") ("Comment" to Policy "1F – Conjunctive Management"). These provisions of the Idaho State Water Plan expressly contemplate that managed recharge is an important strategy to maintain, enhance and stabilize aquifer levels and spring discharges in the Thousand Springs reach. The subordination condition in the Milner Permit would be inconsistent with enhancing or stabilizing aquifer levels and/or spring discharges much of the time in most years in contravention of Policies 5H and 1J of the Idaho State Water Plan.

19. Including the subordination condition in the Milner Permit in the license for water right no. 01-7011 would also tend to create "another Swan Falls situation," the avoidance of which was a principal reason for empowering the Director, under Idaho Code § 42-203B(6), to subordinate hydropower water right permits and licenses. Minutes, Senate Resources and Environment Committee, January 18, 1985, p. 9. The issue in the Swan Falls controversy was whether certain hydropower water rights "should be subordinated to future appropriators to

encourage further development of agricultural uses, domestic, commercial, municipal or industrial (DCMI) uses, or other uses which would be beneficial to Idaho." JOURNAL OF THE STATE SENATE, ORGANIZATIONAL SESSION AND FIRST REGULAR SESSION OF THE FORTY-EIGHTH LEGISLATURE OF THE STATE OF IDAHO, 1985 at 58 (parenthetical in original). The Legislature resolved this issue with respect to future hydropower water rights by authorizing the Director to subordinate hydropower water right permits and licenses in order to prevent such water rights from having the effect of blocking "uses which would be beneficial to Idaho." *Id.* As discussed above, the Legislature and the Idaho Water Resource Board have determined that recharge uses upstream from Milner Dam are beneficial to Idaho, and including the subordination condition of the Milner Permit in the license for water right no. 01-7011 would potentially preclude recharge uses upstream of Milner Dam much of the time in most years. Thus, including the subordination condition of the Milner Permit in the license for water right no. 01-7011 would be inconsistent with the legislative intent that Idaho Code § 42-203B(6) be used to prevent "another Swan Falls situation."

20. The Idaho Legislature and the Idaho Water Resource Board have already carefully considered and weighed the policy questions implicit in the question of the form of the subordination condition for water right no. 01-7011. The Legislature has determined that the Snake River upstream from Milner Dam should be administered for purposes of hydropower generation separate and independent from the Snake River downstream of Milner Dam for purposes of determining and administering water rights above and below Milner Dam, and that the source of flows for water rights downstream from Milner Dam is limited to flows arising downstream from Milner Dam. The Legislature and the Idaho Water Resource Board have determined that flows at Milner Dam may be reduced to zero for purposes of satisfying water rights above Milner Dam, that flows downstream from Milner Dam are to be principally supplied by ground water discharge from the Snake River Plain aquifer, that the Snake River Plain aquifer and the Snake River must be managed as a single resource, and that managed recharge is an important component of the unified management regime necessary to maintain, enhance and stabilize aquifer levels, spring discharges and stream flows in the river-aquifer system. The Director is statutorily obligated to adhere to these determinations in issuing the license for water right 01-7011. Including the subordination condition of the Milner Permit in the license for water right 01-7011 would directly contravene these determinations.

21. The foregoing discussion demonstrates that full subordination of water right no. 01-7011 is consistent with Idaho Code §§ 42-234(2) and 42-4201A(2). Sections 42-234(2) and 42-4201A(2) do not specifically address the question of the determination and administration of water rights with respect to river flows upstream and downstream from Milner Dam. The general directive that recharge water rights shall be secondary to prior perfected rights does not control over specific legislative determinations and statutory provisions limiting the source of hydropower uses downstream from Milner Dam to flows arising downstream from Milner Dam, and providing that all flows arising above Milner Dam may be diverted for uses above Milner Dam. *See Mulder v. Liberty Northwest Ins. Co.*, 135 Idaho 52, 57, 14 P.3d 372, 377 (2000) ("A basic tenet of statutory construction is that the more specific statute or section addressing the issue controls over the statute that is more general."). For similar reasons, Idaho Code §§ 42-234(2) and 42-4201A(2) do not override or repeal Idaho Code §§ 42-203B(2), 42-1734B(4) or

1997 Idaho Session Laws chapter 38, section 1 by implication.[8] *See Gooding County v. Wybenga*, 137 Idaho 201, 204, 46 P.3d 18, 21 (2002) ("Repealing or amending a statute by implication is disfavored in the law, and it will not be inferred absent a clear, legislative intent."). Rather, sections 42-234(2) and 42-4201A(2) must be interpreted harmoniously with Idaho Code §§ 42-203B(2), 42-1734B(4) and 1997 Idaho Session Laws chapter 38, section 1. *See State v. Barnes*, 133 Idaho 378, 380, 987 P.2d 290, 292 (1999) ("Statutes relating to the same subject matter, although in apparent conflict, are to be construed in harmony, if reasonably possible.") Interpreting sections 42-234(2) and 42-4201A(2) as prohibiting the Director from following the clear mandates of Idaho Code §§ 42-203B(2) and section 1 of chapter 38 of the 1997 Idaho Session Laws would unnecessarily introduce tension among statutes that can be construed harmoniously, for reasons previously discussed.[9]

22. The subordination condition proposed by the Canal Companies contravenes the applicable statutes and provisions of the Idaho State Water Plan in effect at the time. The above-quoted provisions of Idaho Code § 42-203B were in force in 1987, having been enacted in the 1985 and 1986 legislative sessions. Further, Idaho Code § 42-1736B(1) had been in force since 1978, and provided that "[a]ll future filings, permits and decrees on the unappropriated water of this state shall be determined with respect to the effect such filings, permits and decrees will have on the minimum daily flow of the affected stream or river . . . ." The minimum daily flow for the Milner gaging station under the Idaho State Water Plan at the time was "0 c.f.s.," and the plan provided that the Snake River Plain aquifer "must therefore be managed as an integral part of the [Snake] river system." 1986 Idaho State Water Plan at 35 (Policy 5A). The Idaho State Water Plan further provided at the time that "approval of applications to appropriate the waters of the state shall be subject to the requirement that the use is in the public interest as set forth in the State Water Plan . . . ." and "the State Water Plan shall be considered when establishing the public interest for water allocations." *Id.* at 20 (Policy 1B). Thus, for reasons similar to those discussed above, the subordination condition included in the permit in 1987 contravenes applicable statutes and the provisions of the Idaho State Water Plan.

23. In sum, the Director is authorized, by the Legislature's statutory implementation of the State's constitutional authority to regulate and limit water rights for power purposes, to subordinate a license for a hydropower water right. While the Director has discretion in exercising this authority, such discretion must be exercised by the Director consistent with his statutory obligation to ensure that the license complies with the applicable law and is consistent with the Idaho State Water Plan. As discussed above, the Idaho Legislature and the Idaho Water

[8] *See* 1997 Idaho Sess. Laws 71 ("The exercise of water rights above Milner Dam has and may reduce the flow at the dam to zero.").

[9] This conclusion is further supported by the fact that sections 42-234(2) and 42-4201A(2) provide that the recharge water rights shall be secondary to the hydropower water rights covered by the Swan Falls Agreement ("those water rights for power purposes that may otherwise be subordinated by contract entered into by the governor and Idaho power company on October 25, 1984") but do not make the recharge water rights secondary to the Milner hydropower water right, which had been permitted seven years earlier, in 1977. Thus, with respect to hydropower water rights—a special class of water rights that the State is constitutionally authorized to "regulate and limit"—normal rules of statutory construction would limit the application of sections 42-234(2) and 42-4201A(2) to the hydropower water rights covered by the Swan Falls agreement. *See Twin Falls County v. Cities of Twin Falls and Filer*, 143 Idaho 398, 402, 146 P.3d 664, 668 (2006) ("Idaho has recognized the rule of *expressio unius est exclusio alterius*-'where a constitution or statute specifies certain things, the designation of such things excludes all others.'").

Resource Board have expressly addressed and conclusively decided the policy matters raised by the question of the form of the subordination condition for the license for water right no. 01-7011. Thus, this question is controlled by affirmative enactments of the Idaho Legislature and the policies of the Idaho State Water Plan as ratified by the Idaho Legislature. In short, while the Director has discretion with respect to exercising his authority to subordinate a hydropower water right license under Idaho Code § 42-203B(6), the Director does not have discretion to ignore clear statutory language and provisions of the Idaho State Water Plan, or to approve subordination limitations that are directly contrary to them. For the reasons discussed above, the subordination condition in the Milner Permit is irreconcilably at odds with the cited statutes and policies of the Idaho State Water Plan. Accordingly, the Director concludes that the subordination condition for the license for water right no. 01-7011 should provide that the water right is subordinate to all subsequent upstream beneficial depletionary uses, other than hydropower, within the Snake River Basin of the state of Idaho and does not give rise to any claim against, or right to interfere with, any such junior-priority upstream rights established pursuant to state law. Idaho Code § 42-203B(6); Idaho State Water Plan at 14 ("Comment" to Policy 4D). The reference to "subsequent upstream beneficial depletionary uses" in the subordination condition includes uses for managed recharge which may deplete flows in the Snake River at Milner Dam.

24. The argument of the Canal Companies that their rights to the use of water under the Milner Permit vested upon the submission of proof of beneficial use to the Department in 1993 was rejected by the district court.[10]

ORDER

IT IS HEREBY ORDERED that water right no. 01-7011 authorizing the diversion of water from the Snake River for power purposes be licensed as follows:

Source:	Snake River
Beneficial Use:	Power
Period of Use:	01/01 to 12/31
Diversion Rate:	5,714.70 cfs
Diversion Volume:	2,390,000.0 AF
Points of Diversion:	NW1/4SW1/4 Sec. 28, Twp 10S, Rge 21E, B.M.
	L8 (NE1/4SE1/4) Sec. 29, Twp 10S, Rge 21E, B.M.
Places of Use:	NE1/4SE1/4 Sec. 29, Twp 10S, Rge 21E, B.M.
	L8 (SW1/4NE1/4) Sec. 30, Twp 10S, Rge ~~21E, B.M.~~

Conditions of Approval:

1. The diversion and use of water for hydropower purposes under this water right shall be subordinate to all subsequent upstream beneficial depletionary uses, other than

[10] *Writ Dismissal Order* at 11-12 (Holding that following the beneficial use examination the issuance of the license is not a ministerial act and citing a series of Idaho cases holding that "a right to use the waters of this state remains inchoate until a license is actually issued by IDWR.")

hydropower, within the Snake River Basin of the state of Idaho that are initiated later in time than the priority of this water right and shall not give rise to any right or claim against any junior-priority rights for the depletionary or consumptive beneficial use of water, other than hydropower, within the Snake River Basin of the state of Idaho initiated later in time than the priority of water right no. 01-7011.

2. A measuring device of a type approved by the Department shall be permanently installed and maintained as part of the diverting works.

3. Use of water under this right shall be non-consumptive.

4. This right does not constitute Idaho Public Utilities Commission or Federal Energy Regulatory Commission approval that may be required.

5. The diversion and use of water for hydropower purposes under this water right is subject to review by the Director after the date of expiration of Milner Project License No. 2899 (11/30/2038) issued by the Federal Energy Regulatory Commission. Upon appropriate findings relative to the interest of the public, the Director may cancel all or any part of the use authorized herein and may revise, delete or add conditions under which the right may be exercised.

IT IS FURTHER ORDERED that this is a final order of the agency. The right holder may file a petition for reconsideration of this final order within fourteen (14) days of the service date of this order. The agency will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law pursuant to Idaho Code § 67-5246.

IT IS FURTHER ORDERED that any person aggrieved by this decision shall be entitled to a hearing before the Director to contest the action taken provided the person files with the Director, within fifteen (15) days after receipt of written notice of the order, or receipt of actual notice, a written petition stating the grounds for contesting the action and requesting a hearing. Any hearing conducted shall be in accordance with the provisions of chapter 52, title 67, Idaho Code, and the Rules of Procedure of the Department, IDAPA 37.01.01. Judicial review of any final order of the Director issued following the hearing may be had pursuant to Idaho Code § 42-1701A(4).

DATED this 20th day of October 2008.

David R. Tuthill, Jr.

DAVID R. TUTHILL, JR.
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of October 2008, I caused a true and correct copy of the foregoing Order to be sent by U.S. Mail, postage paid to the following:

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Victoria Wigle
Administrative Assistant to the Director
Idaho Department of Water Resources

State of Idaho
Department of Water Resources

Water Right License

WATER RIGHT NO. 1-07011

Priority: March 30, 1977

Maximum Diversion Rate: 5,714.70 CFS
Maximum Diversion Volume: 2,390,000.0 AF

It is hereby certified that NORTH SIDE CANAL CO LTD
921 N LINCOLN AVE
JEROME ID 83338

And

TWIN FALLS CANAL CO
PO BOX 326
TWIN FALLS ID 83301 have complied with the terms and conditions of the permit, issued pursuant to Application for Permit dated March 30, 1977; and have submitted Proof of Beneficial Use on October 29, 1993. An examination indicates that the works have a diversion capacity of 5714.7 cfs of water from:

SOURCE
SNAKE RIVER **Tributary:** COLUMBIA RIVER

and a water right has been established as follows:

BENEFICIAL USE	PERIOD OF USE	DIVERSION RATE	ANNUAL DIVERSION VOLUME
POWER	01/01 to 12/31	5,714.70 CFS	2,390,000.0 AF

LOCATION OF POINT(S) OF DIVERSION:
SNAKE RIVER NW1/4SW1/4 Sec. 28, Twp 10S, Rge 21E, B.M. TWIN FALLS County
SNAKE RIVER L8 (NE1/4SE1/4) Sec. 29, Twp 10S, Rge 21E, B.M. TWIN FALLS County

PLACES OF USE: POWER

Twp Rge Sec	NE				NW				SW				SE				Totals
	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
10S 21E 29													X				
10S 21E 30			X L8														

State of Idaho
Department of Water Resources

Water Right License

WATER RIGHT NO. 1-07011

CONDITIONS OF APPROVAL

1. The diversion and use of water for hydropower purposes under this water right shall be subordinate to all subsequent upstream beneficial depletionary uses, other than hydropower, within the Snake River Basin of the state of Idaho that are initiated later in time than the priority of this water right and shall not give rise to any right or claim against any junior-priority rights for the depletionary or consumptive beneficial use of water, other than hydropower, within the Snake River Basin of the state of Idaho initiated later in time than the priority of water right no. 01-7011.

2. A measuring device of a type approved by the Department shall be permanently installed and maintained as part of the diverting works.

3. Use of water under this right shall be non-consumptive.

4. This right does not constitute Idaho Public Utilities Commission or Federal Energy Regulatory Commission approval that may be required.

5. The diversion and use of water for hydropower purposes under this water right is subject to review by the Director after the date of expiration of Milner Project License No. 2899 (11/30/2038) issued by the Federal Energy Regulatory Commission. Upon appropriate findings relative to the interest of the public, the Director may cancel all or any part of the use authorized herein and may revise, delete or add conditions under which the right may be exercised.

This license is issued pursuant to the provisions of Section 42-219, Idaho Code. The water right confirmed by this license is subject to all prior water rights and shall be used in accordance with Idaho law and applicable rules of the Department of Water Resources.

Signed and sealed this 20th day of October, 2008.

David R. Tuthill

DAVID R. TUTHILL, JR.
Director

Exhibit 24

RECEIVED
NOV 04 2008
DEPARTMENT OF
WATER RESOURCES

John K. Simpson, ISB No. 4242
Travis L. Thompson, ISB No. 6168
Paul L. Arrington, ISB No. 7198
BARKER ROSHOLT & SIMPSON LLP
1010 W. Jefferson St., Ste. 102
P.O. Box 2139
Boise, Idaho 83701-2139
(208) 336-0700 – Telephone
(208) 344-6034 – Facsimile

Attorneys for North Side Canal Company and Twin Falls Canal Company

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR PERMIT & LICENSE NO. 01-07011 APPLICANT: Twin Falls Canal Company & North Side Canal Company	)	**PROTEST AND PETITION FOR HEARING**

COME NOW, the North Side Canal Company and Twin Falls Canal Compny, (hereinafter "Petitioners" or "Canal Companies"), by and through their undersigned attorneys, and hereby files this Protest and Petition for Hearing regarding the Idaho Department of Water Resources' ("IDWR") issuance of water right License No. 01-07011 on October 20, 2008. The initial bases for Petitioners' protest and petition are as follows:

1. The license includes the following condition, numbered 5 (five), which purports to allow the Director to review the diversion and use of water for hydropower purposes under the license after the date of expiration of the Federal Energy Regulatory Commission ("FERC")

license for the Milner Project, to cancel all or any part of the authorized use, and to revise, delete or add conditions under which the right may be exercised:

> *The diversion and use of water for hydropower purposes under this license is subject to review by the Director after the date of expiration of Milner Project License No. 2899 (11/30/2038) issued by the Federal Energy Regulatory Commission. Upon appropriate findings relative to the interest of the public, the Director may cancel all or any part of the use authorized herein and may revise, delete or add conditions under which the right may be exercised.*

2. This condition was not included in the water right permit approved and issued by IDWR in 1977. After issuance of that water right permit, and in reliance thereon, Milner Dam was reconstructed with the generating facility (Milner Project), provided proof of beneficial use of the water right established by the permit, and has been operating said facility for approximately 15 years without the new condition.

3. The license includes the following provision, numbered 1 (one), which has been materially altered from the original condition agreed upon by the Petitioners and the Idaho Department of Water Resources.

> *The diversion and use of water for hydropower purposes under this water right shall be subordinate to all subsequent upstream beneficial depletionary uses, other than hydropower, within the Snake River Basin of the state Idaho that are initiated later in time than the priority of this water right and shall not give rise to any right or claim against any junior-priority rights for the depletionary or consumptive beneficial use of water, other than hydropower, within the Snake River Basin of the state of Idaho initiated later in time than the priority of water right no. 01-7011.*

4. In the form agreed upon between the parties, permit no. 01-07011 was subordinated to all subsequent upstream beneficial depletionary uses, except hydropower and groundwater recharge. Upon issuance of the license, the reference to groundwater recharge was eliminated. This material change is in contravention of the parties' agreement as well as the law of the State of Idaho.

5. The license as issued contains a volumetric limitation listed at "Annual Diversion Volume" that had never before been referenced by IDWR in the proceedings leading up to the issuance of the license. IDWR requested information from the Petitioners by letter dated Wednesday October 1, 2008. IDWR requested the Petitioners provide any information on the volume issue by Monday October 6, 2008. Due to the time restraints of the request, the Petitioners responded on Thursday October 2, 2008 and requested a reasonable opportunity to consult the water rights examiner and Idaho Power Company to gather any pertinent information. IDWR disregarded the Petitioners' request and issued the license without providing an opportunity to respond to the request for information. The Canal Companies object to the volumetric limitation set forth in the license under "Annual Diversion Volume".

5. The Canal Companies hereby request a hearing before the Director to contest the foregoing objections to the license as issued pursuant to Idaho Code 42-1701A(3). The initial bases for the Canal Companies' petition are stated above and include those stated in the *Petition for Peremptory Writ of Mandate* (and its attached exhibits) previously served upon IDWR. In requesting a hearing to preserve its rights in this matter, the Canal Companies expressly reserve the right to proceed in other forums as appropriate. Further, the Canal Companies request the appointment of an Independent Hearing Officer to preside over the hearing on this petition.

By: _____

John K. Simpson, ISB No. 4242
Travis L. Thompson, ISB No.
BARKER ROSHOLT & SIMPSON LLP
205 North Tenth Street, Suite 520
P.O. Box 2139
Boise, ID 83701-2139

Attorneys for North Side Canal Company and Twin Falls Canal Company

CERTIFICATE OF SERVICE

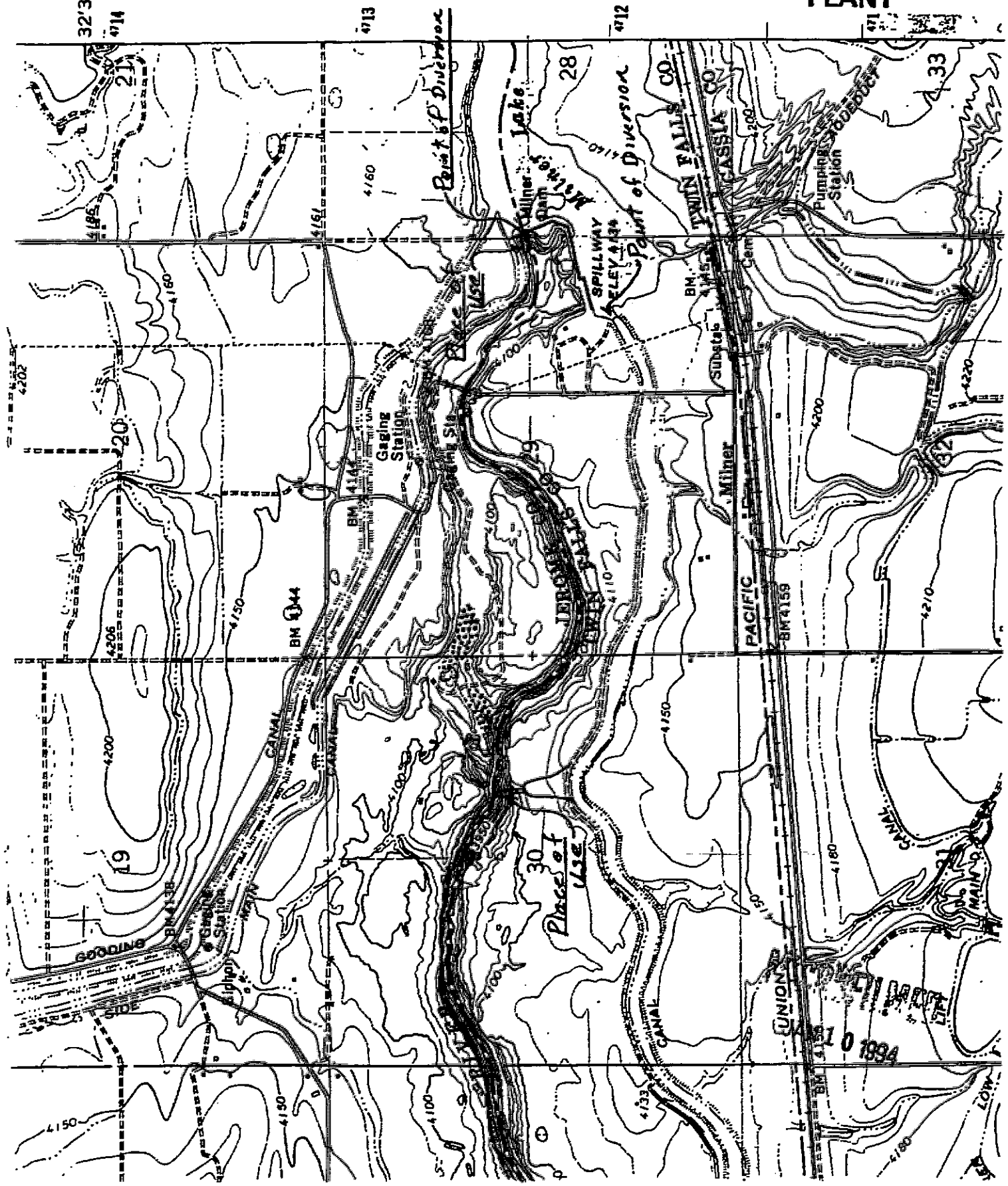
I HEREBY CERTIFY that on this 4th day of November, 2008, I served a true and correct copy of the foregoing document, **PROTEST AND PETITION FOR HEARING**, by hand delivery:

Director David K. Tuthill, Jr.
Idaho Department of Water Resources
322 E. Front St.
Boise, Idaho 83720-0098

John K. Simpson

Exhibit 25

EXHIBIT B
PERMIT 01-7011
MILNER POWER PLANT



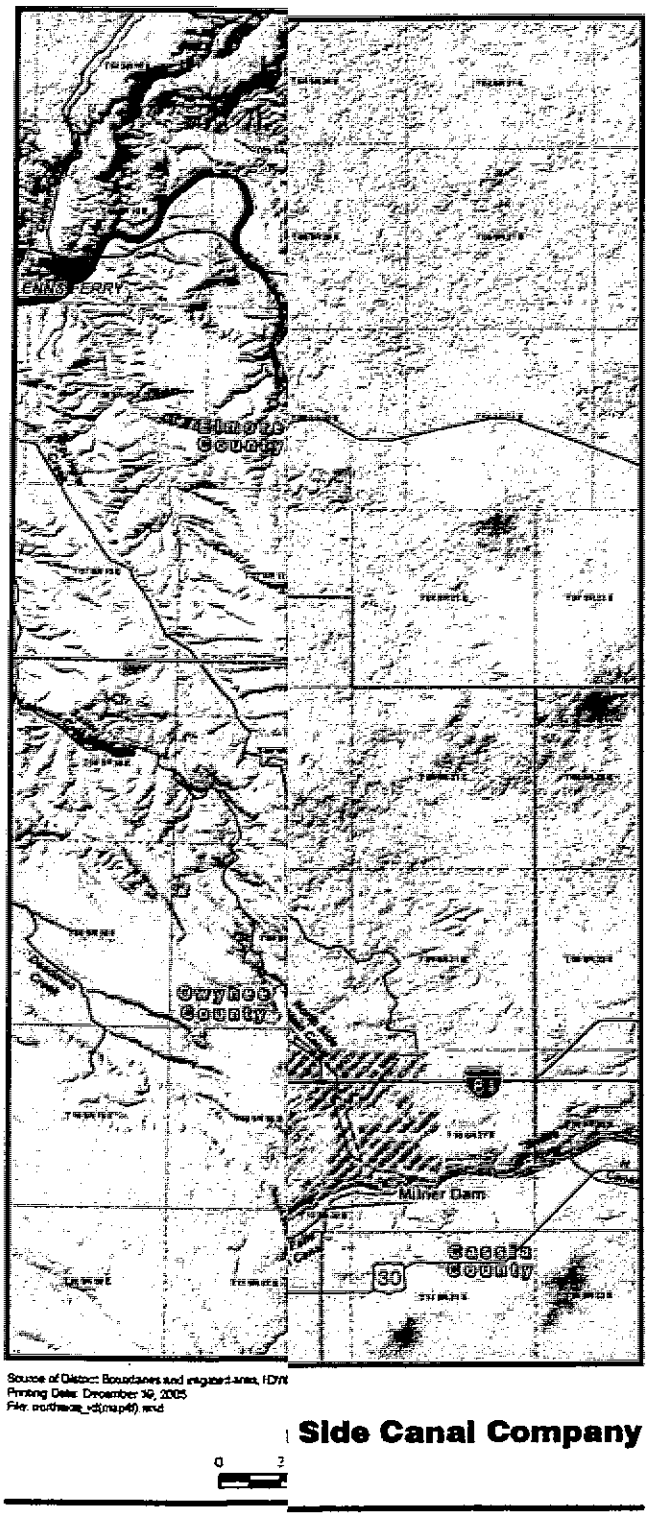
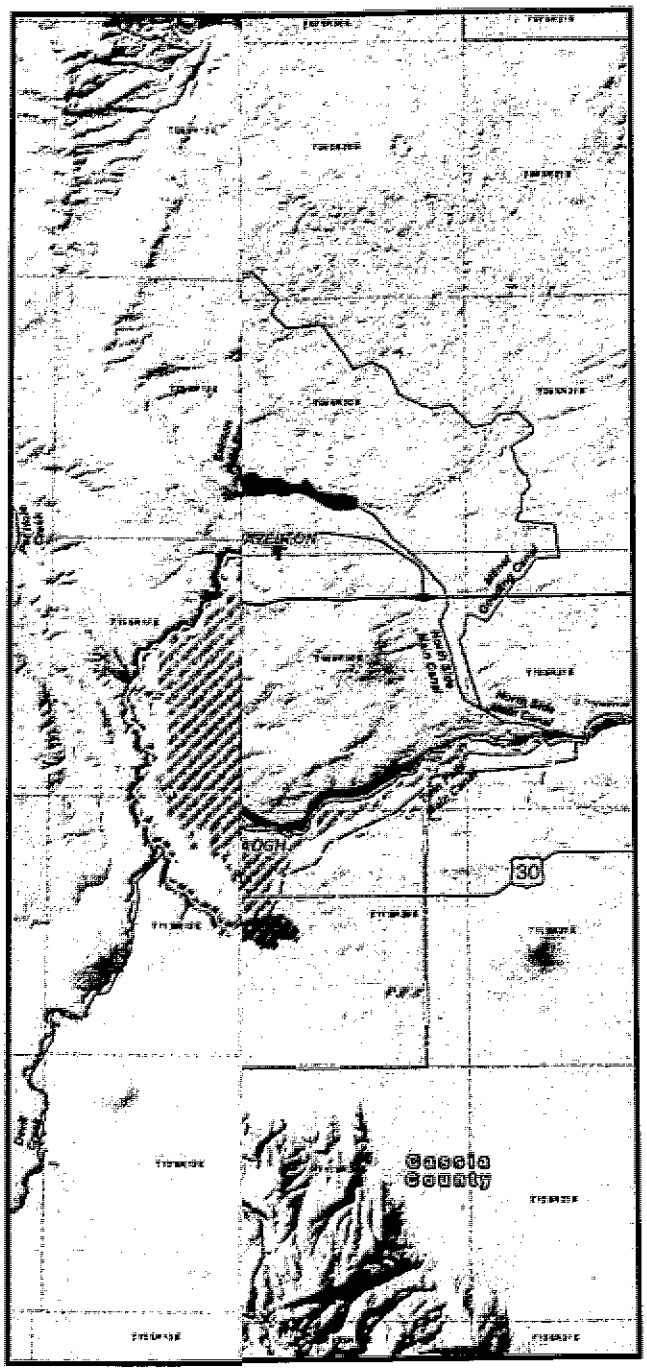


Figure 3-8 Location of North Side Canal



Source of Output Boundaries and Irrigated
Printing Date: December 15, 2005
File: twin_falls_co(nad83).mxd

/In Falls Canal Company

Figure 3-9 Location of Twin Falls Canal (

Exhibit 26

Randall C. Budge, ISB No. 1949
Candice M. McHugh, ISB No. 5908
Thomas J. Budge, ISB No. 7465
RACINE OLSON NYE BUDGE &
BAILEY, CHARTERED
Post Office Box 1391
201 E. Center Street
Pocatello, Idaho 83204-1391
208-232-6101 - Telephone
208-232-6109 - Fax

Attorneys for the Ground Water Districts and Aberdeen-Springfield Canal Company

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF LICENSING WATER RIGHT PERMIT NO. 01-7011 IN THE NAME OF TWIN FALLS CANAL COMPANY AND NORTH SIDE CANAL COMPANY	**PETITION TO INTERVENE**

Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Clark-Jefferson Ground Water District, Madison Ground Water District, and Aberdeen-Springfield Canal Company, acting for and on behalf of their member water users, by and through counsel, hereby petition to intervene in the above-captioned proceeding pursuant to the Department's *Order Designating Contested Case and Appointing Hearing Officer* (November 12, 2008) and Rules 350 through 354 of the Rules of Procedure of the Idaho Department of Water Resources (IDAPA 37.01.01.350-354).

The Department's Rules of Procedure provide that "Persons not applicants or claimants or appellants, petitioners, complainants, protestants, or respondents to a proceeding who claim a direct and substantial interest in the proceeding may petition for an order from the presiding officer granting intervention to become a party, if a formal hearing is required by statute to be

held in the proceeding." IDAPA 37.01.01.350. A timely-filed petition for intervene shall be granted if the petition "shows direct and substantial interest in any part of the subject matter of a proceeding and does not unduly broaden the issues, ... unless the applicant's interest is adequately represented by existing parties." *Id.* at 37.01.01.353.

These Petitioners include thousands of irrigators, municipalities, and commercial and industrial entities operating within the State of Idaho. They are owners of water rights that divert from the Snake River or from groundwater sources tributary to the Snake River at locations upstream from Milner Dam. These Petitioners' water rights have priority dates both senior and junior to the March 30, 1977, priority date of Idaho Water Right Number 01-7011, which is the subject of this proceeding. In addition, these Petitioners have a substantial interest in future water use and development upstream from Milner Dam, particularly for recharge purposes.

Water Right Number 01-7011, issued by the Department on October 20, 2008, includes various conditions, including that the Right shall be subordinate to "all subsequent upstream depletionary uses, other than hydropower...." (Condition No. 1.) This condition prevents Twin Falls Canal Company (TFCC) and North Side Canal Company (NSCC) from curtailing junior-priority water rights, including many of these Petitioners' water rights, in order to increase the supply of water for their hydropower facility at Milner Dam. The condition also assures that Water Right Number 01-7011 will not be wielded by TFCC and NSCC to destroy important efforts to recharge the East Snake Plain Aquifer (ESPA).

TFCC and NSCC filed a *Protest and Petition for Hearing* on Nov. 4, 2008, seeking to have certain of the conditions in Water Right Number 01-7011 amended or removed entirely, including the subordination condition involving groundwater recharge. This could upend current and future recharge of the ESPA—now recognized as a central component to sustaining the

viability of both surface and ground water rights that are hydraulically connected to the ESPA. The recently issued draft Comprehensive Aquifer Management Plan (CAMP) presented by the Idaho Water Resource Board calls for 50,000 acre-feet of annual managed recharge of the ESPA at sites upstream from Milner Dam.[1] Removal of the recharge subordination condition as requested by TFCC and NSCC would fatally impact recharge efforts on the ESPA, undermining the CAMP and potentially devastating many businesses and industries across southern Idaho.

As water users that are keenly interested in recharging the ESPA, these Petitioners have a direct and substantial interest in supporting and defending the conditions of Water Right Number 01-7011 as issued by the Department. These Petitioners do not intend to introduce any additional issues into this proceeding; they seek only to protect the currently-imposed conditions of Water Right Number 01-7011. And these Petitioners are in the best position to represent their interests and to know and understand the specific impacts upon their water rights in the event TFCC and NSCC were successful in changing the conditions of Water Right Number 01-7011. Additionally, these Petitioners accept the appointment of Gerald F. Schroeder as the hearing officer in this matter. Accordingly, these Petitioners meet the standard for intervention under the Department's Rules of Procedure, and therefore respectfully request an order granting their intervention in this proceeding.

DATED this 2nd day of December, 2008.

RACINE, OLSON, NYE, BUDGE & BAILEY, CHARTERED

Thomas J. Budge, Esq.

[1] *Draft Comprehensive Aquifer Management Plan*, November 6, 2008, at 23. The plan is available at: http://www.idwr.idaho.gov/ESPAPlan/ESPA_CAMP_Plan/FINALESPADRAFTPLAN11-12-08.pdf

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of December, 2008, the above and foregoing document was served in the following manner:

Idaho Department of Water Resources c/o Victoria Wigle Assistant to the Director Post Office Box 83720 Boise, Idaho 83720-0098 victoria.wigle@idwr.idaho.gov	[X] U.S. Mail/Postage Prepaid [ ] Facsimile [ ] Overnight Mail [ ] Hand Delivery [X] E-Mail
Honorable Gerald F. Schroeder Hearing Officer [home address] fcjschroeder@gmail.com	[X] U.S. Mail/Postage Prepaid [ ] Facsimile [ ] Overnight Mail [ ] Hand Delivery [X] E-Mail
John Rosholt Travis Thompson BARKER ROSHOLT 113 Main Ave. West, Ste 303 Twin Falls, Idaho 83301-6167 jar@idahowaters.com tlt@idahowaters.com	[ ] U.S. Mail/Postage Prepaid [ ] Facsimile [ ] Overnight Mail [ ] Hand Delivery [X] E-Mail
Robert L. Harris HOLDEN KIDWELL Post Office Box 50130 Idaho Falls, Idaho 83405 rharris@holdenlegal.com	[ ] U.S. Mail/Postage Prepaid [ ] Facsimile [ ] Overnight Mail [ ] Hand Delivery [X] E-Mail

THOMAS J. BUDGE

RECEIVED
DEC 0 9 2008
DEPARTMENT OF
WATER RESOURCES

Robert L. Harris, Esq. (ISB # 7018)
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
P.O. Box 50130
1000 Riverwalk Drive, Suite 200
Idaho Falls, Idaho 83405
Telephone: (208) 523-0620
Facsimile: (208) 523-9518

Attorneys for Mud Lake Water Users, Independent Water Users, Jefferson Canal Co., Monteview Canal Co., Producer's Canal Co., and Fremont-Madison Irrigation District

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF LICENSING WATER RIGHT PERMIT NO. 01-7011 IN THE NAME OF TWIN FALLS CANAL COMPANY AND NORTH SIDE CANAL COMPANY	**PETITION TO INTERVENE**

Mud Lake Water Users, Independent Water Users, Jefferson Canal Company, Monteview Canal Company, Producer's Canal Company, and Fremont-Madison Irrigation District (collectively, the "Upper Snake Water Users"), by and through counsel, hereby petition to intervene in the above-captioned proceeding pursuant to the Department's *Order Designating Contested Case and Appointing Hearing Officer* (November 12, 2008) and Rules 350 through 354 of the Rules of Procedure of the Idaho Department of Water Resources (IDAPA 37.01.01.350-354).

The Department's Rules of Procedure provide that "[p]ersons not applicants or claimants or appellants, petitioners, complainants, protestants, or respondents to a proceeding who claim a direct and substantial interest in the proceeding may petition for an order from the presiding officer

granting intervention to become a party, if a formal hearing is required by statute to be held in the proceeding." IDAPA 37.01.01.350. The petition must be filed "at least fourteen (14) days before the date set for the formal hearing, or by the date of the prehearing conference, whichever is earlier, unless a different time is provided by order or notice." *Id.* at 37.01.01.352. A timely-filed petition for intervene shall be granted if the petition "shows direct and substantial interest in any part of the subject matter of a proceeding and does not unduly broaden the issues, ... unless the applicant's interest is adequately represented by existing parties." *Id.* at 37.01.01.353.

Mud Lake Water Users, Independent Water Users, Jefferson Canal Company, Monteview Canal Company, and Producer's Canal Company are all organized canal companies existing under the laws of the State of Idaho, which exist in Jefferson County, Idaho. These companies possess water rights which authorize the diversion and beneficial use of ground water for irrigation and other purposes, which is used my the numerous members of these companies. Each has a substantial interest in preserving and enhancing ground water availability under their water rights, which includes ground water recharge. Additionally, Mud Lake Water Users possesses Water Right Permit No. 31-7650, which is a water right for ground water recharge to use 730 cfs of water from Camas Creek for such recharge with a priority date of June 11, 1997. This permit is awaiting the issuance of a license.

Fremont-Madison Irrigation District ("Fremont-Madison") is an irrigation district duly organized and existing under the laws of the State of Idaho, Title 43, Idaho Code, with its principal office in St. Anthony, Fremont County, Idaho. Fremont-Madison owns storage rights to the waters of the Snake River, which it stores in Island Park Reservoir. Fremont-Madison has a substantial interest in ground water recharge, and is currently participating in a pilot recharge project near St. Anthony, Idaho, wherein Fremont-Madison has donated 5,000 acre-feet to be delivered to an area

known as Quail Lake for recharge purposes. The recharge is currently being monitored by the Idaho Water Resources Research Institute. Information regarding this project is available from Fremont-Madison, or from the Department.

The Upper Snake Water Users represent numerous irrigators, municipalities, and commercial and industrial entities operating within the State of Idaho. They are all owners of water rights that divert from sources that are tributary to reaches of the Snake River upstream from Milner Dam. Their water rights have priority dates both senior and junior in priority to the hydropower water right that is the subject of this proceeding (March 30, 1977). As set forth above, the Upper Snake Water Users have a substantial interest in future water use and development upstream from Milner Dam, particularly for recharge purposes.

The Water Right that is the subject of this case, No. 01-7011, issued by the Department on October 20, 2008, includes various conditions, including that the water right shall be subordinate to "all subsequent upstream depletionary uses, other than hydropower...."[1] (Water Right No. 01-7011, Condition No. 1.) This condition prevents Twin Falls Canal Company (TFCC) and North Side Canal Company (NSCC) from curtailing junior-priority water rights, including many of the Upper Snake Water Users, in order to increase the supply of water for their hydropower facility at Milner Dam. Additionally, the condition also assures that the water right will not be wielded by TFCC and NSCC to destroy important efforts to recharge the East Snake Plain Aquifer (ESPA).

TFCC and NSCC filed a *Protest and Petition for Hearing* on Nov. 4, 2008, seeking to have certain of the conditions in Water Right No. 01-7011 amended or removed entirely, including the subordination condition involving groundwater recharge. This could potentially upend current and

---

1 Water Right No. 01-7011, Condition No. 1.

future recharge of the ESPA—now recognized as a central component to sustaining the viability of both surface and ground water rights that are hydraulically connected to the ESPA.

In the recently issued draft Comprehensive Aquifer Management Plan (CAMP) presented by the Idaho Water Resource Board, which is currently open for public comment, the plan calls for managed recharge of the ESPA. Specifically, the Plan calls for the following:

> Implement 80 kaf Annual Average over 5 years
> - 20 kaf of recharge above Blackfoot on the Egin Bench including both fall and spring recharge efforts. Implement a fall 2008 recharge pilot project using storage water based on Committee of Nine approval and with consideration of Henry's Fork winter flows.
> - 30 kaf recharge above American Falls on Jensen Grove, Aberdeen Springfield Canal, and New Sweden systems, and with consideration of South Fork River springtime flows.[2]

Managed recharge is clearly a crucial component of the CAMP, and the removal of the subordination condition as requested by TFCC and NSCC would fatally impact recharge efforts on the ESPA.

The Upper Snake Water Users have a direct and substantial interest in supporting and defending the conditions of Water Right No. 01-7011 as issued by the Department. As discussed above, Mud Lake Water Users possesses a yet-to-be licensed permit for recharge that would be directly impacted in the subordination condition challenged by TFCC and NSCC is removed and Fremont-Madison is currently participating in a managed recharge effort that could be impacted in the subordination condition is removed. The Upper Snake Water Users are in the best position to represent their interests and to know and understand the specific impacts that would result to their water rights and recharge efforts if TFCC and NSCC were successful in changing the conditions of

---

2 See *Draft Comprehensive Aquifer Management Plan*, November 6, 2008, at 23. The plan is available at: http://www.idwr.idaho.gov/ESPAPlan/ESPA_CAMP_Plan/FINALESPADRAFTPLAN11-12-08.pdf

Water Right No. 01-7011. Indeed, the Upper Snake Water Users previously participated as *amicus curiae* in a district court action brought by TFCC and NSCC in relation to Water Right No. 01-7011. The Upper Snake Water Users argued that the State of Idaho's motion to dismiss should be granted, which the court eventually did.[3]

Now that the license for this water right has been issued and challenged, the Upper Snake Water Users' are seeking to intervene before the contested case on this matter to represent their direct and substantial interests in this matter. The Upper Snake Water Users do not intend to introduce any additional issues in this matter, but only seek to protect the currently-imposed conditions. Therefore, the Upper Snake Water Users will not unduly broaden the issues before the hearing officer. Additionally, there is no party who adequately represents the Upper Snake Water users that is currently a party to this proceeding.

Because no formal hearing or prehearing conference has been yet established in this matter, the Upper Snake Water Users' Petition to Intervene is timely as it is being filed more than fourteen days before the date of the formal hearing or prehearing conference, as required by IDAPA 37.01.01.352.

Additionally, in the Department's *Order Designating Contested Case and Appointing Hearing Officer* in this matter, it specifically states that "any petition for intervention in this proceeding shall be considered only if the persons or entities seeking intervention agree to accept the appointed hearing officer." The Upper Snake Water Users hereby accept the appointment of Gerald F. Schroeder as the hearing officer in this matter.

---

3 The case was numbered CV-2007-1093.

In sum, the Upper Snake Water Users meet all of the standards and requirements imposed by the Department's Rules and Orders, and therefore respectfully request an order granting their intervention in this matter.

DATED this 4th day of December, 2008.

Robert L. Harris

Robert L. Harris, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, a true and correct copy thereof on this 4th day of December, 2008.

DOCUMENT SERVED: PETITION TO INTERVENE

INDIVIDUALS SERVED:

Victoria Wigle Idaho Department of Water Resources PO Box 83720 Boise, Id 83720-0098 victoria.wigle@idwr.idaho.gov	(√) *First Class Mail* ( ) *Hand Delivery* ( ) *Facsimile* ( ) *Via Overnight Mail* (√) *Email*
Honorable Gerald F. Schroeder Hearing Officer (Home Address) fcjschroeder@gmail.com	( ) *First Class Mail* ( ) *Hand Delivery* ( ) *Facsimile* ( ) *Via Overnight Mail* (√) *Email*
John Rosholt Travis Thompson Barker Roshotl 113 Main Ave. West, Ste. 303 Twin Falls, ID 83301-6167 jar@idahowaters.com tlt@idahowaters.com	(√) *First Class Mail* ( ) *Hand Delivery* ( ) *Facsimile* ( ) *Via Overnight Mail* (√) *Email*
Randall C. Budge Thomas J. Budge Racine Olson Nye Budge & Bailey Chtd. PO Box 1391 Pocatello, ID 83204-1391 rcb@racinelaw.net tjb@racinelaw.net	(√) *First Class Mail* ( ) *Hand Delivery* ( ) *Facsimile* ( ) *Via Overnight Mail* (√) *Email*

Robert L. Harris
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

G:\WPDATA\RLH\1047 MLW\AMilner_License\Filed Pleadings\Petition.Intervene.wpd:sm

RECEIVED
JAN 30 2009
DEPARTMENT OF
WATER RESOURCES

LAWRENCE WASDEN
ATTORNEY GENERAL

STEVEN L. OLSEN, ISB #3586
Chief of Civil Litigation

MICHAEL S. GILMORE, ISB # 1625
Deputy Attorney General
P.O. Box 83720
Boise, ID 83720-0010
Telephone: (208) 334-2400
mike.gilmore@ag.idaho.gov
Attorney for Petitioner Idaho Water Resource Board

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF LICENSING WATER RIGHT PERMIT NO. 01-7011 IN THE NAME OF TWIN FALLS CANAL CMPANY AND NORTH SIDE CANAL COMPANY	))))	**IDAHO WATER RESOURCE BOARD'S PETITION TO INTERVENE**

Petitioner the Idaho Water Resource Board, by and through its counsel of record, hereby petitions to intervene in In the Matter of Licensing Water Right Permit No. 01-7011 in the Name of Twin Falls Canal Company and North Side Canal Company, which is an application to use water for hydroelectric generation at Milner Dam, for the reasons stated below:

IDENTITY AND AUTHORITY OF PETITIONER

1. Idaho Constitution Article XV, § 7, requires the Legislature to compose a "State Water Resource Agency" with power, among other things, "to formulate and implement a state water plan for optimum development of water resources in the public interest."

2. Idaho Code § 42-1732, pursuant to Article XV, § 7, "establishe[s] as the constitutional water agency within the department of water resources the Idaho water resource board" (IWRB). The IWRB is composed of eight members, who are listed below:

(a) Terry T. Uhling, Chairman, Boise
(b) Gary M. Chamberlain, Vice-Chairman, Challis
(c) Bob Graham, Secretary, Bonners Ferry
(d) Jerry R. Rigby, Chairman, Rexburg
(e) Charles (Chuck) Cuddy, Orofino

(f) L. Claude Storer, Idaho Falls
(g) Leonard Beck, Burley
(h) Vic Armacost, New Meadows

The IWRB's mailing address is:

Idaho Water Resource Board
322 East Front Street
P.O. Box 83720
Boise, Idaho 83720-0098

3. Idaho Code § 42-1734 provides the IWRB has powers and duties that include: "(1) To have and exercise all of the rights, powers, duties and privileges vested by article XV, section 7, ... in the water resource agency; ... ."

4. Idaho Code § 42-1734A(1) provides that the IWRB "shall subject to legislative approval, progressively formulate, adopt and implement a comprehensive state water plan for conservation, development, management and optimum use of all unappropriated water resources and waterways of this state." Idaho Code § 42-1736, in turn, provides that the State Water Plan adopted by the IWRB "shall not become effective until it has been submitted to the legislature ... and has been affirmatively acted upon [by] concurrent resolution which may adopt, reject, amend or modify" the Plan.

THE STATE WATER PLAN

5. The current and previous State Water Plans are posted on the Idaho Department of Water Resources website at:

http://www.idwr.idaho.gov/waterboard/Planning/State_Planning/State_Planning.htm

6. Among other things, the 1996 State Water Plan, which is currently in effect, was submitted to the Legislature and, by 1997 Idaho Session, Chapter 38, Section 1, the 1996 State Water Plan was "ratified and approved with the following amendment to Policy 5B relating to Snake River Minimum Flows." Part 5 of the State Water Plan, River Basins Group, Snake River Basin, was adopted and amended by Section 1 as follows:

> 5A–SWAN FALLS AGREEMENT
> It is the policy of Idaho that the Swan Falls Agreement between the state and Idaho Power Company establishes the framework for water management in the Snake River Basin.

5B-SNAKE RIVER MINIMUM FLOWS
It is the policy of Idaho that minimum average daily flows at the Murphy gaging station shall meet or exceed 3,900 cfs from April 1 to October 31 and 5,600 cfs from November 1 to March 31. The average daily flow measured at the Weiser gage shall not be less than 4,750 cfs. A minimum average daily flow of 5,000 cfs at Johnson's Bar shall be maintained and an average daily flow of 13,000 cfs shall be maintained at Lime Point (river mile 172) a minimum of 95 percent of the time. The exercise of water rights above Milner Dam has and may reduce the flow at the dam to zero.

5C-SNAKE RIVER TRUST WATER
It is the policy of Idaho that water held in trust by the state pursuant to Idaho Code 42-203B be reallocated to new uses in accordance with the criteria established by Idaho Code 42-203A and 42-203C.

5D-SNAKE RIVER BASIN DCMI
It is the policy of Idaho that 150 cfs of the water held in trust by the state above Swan Falls Dam pursuant to Policy 5C be reallocated to meet future domestic, commercial, municipal, and industrial consumptive uses in accordance with state law.

5E-SNAKE RIVER BASIN AGRICULTURE
It is the policy of Idaho that appropriated water held in trust by the state pursuant to Policy 5C, less the amount of water necessary to provide for present and future DCMI uses as set forth in Policy 5D, shall be available for reallocation to meet new and supplemental irrigation requirements which conform to Idaho Code 42-203A, 203B, 203C and 203D.

5F-SNAKE RIVER BASIN HYDROPOWER
It is the policy of Idaho that hydropower use be recognized as beneficial use of water, and that depletion of flows below the minimum average daily flows set forth in Policy 5B is not in the public interest.

5G-SNAKE RIVER NAVIGATION
It is the policy of Idaho that water sufficient for commercial and recreational navigation is provided by the minimum flows established for the Snake River.

5H-SNAKE RIVER BASIN SPRINGS
It is the policy of Idaho to seek to maintain spring flows in the American Falls and Thousand springs reaches of the Snake River which will sustain beneficial uses of surface and ground water supplies in accordance with state law.

5I SNAKE RIVER BASIN NEW STORAGE
It is the policy of Idaho that applications for large surface storage projects upstream from the Murphy gage be approved subject to the requirement that the use is in the public interest.

5J-STORAGE ACQUISITION
It is the policy of Idaho that reservoir storage be acquired in the

name of the Idaho Water Resource Board to provide management flexibility in assuring the minimum flows designated for the Snake River.

THE IWRB'S PURPOSE OF, POWER TO, AND INTEREST IN INTERVENTION

7. The purpose of the IWRB's intervention would be to support the application of the policies of the State Water Plan, as adopted and amended by the Idaho Legislature, to the licensing of Water Right Permit No. 01-7011. In all likelihood, Water Right Permit No. 01-7011 will be the most important water right licensed by the Department in which the Department considers proper application of the elements of the State Water Plan quoted above.

8. The IWRB has the power to sue and be sued and to take all actions necessary to carry out its powers and duties. Idaho Code § 42-1734(14), -21).

9. The IWRB has a direct and substantial interest in this contested case because it formulated the State Water Plan, which was adopted and amended by the Legislature, and is directed by Article XV, § 7, and by Idaho Code § 42-1734A(1) to implement the State Water Plan. As a practical matter, implementation of the State Water Plan requires the Department of Water Resources to include conditions in the license for Water Right Permit No. 01-7011 for Milner Dam that reflect the requirements of the State Water Plan.

RELIEF REQUESTED

10. The IWRB seeks as relief that the license awarded to the applicants North Side Canal Company and Twin Falls Canal Company for Water Right No. 01-07011 contain all conditions necessary to comply with the State Water Plan.

Respectfully submitted this 29th day of January, 2009.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By _____
Michael S. Gilmore
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of January 2009, I caused to be served a true and correct copy of the foregoing by the following method to:

Hon. Gerald Schroeder, Hearing Officer
c/o Idaho Department of Water Resources
322 West Front Street
PO Box 83720
Boise, Idaho 83720-0098
fcjschroeder@gmail.com

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☑ E-Mail

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Michael S. Gilmore
Deputy Attorney General

RECEIVED
OCT 0 1 2009
DEPARTMENT OF
WATER RESOURCES

LAWRENCE WASDEN
ATTORNEY GENERAL

STEVEN L. OLSEN, ISB #3586
Chief of Civil Litigation

MICHAEL S. GILMORE, ISB # 1625
Deputy Attorney General
P.O. Box 83720
Boise, ID 83720-0010
Telephone: (208) 334-4130
mike.gilmore@ag.idaho.gov
Attorney for Intervenor Idaho Water Resource Board

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF LICENSING WATER RIGHT PERMIT NO. 01-7011 IN THE NAME OF TWIN FALLS CANAL CMPANY AND NORTH SIDE CANAL COMPANY	))))	**IDAHO WATER RESOURCE BOARD'S MOTION TO AMEND ITS PETITION TO INTERVENE**

Intervenor the Idaho Water Resource Board (IWRB), by and through its counsel of record, Michael S. Gilmore, Deputy Attorney General, hereby moves to amend its Petition to Intervene in this proceeding. At its meeting of Thursday, September 24, 2009, IWRB instructed its counsel to move to amend its Petition to Intervene to state the additional ground for intervention that IWRB holds permits for ground water recharge to the Snake River aquifer and has applied for additional ground water recharge rights that have not yet been permitted. IWRB does not move to amend the Hearing Officer's March 27, 2009, Order Granting Petitions For Intervention that limited the grant of IWRB's Petition to Intervene in that Order. Neither does IWRB move to amend the Hearing Officer's August 28, 2009, Scheduling Order.

IWRB proposes to amended its Petition to Intervene by adding the following underlined words or sentences to existing paragraphs in its Petition to Intervene or the following underlined paragraphs as new paragraphs to its Petition to Intervene.

3. Idaho Code § 42-1734 provides that IWRB has powers and duties that include: "(1) To have and exercise all of the rights, powers, duties and privileges vested by article XV, section 7, ... in the water resource agency; [and] (6)

To file applications and obtain permits in the name of the board, to appropriate, store, or use the unappropriated waters of any body, stream, or other surface or underground source of water for specific water projects ... ."

....

6.1 The IWRB holds permits for or has applied for water rights for the following aquifer recharge projects:

(a) Water Permit No. 1-7054 (which is in the licensing stage), with a priority date of August 25, 1980, for ground water recharge with a diversion rate of 1,200 cfs from January 1 through December 31. The point of diversion is from the Snake River in Jerome County in the SWNW quarter-quarter section of Sections 28 and 29, Township 10S, Range 21 E. This point of diversion is from the reservoir behind Milner Dam, *i.e.*, it is upstream from Milner Dam. The map attached as Exhibit A, which was downloaded from IDWR's mapping services, yellow-highlights this quarter-quarter section. Water License No. 1-7054 will be directly affected by the Department's consideration of the "subordination" term at issue in this contested case.

(b) Water Permit No. 37-7842, with a priority date of August 25, 1980, for ground water recharge with a diversion rate of 800 cfs from January 1 through December 31. The point of diversion is from the Big Wood River and the Little Wood River in Lincoln County in the SWSE quarter-quarter section of Section 24, Township 4S, Range 19 E. The Big Wood and Little Wood Rivers are tributary to the Malad River, which is tributary to the Snake River downstream from Milner Dam. Water Permit No. 37-7842 would not be directly affected by the Department's consideration of the "subordination" term at issue in this contested case, but this water permit is listed for completeness.

(c) In addition on March 20, 1998, the Board applied for the following year-around ground water recharge rights, all of which would divert from the Snake River or its tributaries upstream from Milner Dam:

No.	River	County	Diversion Rate (cfs)
01-7131	Snake	Bonneville & Jefferson	230.01
01-7132	Snake	Jefferson	283
01-7133	Snake	Bingham	682
01-7134	Snake	Bingham	475
01-7135	Snake	Bonneville	949

01-7136	Snake	Jefferson	537
01-7137	Snake	Jefferson	698
01-7139	Snake	Jefferson	110
01-7140	Snake	Jefferson	253
01-7141	Snake	Jefferson	1,095
01-7142	Snake	Jerome[1]	2,831
01-7143	Snake	Twin Falls[2]	3,738
21-7574	Henry's Fork	Fremont	160
21-7575	Henry's Fork	Fremont	339
21-7576	Fall River	Fremont	294
21-7577	Henry's Fork	Fremont	399
21-7578	Henry's Fork	Fremont	568
21-7579	Henry's Fork	Fremont	337
21-7580	Henry's Fork	Fremont	94

None of these applications has yet received a permit.

7. The purposes of the IWRB's intervention would be to support the application of the policies of the State Water Plan, as adopted and amended by the Idaho Legislature, to the licensing of Water Right Permit No. 01-7011, and to protect is water rights listed in Paragraph 6.I. In all likelihood, Water Right Permit No. 01-7011 will be the most important water right licensed by the Department in which the Department considers proper application of the elements of the State Water Plan quoted above.

....

9. The IWRB has a direct and substantial interest in this contested case because it formulated the State Water Plan, which was adopted and amended by the Legislature, and is directed by Article XV, § 7, and by Idaho Code § 42-1734A(1) to implement the State Water Plan. The IWRB also has a direct and substantial interest in this contested case because this case's outcome may affect IWRB's ability to use whatever recharge rights it now has or may be granted in the future under the permits and applications listed in Paragraph 6.1. As a practical matter, implementation of the State Water Plan requires the Department of Water Resources to include conditions in the license for Water Right Permit No. 01-7011 for Milner Dam that reflect the requirements of the State Water Plan and protect IWRB's permits and applications listed in Paragraph 6.1.

---

1 This Jerome County diversion is from the NESE quarter-quarter section of Section 29, Township 10S, Range 21E, which Exhibit A shows is from the reservoir behind Milner Dam.

2 This Twin Falls County diversion is also from the NESE quarter-quarter section of Section 29, Township 10S, Range 21E, which Exhibit A shows is from the reservoir behind Milner Dam.

Respectfully submitted this 30th day of September, 2009.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By _____
Michael S. Gilmore
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of September, 2009, I caused to be served a true and correct copy of the foregoing by the following method to:

Hon. Gerald Schroeder, Hearing Officer
c/o Idaho Department of Water Resources
322 West Front Street
PO Box 83720
Boise, Idaho 83720-0098
fcjschroeder@gmail.com

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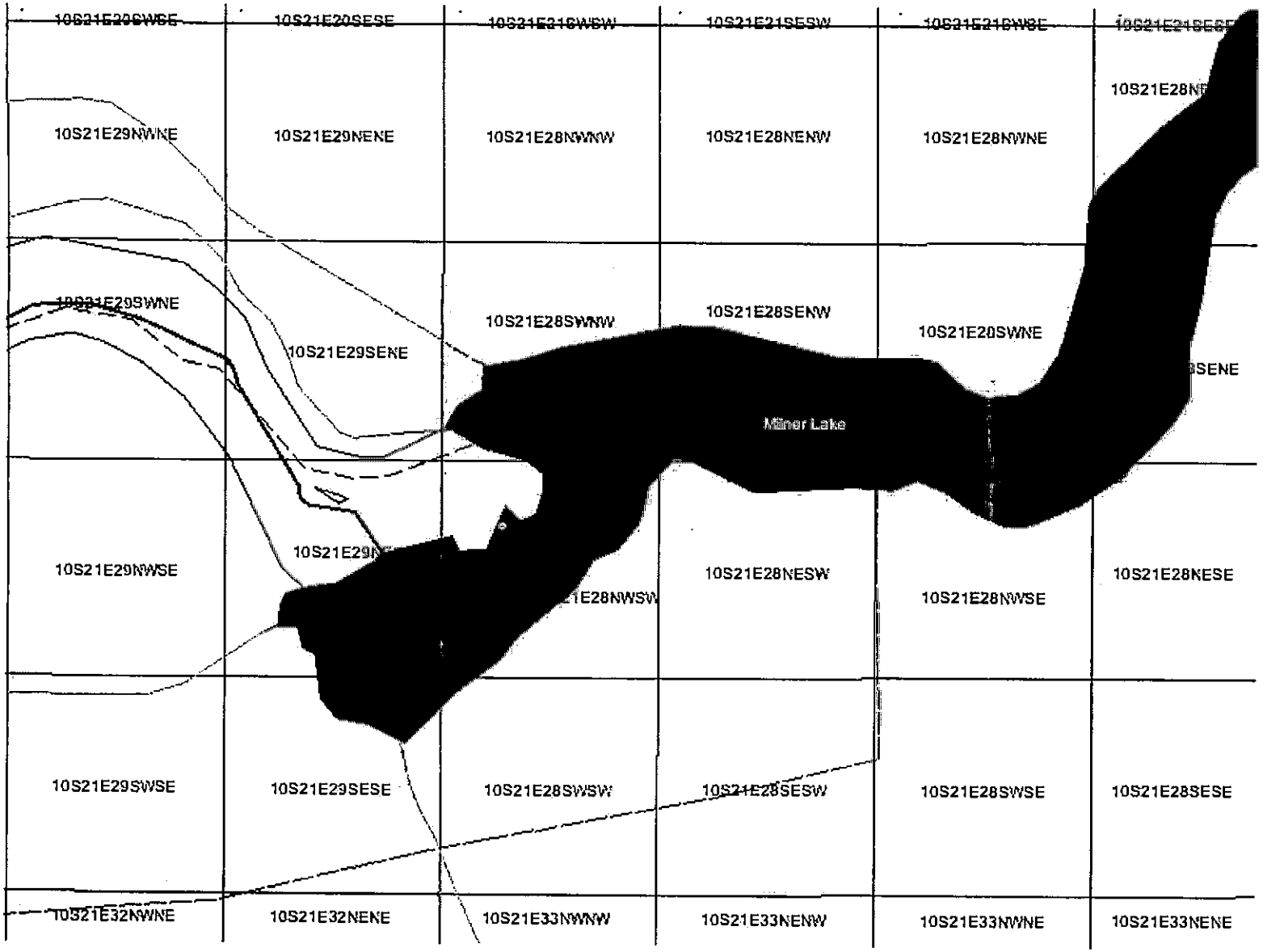
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Michael S. Gilmore
Deputy Attorney General

Exhibit A


10S21E29NWNE
10S21E29NENE
10S21E28NWNW
10S21E28NENW
10S21E28NWNE
10S21E29SENE
10S21E28SWNW
10S21E28SENW
10S21E28SWNE
Milner Lake
10S21E29NWSE
10S21E28NESW
10S21E28NWSE
10S21E28NESE
10S21E29SWSE
10S21E29SESE
10S21E28SWSW
10S21E28SESW
10S21E28SWSE
10S21E28SESE
10S21E32NWNE
10S21E32NENE
10S21E33NWNW
10S21E33NENW
10S21E33NWNE
10S21E33NENE

9/29/2009

Exhibit 27

State of Idaho
DEPARTMENT OF WATER RESOURCES
1301 North Orchard Street, Boise, ID 83706 - P.O. Box 83720, Boise, ID 83720-0098
Phone: (208) 327-7900 Fax: (208) 327-7866 Web Site: www.idwr.state.id.us

DIRK KEMPTHORNE
Governor
KARL J. DREHER
Director

MEMORANDUM

To: Senator Laird Noh
Representative Dell Raybould
Co-Chairs, Natural Resources Interim Committee on
Water Supply and Management Issues

Date: June 23, 2004

From: Karl J. Dreher

Subject: Swan Falls Agreement and Eastern Snake River Plain Aquifer

This memorandum is provided to the Interim Natural Resources Legislative Committee on Water Supply and Management Issues in response to questions regarding the effect of the Swan Falls Agreement on conjunctive administration of ground water rights diverting from the Eastern Snake Plain Aquifer and surface water rights diverting from hydraulically-connected surface water sources. These questions have arisen as a result of the following two papers that have been presented to the Legislative Committee: (1) "Idaho Water Issues of the 21st Century, The Watermaster's Perspective" by Ronald D. Carlson, Watermaster for Snake River Water District 1; and (2) "Initial Comments to the Natural Resources Interim Committee on Water Supply and Management Issues" by the Idaho Ground Water Appropriators, Inc., dated April 7, 2004. It should be noted that numerous issues regarding the interpretation of the Swan Falls Agreement have arisen since it was signed almost twenty-years ago. And as both papers demonstrate, there are strongly held views on the proper resolution of some of these issues. However, in the absence of any definitive judicial resolution of these issues, as the Director of the Idaho Department of Water Resources I must be guided by the plain language of the Swan Falls Agreement and the Department's past application of the Swan Falls Agreement. This memorandum will summarize some of the relevant actions taken by the Department to date in implementing the Swan Falls Agreement.

The Swan Falls Agreement, dated October 25, 1984, was a settlement of two cases brought by the Idaho Power Company against the State of Idaho and the holders of certain surface and ground water rights under which water was diverted above Swan Falls Dam. As part of the Swan Falls Agreement, the Idaho Power Company and the State of Idaho executed what is commonly known as the 1180 Contract to implement the provisions of Senate Bill 1180. Together, these two documents constitute what is commonly referred to overall as the Swan Falls Agreement (the "Agreement").

The Agreement subordinated the non-consumptive hydropower water rights of the Idaho Power Company to existing upstream consumptive uses under surface and ground water rights within the Snake River Basin with priority dates earlier than July 1, 1985. This subordination to existing water rights was unconditional. In addition, the Agreement subordinated the hydropower rights held by the Idaho Power Company to depletion under certain future upstream beneficial uses under future rights acquired pursuant to state law; provided, however, that the Idaho Power Company is entitled as against these future uses to an "unsubordinated right" of "3900 c.f.s. average daily flow from April 1 to October 31, and 5600 c.f.s. average daily flow from November 1 to March 31, both to be measured at the Murphy U.S.G.S. gauging station immediately below Swan Falls."

While the plain language of the Swan Falls Agreement determines the priority relationship between Idaho Power Company's hydropower water rights for its facilities above Swan Falls Dam as against all other water rights above Swan Falls Dam, the view has been expressed that the Swan Falls Agreement also subordinated all uses from the springs in the Thousand Springs Area to the 3,900 cfs and 5,600 cfs flows specified in the Agreement to be maintained at the Murphy gauging station. The foundation for this view lies in the fact that the Agreement expressly contemplated future ground water development from the Eastern Snake Plain Aquifer that could result in depletions to the flow of the Snake River at Murphy down to the minimum flows established by the Agreement. Policy 32F of the State Water Plan is cited as further support for this view. Policy 32F was adopted in 1986 after the signing of the Agreement and, in part, provided:

> The minimum flows established for the Murphy gaging station should provide an adequate water supply for aquaculture. It must be recognized that while existing water rights are protected, it may be necessary to construct different diversion facilities than presently exist.

While there is no question that the Agreement resolved the impediment created by Idaho Power Company's hydropower water rights to future development of surface and ground water supplies above Swan Falls Dam, the assertion that the Agreement also subordinated other spring users water rights is not clear on the face of the Agreement. Given the specificity with which the Agreement is drafted, it is logical to conclude that the parties would have expressly included a provision stating that other surface water rights from spring sources were also being subordinated by the Agreement, had that been the intent of the parties to the Agreement. This would seem to be particularly true given the valuable property rights that would have been affected by such an interpretation. Further, a nonbinding policy statement of the Idaho Water Resource Board regarding only aquaculture rights does not give rise to such an interpretation. Indeed, no specific action was ever taken by the Idaho Legislature to implement Policy 32F of the 1986 State Water Plan and, in fact, Policy 32F was changed and replaced with Policy 5H by the Idaho Water Resource Board in 1996. Policy 5H provides:

> It is the policy of Idaho to seek to maintain spring flows in the American Falls and Thousand Springs reaches of the Snake River which will sustain beneficial uses of surface and ground water supplied in accordance with state law.

A natural reading of these policies is that they constitute a recognition by the Idaho Water Resource Board that in applying the prior appropriation doctrine various principles must be confronted such as the requirement that the holder of a water right employ a reasonable means of diversion, that exercise of a water right can not unreasonably impede use of a water source by other lawful appropriators, and that the futile call doctrine is a potential defense to a delivery call against junior priority ground water rights. These principles and other principles embodied within the prior appropriation doctrine provide the mechanisms for balancing development of our limited water resources with the protection of senior priority water rights. Indeed, such an interpretation is consistent with the implementation of the Agreement by the Idaho Department of Water Resources.

As provided under the Agreement, the State of Idaho commenced a general adjudication in 1987 of all rights to the use of surface and ground water within the Snake River Basin in Idaho to provide a basis for the effective administration of water rights from the interconnected sources within the basin. In 1994, the Interim Legislative Committee on the Snake River Basin Adjudication reiterated that "[c]onjunctive management of ground and surface water rights is one of the main reasons for the commencement of the Snake River Basin Adjudication." *1994 Interim Legislative Committee on the Snake River Basin Adjudication Report at 36.* In accordance with Idaho's adjudication statutes and legislative directive, the Snake River Basin Adjudication ("SRBA") District Court has determined that all water sources will be administered as connected sources of water in the Snake River Basin in accordance with the prior appropriation doctrine as established by Idaho law, unless shown to be a separate water source. *Basinwide Issue 5 Memorandum Decision and Order dated February 27, 2002.* Since the water sources for the springs discharging in the Thousand Springs Area are hydraulically connected to the ground water comprising the Eastern Snake Plain Aquifer, there is no factual basis for arguing that the aquifer is a separate source. Consequently, the principles of the prior appropriation doctrine as established by Idaho law govern the administration of both ground water rights from the Eastern Snake Plain Aquifer and surface water rights from sources in the Thousand Springs Area.

The conclusion that the prior appropriation doctrine as established by Idaho law governs the administration of both the surface water rights from sources in the Thousand Springs Area and ground water rights from the Eastern Snake Plain Aquifer is also confirmed by rules adopted by the Department of Water Resources. In 1994, my predecessor adopted statewide Rules Governing the Conjunctive Management of Surface and Ground Water. Rule 50 specifically designates the Eastern Snake Plain Aquifer as an area determined to have a common ground water supply, meaning that the diversion and use of ground water from the aquifer affects hydraulically-connected ground water and the flow in hydraulically-connected surface waters.

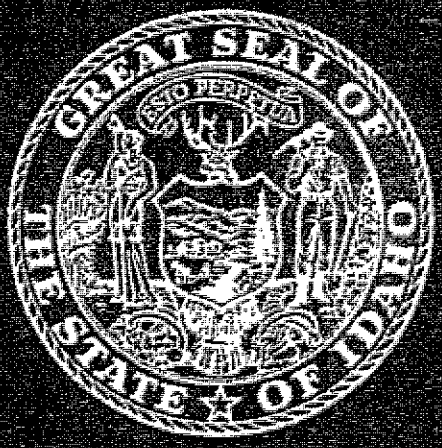
Following the entry of partial water right decrees by the SRBA District Court and the creation and extension of Water Districts No. 130 and No. 120 in 2002 and 2003, I issued an *Amended Order* on March 10, 2004, in response to a water delivery call by Rangen, Inc., the holder of various surface water rights diverted from spring sources. That order requires the holders of certain consumptive ground water rights subject to administration in Water District No. 130 not to divert ground water beginning April 1, 2004, unless sufficient replacement water is provided as set forth in the *Amended Order*. Legal challenges to the validity of the *Amended Order* and previous orders are pending before the Department of Water Resources and have been temporarily stayed for a one-year period, relating to the initial time period for the work of the Interim Natural Resources Legislative Committee on Water Supply and Management Issues. In addition, litigation before the Ada County District Court has been filed challenging the constitutionality of the Conjunctive Management Rules and the manner in which I have applied those rules, which litigation has also been stayed.

Clearly, the actions that the State of Idaho and the Department of Water Resources have taken following the Swan Falls Agreement are predicated on the premise that water rights from springs in the Thousand Springs Area and ground water rights from the Eastern Snake Plain Aquifer are to be administered as being from hydraulically-connected sources under the prior appropriation doctrine as established by Idaho law and that the Agreement only defined the relationship between surface and ground water rights and non-consumptive hydropower rights held by Idaho Power.

In setting the current course for conjunctive administration of water rights from inter-connected ground and surface waters in the Eastern Snake River Plain, I have followed what I have concluded to be the logical course anticipated by the commencement of the Snake River Basin Adjudication and the promulgation of the Conjunctive Management Rules. The dilemma we confront is that various parties have been unable to agree upon the extent that various legal principles (such as reasonable means of diversion, full economic development, and defenses or lack of defenses to administration by priority) come within Idaho's prior appropriation laws. As a community of water users, legislators, and state officials, we have a choice: if we want to continue to debate the parameters of Idaho's laws implementing the prior appropriation doctrine and the meaning of the Swan Falls Agreement, we should proceed directly with litigation; alternatively, we can agree to disagree on the governing legal principles and pursue a negotiated outcome. I firmly believe our efforts should be directed toward pursuing the latter rather than the former because in the end, a litigated solution is unlikely to lead to a lasting outcome acceptable to our community as a whole.

Exhibit 28

IDAHO STATE WATER PLAN



ADOPTED BY THE

IDAHO WATER RESOURCE BOARD

JANUARY 1992

"There shall be constituted a Water Resource Agency, composed as the Legislature may now or hereafter prescribe, ... Additionally, the State Water Resource Agency shall have power to formulate and implement a state water plan for optimum development of water resources in the public interest. The Legislature of the State of Idaho shall have the authority to amend or reject the state water plan in a manner provided by law . . . "

Idaho Constitution

State of Idaho

THE STATE WATER PLAN

Cecil D. Andrus, Governor

Idaho Water Resource Board

F. Dave Rydalch
Chairman

Clarence Parr
Vice-Chairman

Gene M. Gray
Secretary

Kenneth E. Hungerford
Donald R. Kramer
William Platts
Mike Satterwhite
J.D. Williams

Adopted January 1992
Statehouse
Boise, Idaho 83720

Former Members of the Idaho Water Resource Board

Robert M. Bandy, Priest River
Mary T. Brooks, Boise
George L. Crookham, Jr., Caldwell
Sally L. Cupan, Sandpoint
Leonard E. Graham, Rigby
Robert M. Hammes, St. Maries
M. Reed Hansen, Idaho Falls
Franklin Jones, Boise
Evan M. Kackley, Wayan
Ferris M. Kunz, Montpelier
Wm. J. Lanting, Hollister
Charles J. Marshall, Jerome
Herman J. McDevitt, Pocatello
Joseph H. Nettleton, Murphy
Thomas Olmstead, Twin Falls
Arlie L. Parkins, Marsing
Scott W. Reed, Coeur d'Alene
Edward Reichert, Filer
Edwin C. Schlender, Malta
James Shawver, Eden
LeRoy Stanger, Idaho Falls
John F. Streiff, Lewiston
George L. Yost, Emmett

BEFORE THE IDAHO WATER RESOURCE BOARD

IN THE MATTER OF UPDATING)
THE STATE WATER PLAN)
)

A RESOLUTION

WHEREAS, the Idaho Water Resource Board (the Board) has circulated proposed changes to the policies contained in the state water plan, and

WHEREAS, the Board has provided an opportunity for the public to comment on the proposed changes and to suggest others, and

WHEREAS, the Board has considered the hearing officer's report in this matter, has reviewed the record, and modified their proposed changes accordingly.

NOW, THEREFORE, BE IT RESOLVED that the Board adopts the attached changes to the policies of the state water plan, and directs that these changes be provided to the Idaho State Legislature for their consideration.

DATED this 3rd day of January, 1992.

F. Dave Rydalch

F. DAVE RYDALCH, Chairman
Idaho Water Resource Board

ATTEST

GENE M. GRAY, Secretary

THE WATER PLANNING PROGRAM

The Idaho State Water Plan was adopted by the Water Resource Board to guide the development, management, and use of the state's water and related lands. The plan recognizes past actions, addresses present conflicts and opportunities, and seeks to ensure that future water resource uses will complement and supplement state goals directed toward achieving a "quality of life" for the citizens of Idaho. The plan is a dynamic document, subject to change to reflect citizens desires and to be responsive to new opportunities and needs. According to statute, a formal review of this plan must take place at least every five years.

Constitutional Authority

The authority for the preparation of a State Water Plan is Article XV, Section 7 of the Idaho Constitution. This constitutional amendment was adopted in November 1964 following a state-wide referendum and provides that:

> There shall be constituted a Water Resource Agency, composed as the Legislature may now or hereafter prescribe, which shall have power to formulate and implement a state water plan for optimum development of water resources in the public interest; to construct and operate water projects; to issue bonds, without state obligation, to be repaid from revenues of projects; to generate and wholesale hydroelectric power at the site of production; to appropriate public waters as trustee for Agency projects; to acquire, transfer and encumber title to real property for water projects and to have control and administrative authority over state land required for water projects; all under such laws as may be prescribed by the Legislature.

Section 7 provides the basic guidance and authority to formulate a State Water Plan. Before the adoption of Section 7, Section 3 of the Idaho constitution provided for the appropriation and allocation of water during low water conditions. Although no legal confrontations have occurred, Section 7 probably tempers Section 3 in that future decisions must be in conformance with the State Water Plan. Section 3 provides that:

> The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes.
>
> Priority of appropriation shall give the better right as between those using the water; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any other purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes. And in any organized mining district those using the water for mining purposes or milling purposes connected with mining have preference over those using the same for manufacturing or agriculture purposes.
>
> But the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use, as referred to in section 14 of article I of this Constitution.

- *River Basins Group*

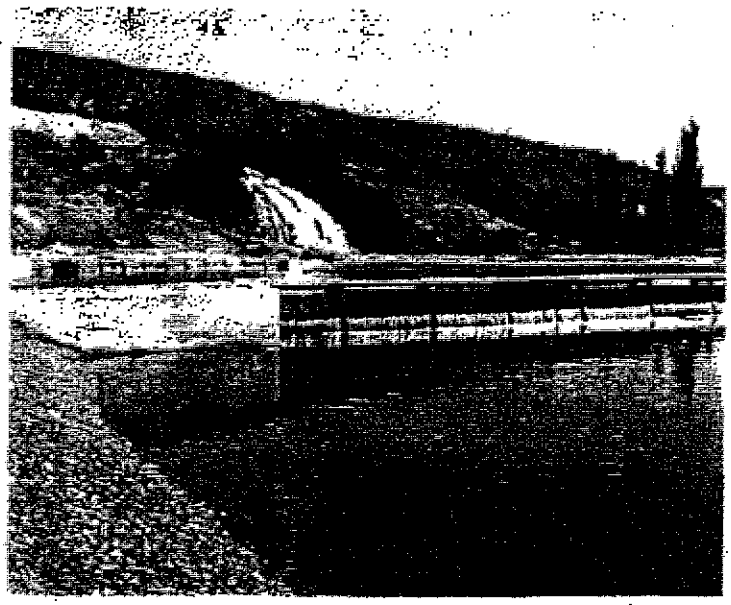
POLICY 5A - SNAKE RIVER BASIN

It is the policy of Idaho that the Swan Falls agreement between the state and Idaho Power Company establishes the framework for water management in the basin. Central to the agreement is the assumption that the Snake River is fully appropriated upstream from Swan Falls Dam except for trust water held by the state and occasional flood waters. The state recognizes that the exercise of water rights above Milner Dam has and may reduce flow at the dam to zero. Minimum average daily flows at the Murphy gauging station shall meet or exceed 3,900 cfs from April 1 to October 31 and 5,600 cfs from November 1 to March 31. The average daily flow measured at the Weiser gauge shall not be less than 4,750 cfs. A minimum average daily flow of 5,000 cfs at Johnson's Bar shall be maintained and an average daily flow of 13,000 cfs shall be maintained at Lime Point (river mile 172) a minimum of 95 percent of the time. Lower flows may be permitted at Lime Point during the months of July, August, and September, during which time the operation of Idaho Power's Hells Canyon dams shall be in the best interest of power and navigation as determined by the Corps of Engineers and Idaho Power Company.

The minimum flows established for the Snake River at the Murphy and Weiser gauging stations are management and permitting constraints; they further insure that the state will be able to assure an adequate hydropower resource base and better protect other values recognized by the state, such as fish propagation, recreation, and aesthetic interests, all of which would be adversely impacted by an inadequate stream flow. The zero flow at Milner Dam is not a target or goal to be achieved, and may not necessarily be desirable. It is rather, a recognition of the current condition in which zero flow passes Milner Dam during certain periods of time. The state should seek to acquire water whenever it becomes available in order to mitigate the impacts of low flow below the dam.

River flows downstream from that point to Swan Falls Dam consist almost entirely of ground-water discharge during portions of low-water years. The Snake River Plain aquifer which provides this water must therefore be managed as an integral part of the river system.

The minimum flows established for Johnson's Bar and Lime Point are contained in the original Federal Power Commission license for the Hells Canyon hydropower complex. By adopting these flows, the Idaho Water Resource Board recognizes the importance of minimum flows to downstream uses and makes their maintenance a matter of state water policy. The Water Resource Board recognizes that the license requirements relate to the provision of water for navigation and power, and not to other instream uses. The Board realizes that the state has no authority to require releases of stored water by the power com-



Aquaculture facility along the Snake River near Buhl, Idaho.

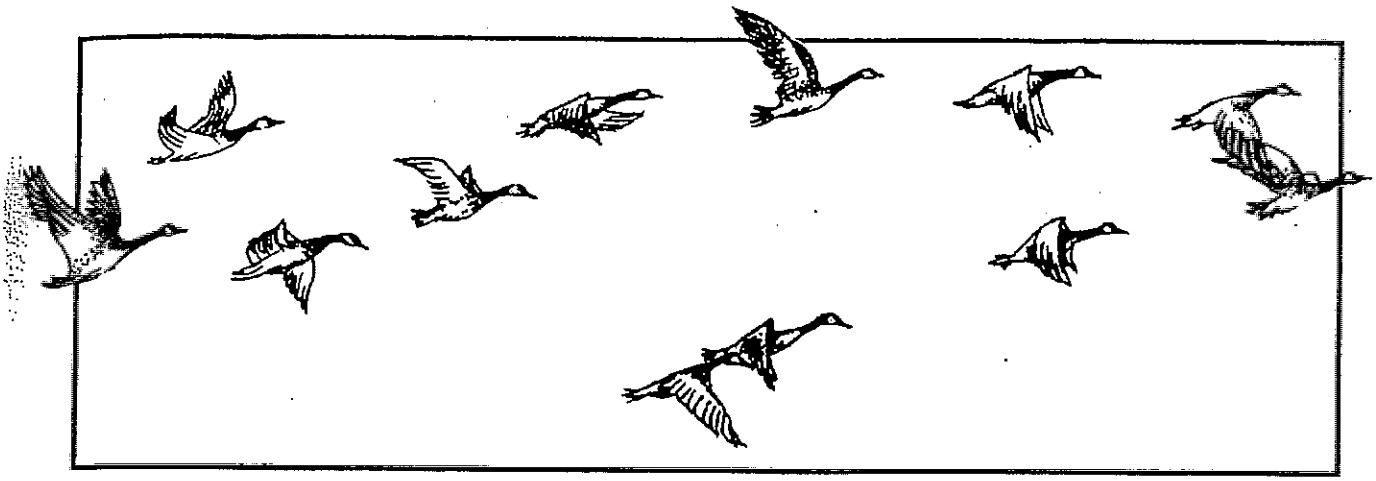
Exhibit 29

IDAHO STATE WATER PLAN

ADOPTED BY THE

IDAHO WATER RESOURCE BOARD

DECEMBER 12, 1986



River Basins Group

POLICY 5A - **Snake River Basin**

IT IS THE POLICY OF IDAHO THAT THE GROUND WATER AND SURFACE WATER OF THE BASIN BE MANAGED TO MEET OR EXCEED A MINIMUM AVERAGE DAILY FLOW OF ZERO MEASURED AT THE MILNER GAUGING STATION, 3,900 CFS FROM APRIL 1 TO OCTOBER 31 AND 5,600 CFS FROM NOVEMBER 1 TO MARCH 31 MEASURED AT THE MURPHY GAUGING STATION, AND 4,750 CFS MEASURED AT WEISER GAUGING STATION. A MINIMUM AVERAGE DAILY FLOW OF 5,000 CFS AT JOHNSON'S BAR SHALL BE MAINTAINED AND AN AVERAGE DAILY FLOW OF 13,000 CFS SHALL BE MAINTAINED AT LIME POINT (RIVER MILE 172) A MINIMUM OF 95 PERCENT OF THE TIME. LOWER FLOWS MAY BE PERMITTED AT LIME POINT ONLY DURING THE MONTHS OF JULY, AUGUST, AND SEPTEMBER.

The minimum flows established for the Snake River at the Murphy and Weiser gauging stations are management constraints; they further insure that minimum flow levels of Snake River water will be available for hydropower, fish, wildlife and recreational purposes. The establishment of a zero minimum flow at the Milner gauging station allows for existing uses to be continued and for some new uses above Milner. It also means that river flows downstream from that point to Swan Falls Dam may consist almost entirely of ground-water discharge during portions of low-water years. The Snake River Plain aquifer which provides this water must therefore be managed as an integral part of the river system.

The minimum flows established for Johnson's Bar and Lime Point are contained in the original Federal Power Commission license for the Hells Canyon hydropower complex. By adopting these flows, the Idaho Water Resource Board recognizes the importance of minimum flows to downstream uses and makes their maintenance a matter of state water policy. Article 43 of the power license provides that:

"The project shall be operated in the interest of navigation to maintain 13,000 cfs flow in the Snake River at Lime Point (river mile 172) a minimum of 95 percent of the time, when determined by the Chief of Engineers to be necessary for navigation. Regulated flows of less than 13,000 cfs will be limited to the months of July, August, and September,

Exhibit 30

IDAHO STATE WATER PLAN



ADOPTED BY

THE
IDAHO
WATER RESOURCE
BOARD

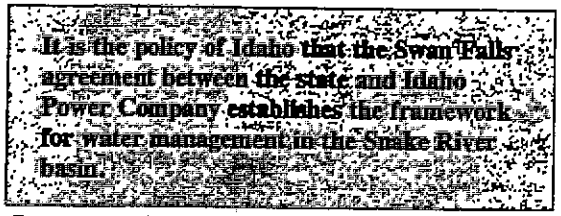
DECEMBER 1996

River Basins Group

The River Basins Group contains resource management policies specific to the state's three major river basin networks: the Snake River Basin, the Bear River Basin in southeast Idaho, and the northern Panhandle river basins.

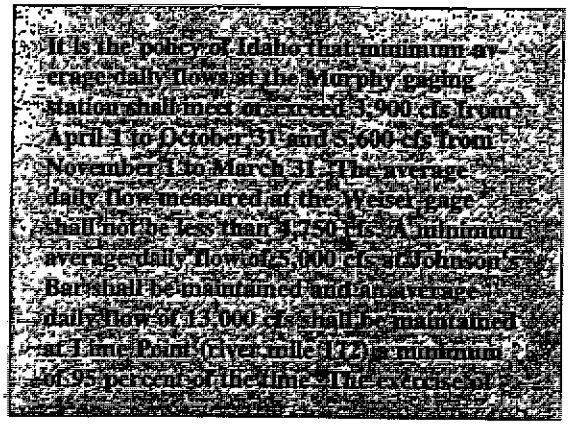
● *Snake River Basin*

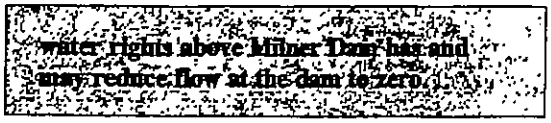
5A - SWAN FALLS AGREEMENT



Comment: The Swan Falls Agreement was signed in 1985 by the State of Idaho and the Idaho Power Company. The Idaho Water Resource Board is committed to continued implementation of this agreement. Minimum flows in the Snake River are crucial to the Swan Falls Agreement. During portions of low water years, river flows downstream from Milner Dam to Swan Falls Dam consist almost entirely of ground water discharge. The Eastern Snake Plain aquifer which provides this water must therefore be managed conjunctively as an integral part of the river system. This agreement also calls for the adjudication of water rights in the Snake River Basin to enhance the state's water management capabilities.

5B - SNAKE RIVER MINIMUM FLOWS





Comment: In licensing the Milner hydropower project, the Federal Energy Regulatory Commission (FERC) specified "target flows" for the Snake River at Milner. The target flow must be satisfied only when water in excess of prior irrigation rights is available. Water for target flows may be acquired from storage or may be leased from the Upper Snake Rental Pool. The State should seek to acquire water whenever it becomes available in order to mitigate the impacts of low flow below the Dam.

The minimum flows established for the Snake River at the Murphy and Weiser gaging stations are management and permitting constraints; they further insure that the State will be able to assure an adequate hydropower resource base and better protect other values recognized by the State such as fish propagation, recreation, and aesthetic interests, all of which would be adversely impacted by an inadequate stream flow.

The minimum flows established for Johnson's Bar and Lime Point are contained in the original Federal Power Commission (now FERC) license for the Hells Canyon hydropower complex. By adopting these flows, the Idaho Water Resource Board recognizes the importance of minimum flows to downstream uses and makes their maintenance a matter of state water policy. Lower flows may be permitted at Lime Point during the months of July, August, and September, during which time the operation of the Hells Canyon dams shall be in the best interest of power and navigation as determined by the Corps of Engineers and Idaho Power Company as owner of the Hells Canyon power facilities.

The Idaho Water Resource Board recognizes that FERC license requirements relate primarily to the provision of water for navigation and power and not to other instream uses. The Board realizes that the state has no authority to require releases of stored water by the power company, but believes the license conditions serve the public interest. When the Hells Canyon hydropower complex is relicensed, the Water Board will reevaluate the public interest.

Exhibit 31

WATER DISTRICT 1

2009 DRAFT RESOLUTIONS

TABLE OF CONTENTS

1.	Annual Meeting of Water District
2.	Watermaster
3.	Treasurer
4.	Election of Watermaster and Treasurer
5.	Budget
6.	Interim Budget
7.	Minimum Charges for Water Delivery
8.	Filing of Resolutions
9.	Cooperative Program
10.	Water District 1 Property
11.	Committee of Nine
12.	Credentials
13.	Authority of Committee of Nine
14.	Approval of Expenses by Committee of Nine
15.	Indemnification of Committee of Nine Members
16.	Resolution – Attorneys Fees
17.	Contingency Fund – Water Rentals
18.	Conditions of Delivery of Water
19.	Special Assessments – Upper Valley Water Users
20.	Rental Pool Procedures of Committee of Nine
21.	Water District 1 Policy Position
22.	Administration
23.	Snake River Basin Adjudication
24.	Endangered Species – Salmon
25.	Endangered Species Act
26.	Clean Water Act
27.	Snake River Recharge/Continued Surface Water Delivery Operations
28.	Implementing Recharge
29.	USBR Operation & Maintenance Activities
30.	Flow Augmentation Study
31.	Hydroelectric Project Relicensing – Hells Canyon Complex & other facilities
32.	NOAA Fisheries Salmon/Steelhead Listings/Hatchery Policy
33.	EPA Policy on Aquatic Herbicides
34.	USBR – Legal Obligations
35.	FCRPS 2008 Biological Opinion Litigation (NWF v NMFS)
36.	Upper Snake Biological Opinion Litigation
37.	DOI – Water for America Initiative
38.	Snail ESA Petitions
39.	Yellowstone Cutthroat Trout ESA Petition
40.	Critical Habitat Designations
41.	Corp of Engineers' Policy on 404 Permits
42.	USBR Storage Right Claims in the SRBA
43.	Water Quality Standards/TMDLS – Upper Snake River Basin
44.	Evaporation Losses from Reservoirs within Water District 1
45.	Cloud Seeding
46.	Water Monitoring Expenses
47.	Additional Storage
48.	IDWR Funding
49.	IWRB Comprehensive Aquifer Management Plan (CAMP)
50.	Ririe Reservoir Flood Control Rule Curves

BE IT FURTHER RESOLVED that the water district treasurer shall maintain said amounts in a separate account and that payment there from shall ONLY be made when authorized by the upper valley Committee of Nine members.

~~18~~20. RENTAL POOL PROCEDURES OF COMMITTEE OF NINE

BE IT RESOLVED that the following Rental Pool Procedures be approved by the Idaho Water Resource Board as follows:

See the Rental Pool Section.

~~20~~21. WATER DISTRICT 1 POLICY POSITION

WHEREAS, there are currently many issues that potentially can change water distribution patterns and water supplies in Idaho; and

WHEREAS, water users are now being asked to fund experts and attorneys in preparation for negotiations and/or litigation; and

WHEREAS, the water users of Water District 1 and their representatives, the Committee of Nine, wish to have a clear representation of the position of Snake River irrigators, and establish the following as the guiding principles in any and all negotiations and litigation:

A. Administration of water rights that have been or will be adjudicated in the SRBA must recognize traditional distribution and water management.

B. The zero minimum flow at Milner, as established in the state water plan be recognized as the Water District 1's position, and that there can be no call for deliveries below Milner by downstream interests.

C. Releases past Milner must be consistent with state law and limited to annual arrangements approved by the Committee of Nine and IWRB.

D. Any changes in upstream water rights that would allow water to be transferred below Milner shall be by Committee of Nine agreement only or will be vigorously opposed.

NOW, THEREFORE, BE IT RESOLVED by the water users of Water District 1, that the Committee of Nine is authorized to allocate sufficient funds to protect and defend these principles in negotiations with the federal government and Indian tribes and in challenging and defending claims in the Snake River Basin Adjudication or other necessary litigation.

~~21~~22. ADMINISTRATION

Exhibit 32

IN THE OISTRICT COURT OF THE FIFTH JUDICIAL OISTRICT OF THE
STATE OF IDAHO, IN ANO FOR THE COUNTY OF TWIN FALLS

In Re SRBA	)	PARTIAL OECREE PURSUANT TO
	)	I.R.C.P. 54(b) FOR
Case No. 39576	)	
	)	Water Right 02-00100

NAME & ADORESS: IOAHO POWER COMPANY
PO BOX 83720
BOISE IO 83707

SOURCES:

SNAKE RIVER	Tributary: COLUMBIA RIVER
COVE CREEK	Tributary: MALAD RIVER
MALAD RIVER	Tributary: SNAKE RIVER
THOUSAND SPRINGS	Tributary: SNAKE RIVER
SNOW BANK SPRINGS	Tributary: SNAKE RIVER
CLEAR LAKE	Tributary: SNAKE RIVER
SAND SPRINGS CREEK	Tributary: SNAKE RIVER

QUANTITY: 2150.00 CFS

PRIORITY OATE: 01-17-1900

POINTS OF OIVERSION:

T02S R01E S18	LOT 10	(SESWSE) Within Owyhee County
	LOT 11	(NWSESE) Within Ada County (Swan Falls Dam)
T09S R18E S31	LOT 8	(NESW) Within Twin Falls County
	LOT 9	(NWSW) Within Jerome County (Shoshone Falls)
T10S R18E S04	LOT 2	(NWNW) Within Twin Falls County (Twin Falls)
	LOT 3	(NENW)
T06S R12E S07	LOT 10	(SWNESE) Within Elmore County
	LOT 5	(SWNESE) Within Gooding County (Bliss Oam)
T07S R13E S02	LOT 7	(SESW) Within Gooding County (Lower Salmon
	LOT 8	(SWSW) Falls)
T08S R13E S02	LOT 1	(NWNE) Within Gooding County
	LOT 2	(NWNE) Within Twin Falls County (Upper Salmon Falls)
T06S R13E S25		SWSW Within Gooding County
S35		NENW
		NENW (Injection)
		NENW (Rediversion) (Malad River)
T06S R13E S25		SWSW Within Gooding County (Malad River)
T06S R13E S36		NWNW
T08S R14E S08		SWNWSE Within Gooding County
		NESWSE
		NWSWSE
		SESWSE (Thousand Springs, Snowbank Springs)
T09S R14E S02	LOT 7	(NESWSE) Within Gooding County (Clear Lake)
T08S R14E S17		SENWSE Within Gooding County (Sand Springs Creek)

PURPOSE AND PERIOO OF USE:

PURPOSE OF USE	PERIOO OF USE	QUANTITY
POWER	01-01 TO 12-31	2150.00 CFS

Power generation is at Swan Falls Dam Power Plant, Shoshone Falls Power Plant, Twin Falls Power Plant, Bliss Dam Power Plant, Lower Salmon Falls Power Plant, Upper Salmon Falls Power Plant, Lower Malad Gorge Power Plant, Upper Malad Gorge Power Plant, Clear Lake Power Plant and Thousand Spring Power Plant.

PLACES OF USE:

POWER T02S R01E S18 LOT 11	Within Ada County (SESE) (Swan Falls Dam Power Plant)
POWER T09S R17E S36 LOT 15	Within Jerome County (NESE) (Shoshone Falls Power Plant)
POWER T10S R18E S04 LOT 3	Within Twin Falls County (NENW) (Twin Falls Power Plant)
POWER T06S R12E S07 LOT 5	Within Gooding County (NESE) (Bliss Dam Power Plant)
POWER T07S R13E S02 LOT 7	Within Gooding County (SESW) (Lower Salmon Falls Power Plant)
POWER T08S R13E S02 LOT 4 S03 LOT 1 LOT 3	Within Twin Falls County (NWNW) (NENE) (NWNW) (Upper Salmon Falls Power Plant)
POWER T06S R13E S27 LOT 2	Within Gooding County (SWSW) (Lower Malad Gorge Power Plant)
POWER T06S R13E S35	Within Gooding County NENW (Upper Malad Gorge Power Plant)
POWER T08S R14E S08 Lot 3	Within Gooding County (NESW) (Thousand Springs Power Plant)
POWER T09S R14E S02 LOT 7	Within Gooding County (SWSE) (Clear Lake Power Plant)
POWER T08S R14E S08 LOT 3	Within Gooding County (NESW) (Thousand Springs Power Plant)

OTHER PROVISIONS NECESSARY FOR DEFINITION DR ADMINISTRATION OF THIS WATER RIGHT:

1. Water right nos. 02-00100, D2-02032A, 02-04000A, and 02-04001A collectively entitle Idaho Power Company to an unsubordinated water right, except as provided in paragraph nos. 3 and 4 below, to average daily flows of 3900 CFS from April 1 to October 31 and 5600 CFS from November 1 to March 31 as measured at the "Murphy Gaging Station" described below in paragraph no. 2. These flows are not subject to depletion, except for depletions caused hy the lawful exercise of tbose water rights identified in paragraph nos. 3 and 4 below, and except for depletions resulting from any diversions or uses of the waters identified in paragraph 5 helow. Water right nos. 02-00100, 02-02032A, 02-04000A, and 02-04001A are satisfied when the average daily flows set forth herein are met or exceeded. Average daily flow, as used herein, shall be based upon actual flow conditions; thus, any fluctuations resulting from the operation of Idaho Power Company facilities shall not be considered in the calculation of such flows. Flows of water purchased, leased, owned or otherwise acquired by Idaho Power Company from sources upstream of its power plants, including above Milner Dam, and conveyed to and past its plants below Milner Dam shall be considered fluctuations resulting from the operation of Idaho Power Company facilities.

2. The "Murphy Gaging Station" is located at latitude 43 degrees 17 minutes 31 seconds, longitude 116 degrees 29 minutes 12 seconds, in T01S R01W, S35, NWNESE, Boise Meridian, Ada County Hydrologic Unit 17050103, on the right bank 4.2 miles downstream from Swan Falls Power Plant, 7.5 miles NE of Murphy, Idaho at river mile 453.5.

3. This water right is subordinate to the lawful exercise of water rights of those persons dismissed from Idaho Power Co. v. State of Idaho, Case No. 81375 (Fourth Judicial Dist. Feb. 16, 1990).

4. This water right is subordinate to the lawful exercise of water rights of those persons who beneficially used water prior to October 1, 1984 and who filed an application or claim for said use by June 30, 1985.

5. For the purposes of the determination and administration of this water right, no portion of the waters of the Snake River or surface or ground water tributary to the Snake River upstream from Milner Dam shall be considered. This water right may not be administered or enforced against any diversions or uses of the waters identified in this paragraph.

6. This partial decree is consistent with the Swan Falls Agreement dated October 25, 1984, the Contract to Implement Chapter 259, Sess. Laws, 1983 dated October 25, 1984 and the Consent Judgments entered in Ada County Civil Cases Nos. 62237 (Mar. 9, 1990) and 81375 (Feb. 16, 1990). The Swan Falls Agreement dated October 25, 1984, shall not be merged into nor integrated with this partial decree, but shall remain in full force and effect independent of this partial decree.

7. This partial decree is subject to such general provisions necessary for the definition of the water rights or for the efficient administration of the water rights as may be ultimately determined by the court at a point in time no later than the entry of a final unified decree. I.C. Section 42-1416(6).

JOHN M. MELANSON
Presiding Judge
Snake River Basin Adjudication

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

JOHN M. MELANSON
Presiding Judge
Snake River Basin Adjudication

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	}	PARTIAL DECREE PURSUANT TO
	}	I.R.C.P. 54(b) FOR
Case No. 39576	}	
	}	Water Right 02-4000B

NAME & ADDRESS: STATE OF IDAHO
TRUSTEE
STATEHOUSE
PO BOX 83720
BOISE ID 83720

SOURCE: SNAKE RIVER Tributary: COLUMBIA RIVER

QUANTITY: 90.00 CFS

PRIORITY DATE: 01-17-1900

POINT OF DIVERSION: T02S R01E S18 LOT 10 (SESWSE) Within Owyhee County
LOT 11 (NWSESE) Within Ada County

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF OSE	QUANTITY
POWER	04-01 TO 10-31	90.00 CFS

Power generation is at the Swan Falls Dam Power Plant.

PLACE OF USE: POWER Within Ada County
T02S R01E S18 LOT 11 (SESE)

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

1. Legal title to this water right is held in trust by the State of Idaho, by and through the Governor, for the benefit of Idaho Power Company as the user of the water for power purposes and for the benefit of the people of the State of Idaho. In addition to the subordination defined in paragraph nos. 4 and 5 below, this water right shall be subject to subordination to and depletion by future beneficial uses under water rights acquired pursuant to applicable state law, unless any such water right is unlawfully exercised or such use depletes or will deplete the average daily flow of the Snake River below 3900 CFS from April 1 to October 31 or below 5600 CFS from November 1 to March 31 as measured at the "Murphy Gaging Station" described below in paragraph no. 2. Average daily flow, as used herein, shall be based upon actual flow conditions; thus, any fluctuations resulting from the operation of Idaho Power Company facilities shall not be considered in the calculation of such flows. Flows of water purchased, leased, owned or otherwise acquired by Idaho Power Company from sources upstream of its power plants, including above Milner Dam, and conveyed to and past its plants below Milner Dam shall be considered fluctuations resulting from the operation of Idaho Power Company facilities.

2. The "Murpby Gaging Station" is located at latitude 43 degrees 17 minutes 31 seconds, longitude 116 degrees 25 minutes 12 seconds, in T01S R01W, S35, NWNESE, Boise Meridian, Ada County Hydrologic Unit 17050103, on the right bank 4.2 miles downstream from Swan Falls Power Plant, 7.5 miles NE of Murphy, Idaho at river mile 453.5.

3. Idaho Power Company, as user of the water for power purposes and a beneficiary of the trust referenced above, is entitled to use the water available at the facility identified herein to the extent of its actual beneficial use but not to exceed the "QUANTITY" set forth above, and to protect its rights to such use of the water as provided by state law against depletions or claims not in accordance with state law.

4. This water right is subordinate to the lawful exercise of water rights of those persons dismissed from Idaho Power Co. v. State of Idaho, Case No. 81375 (Fourth Judicial Dist. Feb. 16, 1990).

5. This water right is subordinate to the lawful exercise of water rights of those persons who beneficially used water prior to October 1, 1984 and who filed an application or claim for said use by June 30, 1985.

6. For the purposes of the determination and administration of this water right, no portion of the waters of the Snake River or surface or ground water tributary to the Snake River upstream from Milner Dam shall be considered. This water right may not be administered or enforced against any diversions or uses of the waters identified in this paragraph.

7. This partial decree is consistent with the Swan Falls Agreement dated October 25, 1984, the Contract to Implement Chapter 259, Sess. Laws, 1983 dated October 25, 1984 and the Consent Judgments entered in Ada County Civil Cases Nos. 62237 (Mar. 9, 1990) and 81375 (Feb. 16, 1990). The Swan Falls Agreement dated October 25, 1984, shall not be merged into nor integrated with this partial decree, but shall remain in full force and effect independent of this partial decree.

8. This partial decree is subject to such general provisions necessary for the definition of the water rights or for the efficient administration of the water rights as may be ultimately determined by the court at a point in time no later than the entry of a final unified decree. I.C. Section 42-1416(6).

JOHN M. MELANSON
Presiding Judge
Snake River Basin Adjudication

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

JOHN M. MELANSON
Presiding Judge
Snake River Basin Adjudication

Exhibit 33

COPY

DISTRICT COURT - SRBA
TWIN FALLS CO., IDAHO
FILED
2009 OCT 19 PM 1 44

LAWRENCE G. WASDEN
Attorney General

CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division

MICHAEL C. ORR (ISB # 6720)
Deputy Attorney General
Natural Resources Division

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(208) 334-2400

Attorneys for the State of Idaho

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	Subcase nos. 00-92002GP, 02-00200, 02-00201, 02-00223 and 02-00224
Case No. 39576	**STATE OF IDAHO'S MOTION FOR PARTIAL SUMMARY JUDGMENT RE: MILNER ZERO MINIMUM FLOW**

Pursuant to Rule 56 of the Idaho Rules of Civil Procedure and Idaho Code §§ 42-1411 and 42-1412, the State of Idaho, by and through the Idaho Water Resource Board ("State"), hereby moves this Court for partial summary judgment on the following two issues:

(1) That the first sentence of General Provision No. 4 in the Director's recommendations for the Basin 02 General Provisions (subcase 00-92002GP) should be clarified to read as follows:

> The flow of the Snake River at Milner Dam may be reduced to zero, and water rights using water downstream from Milner Dam have no right to call for the delivery, or seek the administration, of the flow of the Snake River or surface and ground water tributary to the Snake River upstream from Milner Dam.

(2) That the following condition should be included in the "Other Provisions Necessary for Definition/Administration of this Water Right" section of the partial decree for water right 02-0200:

> The flow of the Snake River at Milner Dam may be reduced to zero, and water rights using water downstream from Milner Dam have no right to call for the delivery, or seek the administration, of the flow of the Snake River or surface and ground water tributary to the Snake River upstream from Milner Dam.

The grounds for this motion are set forth in the supporting memorandum and affidavit filed herewith. The State requests oral argument on this motion.

Respectfully submitted this 16th day of OCTOBER 2009.

LAWRENCE G. WASDEN
Attorney General

CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division

MICHAEL C. ORR
Deputy Attorney General

Michael C. Orr

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16TH day of OCTOBER 2009, I caused a true and correct copy of the foregoing STATE OF IDAHO'S MOTION FOR PARTIAL SUMMARY JUDGMENT RE: MILNER ZERO MINIMUM FLOW to be filed with the Court and served on the following parties by the indicated methods:

Clerk of the SRBA Court
253 Third Avenue North
P.O. Box 2707
Twin Falls, Idaho 83303-2707

- ☒ U.S. Mail
- ☐ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile: 208.736.2121

Idaho Power Company
Represented by:
James C. Tucker
P.O. Box 70
1221 W. Idaho
Boise, ID 83707

- ☒ U.S. Mail
- ☐ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile: 208.388.6935
- ☒ E-mail: JamesTucker@idahopower.com

Idaho Power Company
Represented by:
John K. Simpson
Shelley M. Davis
Barker, Rosholt & Simpson, LLP
1010 W. Jefferson, Suite 102
Boise, ID 83701-2139

- ☒ U.S. Mail
- ☐ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile: 208.344.6034
- ☒ E-mail: jks@idahowaters.com
- ☒ E-mail: smd@idahowaters.com

Idaho Power Company
Represented by:
James S. Lochhead
Michael A. Gheleta
Brownstein Farber Hyatt Shrek, P.C.
410 17th St., Suite 2200
Denver, Colorado 80202

- ☒ U.S. Mail
- ☐ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile: 303.223.0904
- ☒ E-mail: mgheleta@bhfs.com
- ☒ E-mail: jlochhead@bhfs.com

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John A. Rosholt Travis C. Thompson Barker, Rosholt & Simpson, LLP 113 Main Ave W., Suite 303 P.O. Box 485 Twin Falls, Idaho 83303-0485	☒ U.S. Mail ☐ Hand Delivery ☐ Certified Mail, Return Receipt Requested ☐ Overnight Mail ☐ Facsimile: 208.735.2444 ☒ E-mail: jar@idahowaters.com ☒ E-mail: tlt@idahowaters.com
Chief, Natural Resources Division Office of the Attorney General State of Idaho P.O. Box 44449 Boise, Idaho 83720-4449	☐ U.S. Mail ☐ Hand Delivery ☐ Certified Mail, Return Receipt Requested ☐ Overnight Mail ☐ Facsimile: _____ ☒ Not Applicable

United States Department of Justice
Environment & Natural Resources
Division
550 West Fort Street
MSC 033
Boise, ID 83724

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☐ Hand Delivery
☐ Certified Mail, Return Receipt Requested
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IDWR Document Depository
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Boise, ID 83720-0098

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☐ Overnight Mail
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☒ Statehouse Mail

Michael C. Orr

Exhibit 34

MEMORANDUM

Date: April 9, 1987

To: File 01-7011

From: L. Glen Saxton

RE: ANALYSIS OF REQUEST FOR EXTENSION OF TIME REC'D 2-26-87

Past action in connection with permit 01-7011 is summarized as follows:

- June 29, 1977 - Permit was approved
- June 1, 1982 - Proof due
- March 31, 1982 - Extension of time granted based on due diligence designating June 1, 1987 as the new proof due date.
- Feb 26, 1987 - 2nd request for extension of time received.

The request for an extension of time requests a duration of approximately 6 years and 7 months (to Jan. 1, 1995) in which to submit the proof of beneficial use based on FERC related delays.

FERC related actions in connection with the permit are as follows:

- Nov. 5, 1980 - Application for preliminary permit submitted to FERC.
- August 12, 1981 - FERC order issued granting a preliminary permit to study the feasibility of the project.
- July 27, 1984 - Applic. for major license submitted to FERC. The application has not yet been acted upon.

Assuming FERC has not acted upon the app. for license by May 30, 1987 (proof due June 1, 1987), the delay caused by FERC will be about 2 years and 10 months. This is the amount of time for which the extension should be approved. If delayed further by FERC's inaction on the applic. for license, additional time can be requested for delays after June 1, 1987. The department should not consider the time in which the applicant or permit holder is studying the feasibility of a proposed project as a time

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delay attributable to FERC.

The department should add a subordination condition to the request for extension of time if approved.

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Exhibit 35

April 13, 1987

John Rosholt
P. O. Box 1906
Twin Falls, ID 83303-1906

Dear John:

Re: Permit No. 01-7011 - Request for Extension of Time

As a follow up to your telephone conversation with Phil Rassier of this office on April 8, 1987, I am forwarding the language of the department's subordination condition relative to hydropower uses.

The condition reads as follows:

The rights for the use of water acquired under this permit shall be junior and subordinate to all other rights for the use of water, other than hydropower, within the state of Idaho that are initiated later in time than the priority of this permit and shall not give rise to any right or claim against any future rights for the use of water, other than hydropower, within the state of Idaho initiated later in time than the priority of this permit.

The department plans to add this condition to the pending request for extension of time.

Please advise this office at your earliest convenience if you have questions.

Sincerely,

L. GLEN SAXTON
Chief, Operations Bureau

LGS:rf

cc: Phil Rassier

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FEB 24 1988

Exhibit 36

NELSON, ROSHOLT, ROBERTSON, TOLMAN & TUCKER
Chartered
ATTORNEYS AT LAW

THOMAS G. NELSON
JOHN A. ROSHOLT
J. EVAN ROBERTSON
STEVEN K. TOLMAN
JAMES C. TUCKER

TERRY T. UHLING
F. BRUCE COVINGTON
LAIRD B. STONE
JERRY JENSEN
GARY D. SLETTE
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142 3rd AVENUE NORTH
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TWIN FALLS, IDAHO 83303-1906
TELEPHONE (208) 734-0700

Boise Office
1020 MAIN ST., SUITE 390
P.O. BOX 2139
BOISE, IDAHO 83702-2139
TELEPHONE (208) 336-0700

May 8, 1987

L. Glen Saxton, Chief
Operations Bureau
Idaho Department of Water Resources
Statehouse
450 W. State Street,
Boise ID 83720

RE: Permit No. 01-7011
Request for Extension of Time

Dear Glen:

Excuse the delay in responding to your April 13, 1987, letter. Yesterday was my first opportunity to discuss it at a joint meeting of the Twin Falls Canal Company and North Side Canal Company Boards of Directors.

In the event that my clients were willing to consider the imposition of an ex post facto condition on the permit, shouldn't the proposed language be consistent?

I am enclosing for your information a copy of your letter of April 13, together with a copy of the language submitted to FERC as part of IDWR's intervention concerning the Milner license. I also enclose a copy of the original subordination language that appeared in the Hells Canyon license.

To date, Twin Falls and North Side have consented to the subordination of three water permits for power purposes. North Side Canal Company has consented to the subordination of 01-7010 and 01-7084 and Twin Falls has consented to the subordination of 01-7063.

My reason for writing is two-fold. One, to point out the inconsistency of the language that you propose to FERC from your letter of April 13. Secondly, if my Boards are to agree to subordinate, I think they ought to be protected from junior

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diversions for any uses outside of the Snake River Basin, yet in Idaho; protected from junior groundwater recharge projects; and from non-consumptive users who could divert water around the power plant under the proposed subordination provision. To date it has not been important to make these points with the Department since all of the hydropower permits which my clients have agreed to subordinate were essentially additional uses of waters already diverted into their canals under earlier irrigation priorities. In the case of the Milner Power Plant, we have an application standing on its own with a 1977 priority.

I have taken a draft of your letter and marked it with language that would make accepting the subordination less painless. As you know, accepting the subordination may well wreak havoc on financing of the power plant. In cases of those plants built in the canal systems, obviously the ability to deliver the same molecules of water under early irrigation rights eliminated the impact of the subordinations.

At the time of the issuance of the Hells Canyon license, the subordination was to irrigation of lands and other beneficial consumptive uses in the Snake River Water Shed. In your proposed language, non-consumptive uses such as groundwater recharge could take the total flows of the upper Snake available to the Milner Power Plant and put them underground eliminating any generation at the project. The language would also facilitate a non-consumptive diversion of water above the project for fish propagation or some other non-consumptive purpose with a return of the water below the project. Finally, the language would facilitate a diversion of surplus flows of the Snake River to the Bear River Basin for any purpose.

While I recognize the Department's lack of empathy for power generation generally, it seems to me that our hydropower rights deserve some measure of protection. Please consider my proposed language.

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Thank you for your consideration of this matter.

Sincerely,

JOHN A. ROSHOLT

JAR:dcb
43731

cc: Phil Rassier

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FEB 24 1988

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State of Idaho
DEPARTMENT OF WATER RESOURCES
STATE OFFICE, 450 W. State Street, Boise, Idaho

CECIL D. ANDRUS
Governor

A. KENNETH DUNN
Director

Mailing address:
Statehouse
Boise, Idaho 83720
(208) 334-4440

April 13, 1987

John Rosholt
P. O. Box 1906
Twin Falls, ID 83303-1906

Dear John:

Re: Permit No. 01-7011 - Request for Extension of Time

As a follow up to your telephone conversation with Phil Rassier of this office on April 8, 1987, I am forwarding the language of the department's subordination condition relative to hydropower uses.

The condition reads as follows:

The rights for the use of water acquired under this permit shall be junior and subordinate to all other rights for the use of water, other than hydropower, within the state of Idaho that are initiated later in time than the priority of this permit and shall not give rise to any right or claim against any future rights for the use of water, other than hydropower, within the state of Idaho initiated later in time than the priority of this permit.

The department plans to add this condition to the pending request for extension of time.

Please advise this office at your earliest convenience if you have questions.

Sincerely,

L. Glen Saxton

L. GLEN SAXTON
Chief, Operations Bureau

LGS:rf

cc: Phil Rassier

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Hells Canyon License

Article 41. The project shall be operated in such manner as will not conflict with the future depletion in flow of the waters of Snake River and its tributaries, or prevent or interfere with the future upstream diversion and use of such water above the backwater created by the project, for the irrigation of lands and other beneficial consumptive uses in the Snake River waterhead.

Article 42. In the interest of flood control the Licensee shall operate the project as follows:

(a) The total live storage space of about 1,000,000 acre-feet between elevation 1976 and elevation 2077 mean sea level will be made available for flood control use if and as required.

(b) The reservoir level elevation will be no higher than elevation 2034 by 1 March of each year to provide about 500,000 acre-feet of storage space for flood control use at that time each year.

(c) Additional storage space required up to 500,000 acre-feet will be obtained by evacuation as necessary during the month of March in a manner to insure availability on or before 1 April of the total storage capacity needed for flood control, as estimated by the Corps of Engineers. This space will be retained until capture of flood flows is requested by the Corps of Engineers, subject to possible involuntary storage as may be required due to temporary inflows in excess of outlet capacity, or until refilling in the interest of power output is authorized by the Corps of Engineers. In the event of involuntary storage, full capacity will be regained as soon as possible.

(d) During the flood storage period controlled outflows will be as requested by the Corps of Engineers. Daily outflows of 30,000 acre-feet, as a minimum, will be permitted when required for power purposes.

(e) In order to achieve the above operation for flood control, discharge capacity of 65,000 c.f.s. at minimum pool, evaluation 1976, including gated outlet capacity plus one-half of the ultimate turbine capacity, is to be provided by the Licensee.

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(f) The above conditions will be subject to review from time to time as requested by the Licensee or the Corps of Engineers.

B.2 (a)

IDWR FERC Intervention

Commission for the Milner Project No. 2899-003 on the Snake River in Twin Falls, Cassia, Jerome and Minidoka Counties, Idaho, near the town of Burley on lands managed by the U.S. Bureau of Reclamation.

Milner Project

IV.

The Department's participation in the Commission proceeding on the Milner Project No. 2899-003 is in the public interest because the Applicants and the Commission need to know the policies of the State of Idaho regarding the proposed hydroelectric development at the Milner Project site.

Position of Department

V.

The Department's position is that any license issued by the Commission to the Twin Falls Canal Company and North Side Canal Company should be subordinated to upstream depletionary uses. Specifically, the Department requests the Commission to include the following provision in any license issued for the proposed Milner Hydroelectric Project:

> The Project shall be operated in such manner as will not conflict with the future depletion and flow of the waters of the Snake River and its tributaries, or prevent or interfere with the future upstream diversion and use of such water above the back water created by the project, as needed for upstream development in the public interest, or give rise to any right or claim against any future rights for the use

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of water, other than hydropower, within the State of Idaho initiated later in time than the priority for any rights to the use of water acquired for the project.

Basis For Department's Position

VI.

The Constitution of the State of Idaho provides that the waters of the state are subject to the regulation and control of the state. Idaho Cost. art. 15, §§ 1, 3.

VII.

The Constitution of the State of Idaho provides that the Idaho Water Resource Board shall have the power to formulate and implement a state water plan. Idaho Const. art. 15, § 7.

VIII.

The Idaho Water Resource Board has recently amended the state water plan for the reach of the Snake River where the proposed Milner Project will be located which imposes new restrictions on water use. See Exhibit A, which is attached hereto and is incorporated herein by reference. The amended state water plan provides a comprehensive plan for the development of the water resources of the State of Idaho.

IX.

The State of Idaho has enacted legislation which further implements the state's policy of subordinating hydropower water rights to upstream consumptive uses. Idaho

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FEB 24 1988

Exhibit 37

L_PARTMENT OF WA_ER RESOURCES
STATE OFFICE, 450 W. State Street, Boise, Idaho

JOHN V. EVANS
Governor

A. KENNETH DUNN
Director

Mailing address:
Statehouse
Boise, Idaho 8372(
(208) 334-4440

SEPTEMBER 1, 1985

OEAR PERMIT HOLOER:

ACCOROING TO OUR RECOROS, YOU ARE THE HOLOER OF A WATER PERMIT ON WHICH PROOF O BENEFICIAL USE OF WATER WAS NOT SUBMITTEO BEFORE JULY 1, 1985, WHICH INOICATES YOU PROJECT IS NOT COMPLETE. THEREFORE, YOU NEEO TO BE AWARE OF CHANGES IN IOAHO LAW EFFECTIVE JULY 1, 1985, WHICH IMPACT ALL WATER PERMITS ISSUEO BY THIS OEPARTMENT.

SPECIFICALLY, PURSUANT TO SECTION 42-2030, IOAHO COOE, THE OEPARTMENT MUST REVIEW AL PERMITS FOR WHICH OEVELOPMENT OF WATER USE WAS NO COMPLETEO ON OR BEFORE JULY I, 1985, T DETERMINE IF THEY MEET THE NEW REQUIREMENTS OF CHAPTER 2, TITLE 42, IOAHO COOE. RULE ANO REGULATIONS GOVERNING THE RE-EVALUATION OF PERMITS ARE NOT YET FINALIZED. HOWEVER IF YOU COMPLETEO THE OEVELOPMENT UNOER YOUR PERMIT BEFORE JULY 1, 1985, YOU SHOULO SUBMI A PROOF OF BENEFICIAL USE STATEMENT, STATING THAT THE PROJECT WAS COMPLETEO BEFORE JUL 1, 1985 SO THAT YOUR PERMIT WILL NOT BE SUBJECT TO THE REVIEW REQUIREMENTS OF SECTIO 42-2030, WHICH REAOS AS FOLLOWS:

> 42-2030. REVIEW OF PERMITS - OPPORTUNITY FOR HEARING. - (1)THE OEPARTMENT SHALL REVIEW ALL PERMITS ISSUED PRIOR TO THE EFFECTIVE OATE [JULY I, 1985] OF THIS SECTION, EXCEPT TO THE EXTENT A PERMIT HAS BEEN PUT TO BENEFICIAL USE PRIOR TO JULY 1, 1985, TO OETERMINE WHETHER THEY COMPLY WITH THE PROVISIONS OF CHAPTER 2, TITLE 42, IOAHO COOE. IF THE OEPARTMENT FINOS THAT THE PROPOSEO USE OOES NOT SATISFY THE CRITERIA OF CHAPTER 2, TITLE 42, IOAHO COOE, THEN THE OEPARTMENT SHALL EITHER CANCEL THE PERMIT OR IMPOSE THE CONOITIONS REQUIREO TO BRING THE PERMIT INTO COMPLIANCE WITH CHAPTER 2, TITLE 42, IOAHO COOE. IF THE OEPARTMENT FINOS THAT THE PERMIT SATISFIES THE CRITERIA ESTABLISHED IN CHAPTER 2, TITLE 42, IOAHO COOE, THEN THE OEPARTMENT SHALL ENTER AN OROER CONTINUING THE PERMIT. (2)THE OEPARTMENT SHALL PROVIOE AN OPPORTUNITY FOR HEARING IN ACCOROANCE WITH SECTION 42-1701A, IDAHO COOE, ANO SECTIONS 67-5209 THROUGH 67-5215, IOAHO COOE, FOR EACH HOLOER OF A PERMIT THAT IS PROPOSEO EITHER TO BE CANCELLEO OR MAOE SUBJECT TO NEW CONDITIONS.

YOU MAY OBTAIN PROOF OF BENEFICIAL USE FORMS FROM THE DEPARTMENT. IF YOU HAVE AI QUESTIONS, PLEASE LET US KNOW.

SINCERELY,

L. Glen Saxton

L. GLEN SAXTON
CHIEF, OPERATIONS BUREAU

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Exhibit 38

1997 AUG 28 PM 3:35
DISTRICT COURT-SRBA
TWIN FALLS CO. IDAHO
FILED

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re: SRBA Case No. 39576 NORMAN RILEY and ROBIN RILEY, husband and wife, Plaintiffs, v. CATHERINE ROWAN, Defendant.	Case No. 94-00012 MEMORANDUM DECISION

I. BACKGROUND

This action contesting ownership of a water right was filed in the Snake River Basin Adjudication (SRBA) by Norman and Robin Riley against Catherine Rowan. This follows the case of *Rowan v. Riley*, Madison County Case CV-93-350, in which the Honorable James C. Herndon, Presiding District Judge, held that he did not have subject matter jurisdiction to resolve the ownership of the water right at issue. The dispute is about a water right license issued in the names of two deceased people. The enabling permit for the license is Water Permit 22-07280. Trial was held followed by briefing by the parties. The following decision constitutes this court's findings of fact and conclusions of law.

II. FINDINGS OF FACT

A. THE PARTIES

Plaintiffs, Norman and Robin Riley, husband and wife, (the Rileys) own and farm land in Madison County. Robin Riley is the daughter of James "Jim" Howe. Jim Howe died on March 4, 1992. By agreement with her sisters, Robin Riley is entitled to any farming interest including water from her father's estate. The Rileys claim that Water Permit 22-07280 is a personal property farming interest of Jim Howe's estate which entitles them to ownership of the water license that followed from the permit.

Defendant, Catherine Rowan, is a Utah resident who owns real property in Madison County. Catherine Rowan leases her land to the Rileys for farming purposes. Catherine Rowan was the sister of Jim Howe and is Robin Riley's aunt.

B. THE LAND

Catherine Rowan and Jim Howe owned a vested remainder in 756 acres of land (the Farm) deeded to them by the Webster-Soule Farm Corporation in 1944. This deed reserved a life estate in their mother, Lucille Howe (Lucille).

From 1969 to the date of Lucille's death in 1983, Jim Howe leased and farmed the land that constituted Lucille's life estate. Therefore, prior to Lucille's death, Jim Howe leased and farmed the land in which he and Catherine Rowan held a future interest. After Lucille's death, the Farm passed to Jim Howe and Catherine Rowan as tenants in common in fee simple absolute.

Between 1983 and 1988, Jim Howe continued to farm all of the land--his one half and Catherine Rowan's half under a lease. Facing bankruptcy in 1987 and 1988, Jim Howe sought loans to be secured by his ownership interest in the Farm. In 1988 Catherine Rowan desired to partition the Farm to avoid personal liability for Jim Howe's debt.

On March 31, 1988, cross deeds were executed dividing the Farm into two halves. Jim Howe was deeded the northern half with all appurtenances and Catherine Rowan was deeded the southern half with all appurtenances. (Exhibits J, K, M, N.)

The disputed water is drawn from a well located on the land deeded to Catherine Rowan. The water from the "south well" was primarily used to irrigate the south half of the Farm and, secondarily, to supplement the irrigation of the north half. The original cross deeds did not grant an interest in the water from the "south well" to Jim Howe for use on his land.

In order to service loans, Jim Howe's lender required him to secure a right to water from the "south well" located on Catherine Rowan's land, as well as an easement to maintain the delivery system to the north lands. Jim Howe sought and Catherine Rowan granted an easement (Corrected Agreement, August 3, 1988, Exhibit P) and a one-half interest in the water from the "south well" (Correction Grant Deed, August 11, 1988, Exhibit R). Jim Howe continued to farm his north land and Catherine Rowan's southern half under a lease.

On December 5, 1991, Jim Howe executed a Bill of Sale of Goods and Chattels (Bill of Sale) to the Rileys. The Bill of Sale lists "any and all water rights including . . . application approved permit #22-7280 which is the water right associated with the well on Catherine Rowan's southern portion of land." Six months after Jim Howe's death in March 1992, the Rileys filed the Bill of Sale in Madison County.

After Jim Howe's death, the Rileys farmed both halves of the original Farm pursuant to a lease with Catherine Rowan for her southern half. In 1995 the working relationship between Catherine Rowan and the Rileys deteriorated to the point that Catherine Rowan wanted to discontinue renting her land to the Rileys. The Rileys have continued to lease Catherine Rowan's land by court order issued in the original Madison County case.

C. THE WATER LICENSE FOR THE "SOUTH WELL"

On August 28, 1978, Jim Howe applied for a water permit from IDWR under the names of "Lucille W. Howe AND/OR Jim Howe." From what would be called the "south well," IDWR granted the Water Permit 22-07280 allowing the appropriation 10.81 cfs of ground water from the "south well." The permit application also stated that Lucille Howe owned the property that was to be the place of use. Question 9(c) of the permit application states: "If the property is owned by a person other than the applicant, describe the arrangement enabling the applicant to make this filing." Question 9(c) was not completed by either Jim Howe or Lucille Howe reflecting that Jim and Lucille filed as owners of the land. The permit also required proof of construction of work and application of water to beneficial use to be submitted on or before August 1, 1983.

The well was constructed and Jim Howe timely filed a notice of completed development for Water Permit 22-07280 on February 7, 1983, with IDWR.

On August 23, 1989, IDWR issued a Beneficial Use Field Report for Water Permit 22-07280 listing the owner as "Lucille W. Howe or Jim Howe." The Beneficial Use Field

Report (August 23, 1989, Exhibit 5) confirmed that the conditions specified by the permit six years earlier had been completed.

On August 14, 1988, a Notice of Claim to a Water Right for the "south well," Water Permit 22-07280, was filed in the SRBA in the name of "Lucille W. Howe - Deceased, Jim W. Howe and/or Catherine Rowan."

On November 12, 1992, Robin Riley filed with IDWR a New Property Owner Notice of Change of Water Right Ownership (Notice of Change) listing the Rileys as claimants. The Notice of Change form asked if the change in ownership resulted in a splitting of the water right and the "yes" box was checked, listing Water Permit 22-07280 as having been split.

On November 24, 1992, IDWR sent a letter to Norman Riley indicating that Water Permit 22-07280 had been split into 22-07280A and 22-07280B. On December 2, 1992, IDWR issued Notices of Claim to a Water Right to both the Rileys (Notice of Claim 22-07280B) and to Catherine Rowan (Notice of Claim 22-07280A). The division of the original 10.81 cfs was 4.270 cfs to the Rileys and 6.540 cfs to Catherine Rowan.

On December 4, 1995, IDWR issued Water Right License 22-07280 in the name of Jim Howe and Lucille Howe, both deceased. In a December 6, 1995, letter to the Rileys and Catherine Rowan, IDWR informed them of their right to request a hearing to review the terms and conditions for Water Right License 22-07280 before IDWR pursuant to Idaho Code § 42-1701 A(3). Both parties filed petitions requesting a hearing.

The matter was heard on March 19, 1996, before an IDWR hearing officer. The officer concluded that a revocation of the license was not appropriate at that time. The officer believed that the ownership dispute did not undermine the authority of IDWR to issue the license under Idaho Code § 42-219, despite the fact that IDWR named two deceased persons as owners of the license.

The Rileys filed this *Complaint for Declaratory Judgment Regarding Ownership of Water Rights* in the SRBA.

III. DECLARATORY JUDGMENT STANDARDS

None of the parties have disputed the propriety of determining the issue of ownership of the water right under Idaho's declaratory judgment statute, Idaho Code § 10-1201, *et seq.* *See*

also, I.R.C.P. 57. The standard for determining justiciability in a declaratory judgment setting has been set by the United States Supreme Court:

> The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. . . . It must be a real and substantial controversy admitting a specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

Aetna Life Insurance Company v. Haworth, 300 U.S. 227, 240-41 (1937).

This standard has been adopted by the Idaho Supreme Court, which held that "a declaratory judgment must clarify and settle the legal relations and issues, and afford relief from the uncertainty and controversy which gave rise to the action." *Harris v. Cassia County*, 106 Idaho 513, 516, 681 P.2d 988, 991 (1984). *See also*, *State v. Rhoades*, 119 Idaho 594, 809 P.2d 455 (1991); *Sweeney v. American National Bank*, 62 Idaho 544, 115 P.2d 109 (1941). Based upon the facts presented at trial, the standard for declaratory judgment has been met. It is found that the SRBA court has jurisdiction over the parties and the subject matter of this declaratory judgment action.

IV. THE LEGAL RELATIONSHIPS AND DUTIES BETWEEN PARTIES

A determination of ownership of the water right requires a clear delineation of the property interests, legal relationships, and duties between the parties.

A. JIM HOWE 'S AND CATHERINE ROWAN'S PROPERTY INTERESTS IN THE FARM

The first inquiry is to determine Jim Howe's and Catherine Rowan's interests in the Farm when the initial application for the disputed water permit was filed on August 28, 1978. The 1944 deed sets forth Catherine Rowan's and Jim Howe's interests:

> [R]emainder over in fee to her children, share and share alike, without restriction, the lands hereinafter describes. Provided, however, that if any of the children of the said Lucille Webster Howe die without issue, then their pro rata share shall pass to their surviving brothers and sisters, share and share alike, in fee. If any of them die leaving issue, then their issue shall share by right of representation in fee.

(Exhibit B.)

The deed reserved a life estate in Lucille Howe. Lucille's children were deeded the Farm in fee simple, contingent upon their dying with issue. Therefore, under the terms of the deed, Jim

Howe and Catherine Rowan possessed a contingent remainder in the Farm at the time Jim filed the water permit application.

Idaho Code §55-111 entitled Suspension of Power of Alienation states:

> The absolute power of alienation of real property cannot be suspended by any limitation or condition whatever, for a longer period that during the continuance of the lives of the persons in being at the creation of the limitation or condition, and 25 years thereafter . . .; no trust heretofore or hereafter created, either testamentary or inter vivos, shall be declared void, but shall be so construed as to eliminate parts violating the above provisions, and in such a way that the testators or trustors wishes are carried out to the greatest extent permitted by this act.

Here, the deed expressly states that the extent of Lucille's children's interest in the Farm is contingent upon whether or not the child dies with issue. This condition is subject to the limitations provided for by Idaho Code § 55-111. If the contingency provided for by the grantor could exist beyond the statutory period provided by Idaho Code § 55-111, the contingency must be struck.

Any valid limitation or condition within a gift must occur or fail within 25 years of a life in being at the time of creation of the restriction. Idaho Code § 55-111. The gift from the grantor to the "children of Lucille Howe" is a class gift. A class gift is a gift of "aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, who are all to take in equal or some other definite proportions; share of each being dependant for its ultimate amount upon the ultimate number." *Hepburn v. Winthrop*, 83 F.2d 566, 570, 65 App. D.C. 309 (1936). At the time of the creation of the deed, the ultimate number of Lucille's children with issue was indeterminable. Because there may have been unborn members of the class at the time of creation, the unborn member of the class cannot be considered a life in being for the purposes of Idaho Code § 55-111. At common law, a gift to a single class member in violation of the rule against perpetuities voided the gift for the entire class. *See for example, Betchard v. Iverson,* 212 P.2d 783, 786, 35 Wash. 2d 344 (1949). Because no member of the class of Lucille's children can be used as a measuring life, the only measuring life named within the gift is that of Lucille Howe.

Idaho Code § 55-111 states that the absolute power of alienation cannot be suspended by any limitation or condition for a period longer than the duration of the lives of persons in being

at the time of the creation of the condition and 25 years thereafter. Since, Lucille Howe is necessarily the measuring life, the contingency stated in the deed must be definitively settled within 25 years after Lucille Howe's death to be valid. The gift's contingency that Lucille's children must die with issue in order to take would not necessarily vest within 25 years of Lucille's death. The contingency in the gift is in violation of Idaho Code § 55-111.

Idaho Code § 55-111 provides that "no trust heretofore or hereafter created, whether testamentary or inter vivos, shall be declared void, but shall be so construed as to eliminate parts violating the above provision, and in such a way that the [testators] wishes are carried out to the greatest extent permitted by this act." Therefore, the contingency contained in the deed is severable from the gift. Severing the contingency from the deed results in Catherine Rowan and Jim Howe owning a fully vested and indefeasible future interest in Lucille Howe's life estate at the time Jim Howe applied for Water Permit 22-07280.

B. The Legal Relationship Between Catherine Rowan and Jim Howe Created By the Shared Interest in the Farm

During Lucille's lifetime, legal duties existed between Jim Howe and Catherine Rowan based on their co-ownership of the vested remainder interest in the Farm.

Idaho Code § 55-104 states that "[e]very interest created in favor of several persons in their own right is an interest in common, unless acquired by them in partnership, joint interest, or as community property." In Idaho there is a rebuttable presumption favoring tenants in common, with no right of survivorship. *Powell v. Powell*, 22 Idaho 531 (1912). The record contains no evidence that the interest in the Farm was anything other than a tenancy in common.

Tenants in common are entitled to the use, benefit, and possession of the common property, provided they do not exclude their cotenant from a like use, occupancy, and benefit. *Washington County Irrigation Dst. v. Talboy*, 55 Idaho 391 (1935). The same duty exists between co-remaindermen prior to a present possessory interest. *Givens v. Givens*, 387 S.W.2d 851 (1965); *Clark v. Lindsey*, 25 N.E. 422 (1890). Succinctly stated, the principle is:

> Where there are two remaindermen, they, in their relations with each other concerning their respective interests in the property given to them together, may to a certain extent, be governed by the principles of law which govern the rights duties, and liabilities of cotenants generally. For example, where a life estate and remainders in two or more persons have been created in real estate, and the life

> tenant is still living, the coremaindermen have fiduciary relationship to each other such that no one of them may impair the rights or interests of his coremaindermen. If one them acquires an outstanding title, **he acquires it for all**, subject to the duty of others to contribute to the cost of acquiring the title if they wish to take advantage of it.

51 Am. Jur. 2d § 1 (1970) (emphasis added).

Therefore, a fiduciary duty existed between Jim Howe and Catherine Rowan as tenants in common owning a vested remainder interest in the Farm.

C. Catherine Rowan Owned an Interest in the Water Permit and the License

When Jim Howe filed the application for a water permit in August 1978, he owed a fiduciary duty to Catherine Rowan to protect her ownership interest in the Farm. Any action taken by Jim Howe to exclude Catherine Rowan as a co-owner of the permit would violate that fiduciary duty.

Plaintiffs attach great importance to the fact that Jim Howe was a lessor of the Farm when he applied for the water permit. *Plaintiff's Post Trial Brief* at 19. They correctly argue that "water may be appropriated for beneficial use on land not owned by the appropriator, and this water right becomes the property of the appropriator." *Plaintiff's Pretrial Brief* at 6. The law shields non-owners of land (lessors) after the lessor completes development of a proposed water right. In such instances, Idaho Code § 42-211 establishes the procedure by which anyone who has filed a permit application may change the place of use.

> Whenever a permit has been issued pursuant to the provisions of this act, and the permit holder desires to change the place . . . of intended use or make other substantial changes in the method of diversion or proposed use or uses of water, he shall file an application for amendment upon forms to be furnished by the department of water resources to examine same and if approval thereof would not result in the diversion and use of more water than originally permitted and the **rights of others will not be adversely affected thereby**, the director of the department of water resources shall approve said application. . . .

Id. (Emphasis added.)

In August 1978, Jim Howe leased the Farm from Lucille; however, he was also the owner of a vested future interest in the Farm along with Catherine Rowan. He, therefore, held two simultaneous interests in the Farm: a leasehold and a vested future interest in common with

Catherine Rowan.

Idaho water law, as the Plaintiffs have argued, protects a lessor permittee by granting them the shield of a personal property interest in a water permit. *See, e.g., Marshall v. Niagara Springs Orchard Co. Ltd.*, 22 Idaho 144, 125 P. 208 (1912); *Basinger v. Taylor*, 30 Idaho 289, 164 P. 522 (1917); *Big Wood Canal Co. v. Chapman*, 45 Idaho 380, 263 P. 45 (1927); *Hardy v. Higginson*, 123 Idaho 45, 849 P.2d 946 (1993). The law does not allow an owner permittee who leases from his cotenants to use this protection as a sword to divest the cotenants of their water right. To allow Jim Howe to use his leasehold to overcome Catherine Rowan's vested remainder, which she held in common with him, would violate two legal principles. First, it would allow Jim Howe to benefit from the lease, ignoring his ownership interest, by using Idaho water law as a sword against Catherine Rowan. Secondly, it would allow him to breach the fiduciary duty of due care, loyalty, and prudence owed to his vested remainder cotenant, Catherine Rowan. The law does not allow these results.

Further, the facts of the case do not support the result favored by the Plaintiffs. Jim Howe expressly acknowledged that the permit application was intended to benefit the complete set of farm owners, not just himself. When he filed the application in his and Lucille's names, he did not intend to disavow Catherine Rowan's ownership interest nor did he breach his fiduciary duty to her. The application form, Question 9(c), asked: " If the property is owned by a person other than the applicant, describe the arrangement enabling the applicant to make this filing." Exhibit D. This was left blank indicating that no "arrangement," lease or otherwise, was the basis of Jim Howe's filing. He filed as a co-owner, not as a lessee.

Most significantly, following partition with Catherine Rowan, Jim Howe was required by his lenders to secure an interest in the "south well." Jim Howe and Catherine Rowan entered in the Correction Grant Deed (Exhibit R) reflecting Jim Howe's clear, unambiguous agreement and understanding that the permitted interest in the "south well" was shared with Catherine Rowan. That shared interest, as reflected in the Correction Grant Deed, served as the basis of Jim Howe's securing financing and is consistent with his fiduciary duty to Catherine Rowan.

The evidence in this case demonstrates that the Rileys knew their interest in the permit was shared with Catherine Rowan. Evan after having recorded the Bill of Sale from Jim Howe which purported to convey the permit, Robin Riley filed a New Property Owner Notice of Change of

Water Right Ownership with IDWR. (Exhibit 2.) Where the form asks if the change in ownership results in a splitting of the right (into two or more rights), it is marked "yes." Robin Riley was correct in her statement to IDWR. Her position in this action has since changed.

The actions of Jim Howe, his application for the permit, his use of the permitted right to provide water for the Farm, his agreement to partition the Farm with Catherine Rowan, and his later acquisition of a one-half interest in Catherine Rowan's "south well," all reflect that Jim Howe understood and intended that he took an interest in the permit as an co-owner of land with Catherine Rowan, not as a lessor of the land. Any action otherwise would have breached his fiduciary duty to his sister. The only interest Jim Howe had in the permit was as an owner and was identical to that of Catherine Rowan. At Lucille's death, Jim Howe and Catherine Rowan became co-owners of the permit. To rule otherwise would allow Jim Howe, a co-owner, to strip water from his cotenant's Catherine Rowan, one-half of the Farm. Idaho Water law does not permit such a result.

V. WATER PERMIT 22-07280 BECAME A LICENSE BY OPERATION OF LAW DUE TO IDWR'S FAILURE TO MEET ITS STATUTORY DUTY

The failure of IDWR to perform its statutory duty to issue the license in a reasonable time requires the finding that Water Permit 22-07280 became a license by operation of law.

Following is a chronology of IDWR's action on Water Permit 22-07280:

August 28, 1978	Application for Permit filed in the names of Lucille W. Howe and/or Jim W. Howe (Exhibit D). Permit approved by IDWR.
February 7, 1983	Proof of Beneficial Use submitted to IDWR in the name of Jim Howe (Exhibit I).
August 23, 1989	IDWR Beneficial Use Field Report prepared (Exhibit 5).
December 4, 1995	Water License 22-07280 issued to Jim W. Howe and Lucille W. Howe, both deceased (Exhibit KK).

The record establishes that Jim Howe timely filed proof of beneficial use under Water Permit 22-07280 on February 7, 1983. IDWR then had a statutory duty to examine various aspects of the submission. I.C. § 42-217. The legislatively mandated examination was not issued until August 23, 1989 (IDWR Beneficial Use Field Report - Exhibit 5); over six years after Howe's submission.

IDWR has a duty to timely issue licenses following proper application, permitting, proof of beneficial use, and department examination.

> Upon receipt by the department of water resources of all the evidence in relation to such final proof, it shall be the duty of the department to carefully examine the same, and if the department is satisfied that the law has been fully complied with and that the water is being used at the place claimed and for the purpose for which it was originally intended, the department shall issue to such user or users a license confirming such use.

I.C. § 42-219(1) (emphasis added).

In this case, IDWR issued the license on December 4, 1995; 12 years and 10 months after the submission of proof of beneficial use and 6 years and 4 four months after IDWR completed its tardy Beneficial Use Field Report. Where the legislature has placed the duty on IDWR to examine and issue licenses, a delay of 12 years and 10 months constitutes a breach of that duty.

IDWR's breach of duty in issuing the license for this right caused the right to remain in a state of legal limbo. By holding the right in the permitting process, IDWR denied it the statutory recognition and benefits conveyed to licensed rights under Idaho Code § 42-220. IDWR's failure to timely exercise its duty left the permitted water right as a personal property interest, thereby denying it the real property right status to which it was legally entitled. Had IDWR met its duty, the ownership dispute may never have ripened because a license would have issued and become appurtenant to the land. This dispute has spawned lawsuits in Madison County and the SRBA and an administrative proceeding before IDWR. Had IDWR fulfilled its statutory obligation, none of these actions, with their substantial expense, would likely have been filed.

IDWR's breach of its duty to issue licenses in a timely manner takes on constitutional dimensions as well. The Idaho Constitution holds inviolate the right to appropriate water. IDAHO CONST. art. 15 § 3. The lengthy delay in issuing this license denied the water users their constitutional right to appropriate water. By leaving the right in the vulnerable permit status, it is not accorded the statutory recognition of a fully protected water right, as it would be when licensed.

The record in this case reflects that significant delays in issuing licenses is IDWR's usual practice statewide. This inattention to a legislatively mandated duty requires the court to rule that Water Permit 22-07280 is deemed to have become a license on February 7, 1983, the date Jim

Howe submitted proof of beneficial use. IDWR's examination and report issued six years later found the use was lawfully established and the license, issued 12 years and 10 months later, issued on the exact terms of the permit. Therefore, where a license issued is consistent with the terms of the permit application, the permit, and IDWR's examination and where IDWR has breached its duty to timely license the water right, this court deems the license to be effective and in force as of the date proof of beneficial use was submitted.

The effect of this ruling is that the right in dispute became a licensed real property right as of February 7, 1983. At Lucille Howe's death in October 1983, the owners of Water License 22-07280 became James Howe and Catherine Rowan. Therefore, after February 7, 1983, no permit existed as a personal property interest in water belonging to James Howe which could have been sold or bequeathed to the Rileys.

The license, effective February 7, 1983, was a real property interest which was part of the land. Its ownership was transferred by the various deeds between Jim Howe and Catherine Rowan. The current status of the license is governed by the Correction Grant Deed (Exhibit R) conveying a one-half interest in the water from the "south well" to Jim Howe, which has passed to the Rileys.

VI. CONCLUSION

Catherine Rowan owns a licensed (License 22-07280) one-half interest in the "south well." The Rileys own a licensed (License 22-07280) one-half interest in the "south well."

The gift by deed, reserving a life estate in Lucille W Howe, created a co-tenency between Jim Howe and Catherine Rowan as vested remaindermen. Jim Howe's application for a water permit (22-07280) established in Catherine Rowan an interest in the permitted water. Jim Howe did not breach his fiduciary duty to her by taking action against his cotenant sister to strip her of her rightful interest. Catherine Rowan held the same ownership interest in Water Permit 22-07280 as Jim Howe.

It is also held that Water Permit 22-07280 became a license by operation of law on February 7, 1983. IDWR's failure to carry out its legislatively mandated duty to examine and license water rights following submission of proof of beneficial use requires this result. Therefore, the license became effective prior to Lucille Howe's death. When Lucille died in

October 1983, the property and Water License 22-07280 vested in Jim Howe and Catherine Rowan as cotenants. The license followed the conveyances between Jim Howe and Catherine Rowan resulting in a one-half ownership interest now in Catherine Rowan and the Rileys.

VII. ORDER

Based on this decision, **IT IS ORDERED** that the Idaho Department of Water Resources examine Water License 22-07280 and issue separate licenses to Catherine Rowan and Norman and Robin Riley, husband and wife, consistent with the Correction Grant Deed (Exhibit R) and its examination. These licenses shall issue and be filed with this court on or before October 1, 1997.

IT IS SO ORDERED.

DATED August 28, 1997.



DANIEL C. HURLBUTT, JR.
Presiding Judge
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the **MEMORANDUM DECISION** was mailed on August 28, 1997, with sufficient first-class postage to the following:

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Anderson, Nelson & Hall
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IDWR Document Depository
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Boise, ID 83720-0098

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IDWR
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Courtesy copy to:

Hon. James C. Herndon
District Judge, 7th Judicial District
PO Box 717
Blackfoot, ID 83221

Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF IDAHO

Docket No. 24153

IN RE SRBA CASE NO. 39576 SUB-CASE NO. 94-00012 COMPLAINT FOR DECLARATORY JUDGMENT RE OWNERSHIP OF WATER RIGHT.	
NORMAN RILEY and ROBIN RILEY, husband and wife, Plaintiffs-Appellants, v. CATHERINE ROWAN, Defendant-Respondent.	Idaho Falls, May 1998 Term 1998 Opinion No. 96 Filed: August 19, 1998 Frederick C. Lyon, Clerk

Appeal from the District Court of the Fifth Judicial District, State of Idaho. Hon. Daniel C. Hurlbutt, District Judge.

District court decision awarding a one-half interest in water license to plaintiffs and a one-half interest to defendant, affirmed

Anderson, Nelson, Hall and Smith, Idaho Falls, for appellants. Steven R. Parry argued.

Rigby, Thatcher, Andrus, Rigby, Kam & Moeller, Chtd., Rexburg, for respondent. Gregory W. Moeller argued.

WALTERS, Justice

NATURE OF THE CASE

This appeal raises a question of water law within the Snake River Basin Adjudication (SRBA). Norman and Robin Riley filed a declaratory judgment action against Catherine Rowan contesting the ownership of a water license issued in the names of two deceased people. After the SRBA district court held that each of the parties was entitled to a one-half interest in the water

license, the Rileys appealed. We affirm.

I. FACTS AND PROCEDURAL BACKGROUND

In 1944, Lucille Howe was deeded a life estate in 756.5 acres of farm land in Madison County. The remainder interests in the farm land were given to her two children, James "Jim" Howe and Catherine Rowan. Thereafter, Jim Howe leased and farmed the land in which he and Rowan held future interests. In 1969, Jim Howe developed a well on the northern portion of the land, and subsequently acquired a water license from the Idaho Department of Water Resources (IDWR) in his name for the north land. The ownership of the water license for the north well is not in dispute.

In 1978, Jim Howe applied for a water permit from the IDWR, under the names of "Lucille W. Howe and/or Jim Howe," to develop a well on the southern portion of the land. The IDWR granted water permit No. 22-07280 for the appropriation of 10.81 cubic feet per second (c.f.s.) of ground water from the southern well. Thereafter, Jim Howe constructed the well and filed a notice of completed development with the IDWR, and he subsequently filed a notice of claim in the SRBA.

Lucille Howe died in 1983, and the farm land passed to Jim Howe and Rowan as tenants in common in fee simple absolute. In 1988, Jim Howe and Rowan agreed to partition the property. Jim Howe was deeded the northern half of the property with all appurtenances and Rowan was deeded the southern half of the property with all appurtenances. Jim Howe continued to farm his north land and Rowan's southern half under a lease agreement. Jim Howe and Rowan later entered into an agreement in which Jim Howe was granted a one-half interest in the water from the south well, as well as an easement to maintain delivery systems from the south well to his north land.

In 1991, Jim Howe sold all of his water rights, including any rights associated with the well on Rowan's southern portion of the land, to his daughter, Robin Riley, and her husband. The next year, Jim Howe died. After the settlement of Jim Howe's estate, the Rileys filed a notice of change of water right ownership with the IDWR, listing water permit No. 22-07280 as having been split. Consistent with the request, the IDWR split the water permit into 22-07280A and 22-07280B. The original permit for 10.81 c.f.s. was divided into 4.270 c.f.s. to the Rileys and 6.540 c.f.s. to Rowan.

On August 16, 1993, Rowan filed a declaratory judgment action against the Rileys, asking the court to determine the parties' rights and obligations as they related to the ownership of the south well, the responsibility for certain debt, and the ownership of water right No. 22-07280. The district

court determined that it did not have subject matter jurisdiction to hear any water law issues. The parties then sought a determination from the IDWR regarding the ownership of the permit and whether a license should be issued.

The IDWR granted the license and named as owners of the license, Lucille Howe and Jim Howe, both deceased. Subsequently, the Rileys filed a declaratory judgment action in the SRBA regarding the ownership of the water rights. In its memorandum decision, the SRBA district court awarded both Rowan and the Rileys a one-half interest in water license No. 22-07280. The Rileys appealed.

On appeal, the Rileys assert that the SRBA district court erred in holding that Rowan has an ownership interest in water right No. 22-07280. In particular, the Rileys contend that the SRBA district court erred in determining that (1) Jim Howe and Rowan held vested remainder interests prior to the death of their mother as a result of the 1944 deed; (2) Jim Howe owed a fiduciary duty to Rowan which prohibited him from acquiring a water permit in his own behalf; (3) the IDWR breached its statutory duty to issue a water license, which resulted in the water permit becoming a license on the date that proof of beneficial use was submitted; and (4) the bill of sale entered into between Jim Howe and the Rileys did not convey ownership of the water permit to the Rileys.

II. DISCUSSION

A. Standard of Review.

This Court must defer to findings of fact based upon substantial evidence, but will review freely the conclusions of law reached by stating legal rules or principles and applying them to the facts found. *Sun Valley Shamrock Resources, Inc. v. Travelers Leasing Corp.*, 118 Idaho 116, 118, 794 P.2d 1389, 1341 (1990). Accordingly, we exercise free review over the district court's conclusions of law. *Kawai Farms, Inc. v. Longstreet*, 121 Idaho 610, 613, 826 P.2d 1322, 1325 (1992).

B. Whether the SRBA District Court Erred in Holding that Rowan has a One-Half Ownership Interest in Water License No. 22-07280.

The Rileys initially contend that the SRBA district court erred in determining that the 1944 deed violated the provisions of Idaho Code § 55-111, and by holding that the childrens' remainder interests were vested remainders. Instead, the Rileys assert that Jim Howe and Rowan held

contingent remainders until Lucille Howe's death. We agree and conclude that Jim Howe and Rowan held contingent remainders at the time the water permit was applied for and until the time when Lucille Howe died.

The granting language of the 1944 deed provides:

> [F]or the term of her [Lucille Webster Howe's] natural life (that is to say, a life estate) and at her death remainder over in fee to her children, share and share alike, without restriction, the land hereinafter described. Provided, however, that if any of the children of the said Lucille Webster Howe die without issue, then their pro rata share shall pass to their surviving brothers and sisters, share and share alike, in fee. If any of them die leaving issue, then their issue shall share by the right of representation in fee.

The deed clearly only refers to Lucille Howe's interest as a life estate, and the remainder interests pass at Lucille Howe's death. Thus, it is at Lucille Howe's death that the remainder interests pass in fee, without restriction, and the identity of the remaindermen is determined. These remainder interests vest upon Lucille Howe's death. Thus I.C. § 55-111, which requires the remainder interest to vest or fail within twenty-five years of Lucille Howe's death, has been met. Consequently, until Lucille Howe's death the parties held contingent remainders, which were contingent upon each surviving Lucille Howe.

Having determined that Jim Howe and Rowan held contingent remainders at the time the water permit was applied for, the next question becomes whether Jim Howe acquired an interest in the water permit to the exclusion of Rowan. The district court held that the only interest Jim Howe had in the permit was identical to that of Rowan; thus at the time of Lucille Howe's death, Jim Howe and Rowan became co-owners of the permit. The evidence indicated that Jim Howe "acknowledged that the permit application was intended to benefit the complete set of farm owners, not just himself. When he filed the application in his and Lucille's names, he did not intend to disavow Catherine Rowan's ownership interest." Furthermore, both the application for the permit and the notice of claim were filed when Jim Howe was acting as manager of the farm and did not create a separate interest in the water permit to the exclusion of Rowan. The district court determined that following the parties' decision to partition the property, Jim Howe and Rowan entered into an agreement in which it was "Jim Howe's clear, unambiguous agreement and understanding that the permitted

interest in the 'south well' was shared with Catherine Rowan." We conclude that sufficient evidence supports the district court's decision that Jim Howe did not acquire an interest in the water permit prior to Lucille Howe's death.

Jim Howe's only interest in the water permit was the one-half interest he obtained following Lucille Howe's death and the partition of the property. The bill of sale Jim Howe entered into with the Rileys could transfer no more than Jim Howe owned. Accordingly, we conclude that after the water permit became water license No. 22-07280 the Rileys and Rowan were each entitled to a one-half interest.

With respect to whether Jim Howe owed a fiduciary duty to Rowan, we need not address this issue because Jim Howe never acquired an interest in the water permit to the exclusion of Rowan. Additionally, having determined that Jim Howe and Rowan were tenants in common, each owning a one-half interest in water license No. 22-07280, we decline to address whether the IDWR breached its statutory duty by delaying the issuance of the license. Regardless of when the IDWR issued the licence, Jim Howe and Rowan each owned a one-half interest prior to Jim Howe subsequently selling his interest to the Rileys.

III. CONCLUSION

Although we conclude that the district court was incorrect in determining that Jim Howe and Rowan held vested remainders when the permit was applied for, we nevertheless affirm the district court's conclusion. Thus, for the above stated reasons, we affirm the SRBA district court's decision that each of the parties is entitled to a one-half interest in water license 22-07280. Costs on appeal to the respondent. No attorney fees are awarded on appeal.

Chief Justice TROUT and Justices JOHNSON, SILAK and SCHROEDER, CONCUR.

I, Frederick C. Lyon, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the above is a true and correct copy of the Opinion entered in the above entitled cause and now on record in my office.
WITNESS my hand and the Seal of this Court

FREDERICK C. LYON Clerk

By: Doreen Bird Deputy

Exhibit 39

COPY

Filed January 13, 2010
BETTY J. THOMAS 1:00 P. M.
Clerk District Court
By Jeanette Anderson Deputy

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF WASHINGTON

****

IDAHO POWER COMPANY, Petitioner, v. IDAHO DEPARTMENT OF WATER RESOURCES, Respondent. IN THE MATTER OF LICENSED WATER RIGHT NO 03-7018 IN THE NAME OF IDAHO POWER COMPANY	CASE NO. CV-2009-1883 MEMORANDUM DECISION AND ORDER ON APPEAL

I.

NATURE OF THE CASE

Idaho Power Company ("Idaho Power") filed this petition for judicial review of a final agency order issued on March 30, 2009 by the Director of the Idaho Department of Water Resources ("Department"). The aforesaid agency order involved the issuance of Water Right License 03-7018, a hydropower water right license, to Idaho Power. Idaho Power appeals from the agency order, asserting that the Department's insertion of a particular condition into the license, which had **not** been included in the water right

permit previously issued to Idaho Power for the project on January 29, 1976, exceeds the Department's statutory and constitutional authority.

II.

FACTUAL AND PROCEDURAL BACKGROUND

The factual background and setting of this case is undisputed. Idaho Power, the State of Idaho, and the Federal Government have a long and fairly well documented history of both cooperation and conflict in the development of hydropower facilities along the Snake River. See e.g., Idaho Power v. State of Idaho, 104 Idaho 575, 661 P.2d 741 (1983). With permission from the State and Federal Government, Idaho Power constructed a series of three hydropower dams in the Hells Canyon stretch of the Snake River in the 1950's. Brownlee Dam, located in Washington County, Idaho, is one of those three, and Idaho Power received a water right license in 1959 for water to service four hydropower generators at Brownlee. That license is not at issue here. In the 1970's, Idaho Power applied for a water right permit to appropriate an additional 5,000 cfs of water to power a fifth hydropower generator at Brownlee Dam. The Department issued a permit, No. 03-7018, on January 29, 1976, as requested for 5,000 cfs , clearing the way for Idaho Power to install the new turbine and diversion works and to begin putting water to the beneficial use of powering the turbine to meet the increasing electrical needs of the region The Department included two conditions in the permit, which are not at issue here. After receiving the permit, Idaho Power began "proving up" its project as required by Idaho's statutory permit/license scheme for obtaining a water right. See I.C. § 42-202 et. seq. This involved the construction and placement of the fifth power turbine, and then the subsequent application of the

permitted water to beneficial use. Idaho Power asserts that the cost of installing this fifth turbine was approximately $39,000,000, a figure the State does not contest. After proving up the project as required by law, Idaho Power began putting the permitted 5,000 cfs of water to beneficial use; Idaho Power submitted proof of beneficial use in 1980. (R. p. 83). The Department, on August 27, 1980, issued an acknowledgement of receipt of Idaho Power's proof of beneficial use and responded with a letter to Idaho Power that "before a license can be issued, a field examination must be made" by the Department.

Thereafter, Idaho Power put its permit to full beneficial use and has used its permitted 5,000 cfs for its fifth hydropower generator at Brownlee Dam continuously, and without interference from the Department, up to the date of the issuance of the license, approximately 29 years. This is undisputed. The record shows that in 1985, a Department representative submitted a "Beneficial Use Field Report" confirming that Idaho Power had proved up its project, recommending in a "LICENSING REPORT" that Idaho Power receive its "5,000 cfs as per permit". (R. p. 90). Thereafter, the Department took no additional action to issue the final license for quite some time. In fact, the next action taken by the Department appears in an internal "MEMORANDUM" prepared **twelve years later**, requesting "Ralph Mellin's Assistance with Licensing Idaho Power Company's Permit No. 03-07018". (R. p. 99). The Memo indicated that Mellin's help was needed to resolve questions about the interpretation of the data collected during the 1985 field exam. The Department apparently found no irregularities with the twelve-year old data; however, the Department again let the matter languish, finally issuing the license for Permit No. 03-07018 in November 2007.

(R. p. 130). The facts set forth above, again, are very clear from the record and are not in dispute. The dispute involves a "new" condition inserted into the license by the Department in 2007 which was not one of the conditions included in the water permit issued thirty-two years earlier, before Idaho Power invested $39,000,000 in developing the water right granted in the permit. It is condition No. 3, found at page 130 of the Agency Record:

> The diversion and use of water for hydropower purposes under this license is subject to review by the Director after the date of expiration of the Federal Energy Regulatory Commission license for Brownlee Dam. Upon appropriate findings relative to the interest of the public, the Director may cancel all or any part of the use authorized herein and may revise, delete or add conditions under which the right may be exercised.

Idaho Power argues that the Department lacked statutory authority to insert this additional condition at the time of licensing, and/or that the condition is unconstitutional even if within the ambit of purported legislative authority.

The Department points to I.C. § 42-203B(6) as authority to add the "new" condition. That statute states "[t]he director shall have the authority to subordinate the rights granted in a permit or license for power purposes to subsequent upstream beneficial depletionary uses [and] **[t]he director shall also have the authority to limit a permit or license for power purposes to a specific term."** (Emphasis added). The Department contends that condition No. 3 in the license is such a "term" limit. Subsections (6) and (7) were added to I.C. § 42-203B by the Idaho Legislature in 1985, approximately five years after Idaho Power began putting the water to beneficial use under the permit. The last sentence of I.C. § 42-203B(6) states that "[s]ubsection (6) of this section shall not apply to licenses which have already been issued as of the effective date [July 1, 1985] of this act", clearly forbidding the Department from adding a

term limit to a license issued before the section's enactment. The Department's position relative to the license in this case is that the legislature's inclusion of the word "license", and not the word "permit" in the last sentence is indicative of a grant of authority to include term limits in all licenses issued after 1985, even on those where the permits were issued prior to 1985. Idaho Power disagrees and argues that the Department should be ordered to issue the license without Condition No. 3's term restriction on the water right.

III.

ISSUES ON APPEAL

A. Whether or not inclusion of Condition No. 3 in Water Right License 03-07018 is in violation of the Idaho Code.

B. Whether or not Petitioner's constitutional rights have been violated by the inclusion of Condition No. 3.

IV.

STANDARD OF REVIEW

Judicial review of a final decision of the director of the Department is governed by the Idaho Administrative Procedure Act (IDAPA), chapter 52, Title 67, Idaho Code. I.C. § 42-1701A(4). IDAPA governs the review of local administrative decisions. Urrutia v. Blaine County, 134 Idaho 353, 2 P.3d 738 (2000). This Court does not substitute its judgment for that of the agency as to the weight of the evidence presented. *Id.* The Court instead defers to the agency's findings of fact unless they are clearly erroneous. *Id.* The agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record. *Id.*

The Court is further limited in its scope of review, and is directed to examine only whether the agency action ran afoul of those grounds set out in Idaho Code § 67-5279(3), which examine whether the actions:

(a) violate statutory or constitutional provisions;

(b) exceed the agency's statutory authority;

(c) are made upon unlawful procedure;

(d) are not supported by substantial evidence; or

(e) are arbitrary, capricious, or an abuse of discretion.

Id. The party challenging an action under Idaho Code § 67-5279(3) must first illustrate that the agency erred in a manner specified in Idaho Code § 67-5279(3) and must then show that a substantial right of the party has been prejudiced. Price v. Payette County Bd. Of County Comm'rs, 131 Idaho 426, 958 P.2d 583 (1998). If the Board's action is not affirmed, "it shall be set aside ... and remanded for further proceedings as necessary." *Id.*, I.C. § 67-5279(3).

V.

ANALYSIS

A. Was inclusion of Condition No. 3 in Violation of Idaho Code?

As a preliminary matter, this Court will indicate that the Department cites only to I.C. § 42-203B(6) as the statutory authority to include condition 3 in the Water License issued to Idaho Power, and the Department asserts that its intention is to use condition no. 3 as a term limit on the license. The portions of the statute which discuss term limits on hydropower licenses state:

> 6. . . . The director shall also have the authority to limit a permit or license for power purposes to a specific term. Subsection (6) of this section shall not apply to licenses which have already been issued as of the effective date [July 1, 1985] of this act.

7. The director in the exercise of the authority to limit a permit or license for power purposes to a specific term of years shall designate the number of years through which the term of the license shall extend and for purposes of determining such date shall consider among other factors:

a. The term of any power purchase contract which is, or reasonably may become, applicable to, such permit or license;
b. The policy of the Idaho public utilities commission (IPUC) regarding the term of power purchase contracts as administered by the IPUC under and pursuant to the authority of the public utility regulatory police act of 1978 (PURPA);
c. The term of any federal energy regulatory commission (FERC) license granted, or which reasonably may be granted, with respect to any particular permit or license for power purposes;
d. Existing downstream water uses established pursuant to state law.

The term of years shall be determined at the time of issuance of the permit, or as soon thereafter as practicable if adequate information is not then available. The term of years shall commence upon application of water to beneficial use. The term of years, once established, shall not thereafter be modified except in accordance with due process of law.

The goal of statutory interpretation is to discover the intention of the legislature in drafting a statute, and to apply the statute accordingly, examining not only the literal words of the statute, but also the reasonableness of proposed constructions, the public policy behind the statute, and its legislative history. Hayden Lake First Prot. Dist. v. Alcorn, 141 Idaho 388, 111 P.3d 73 (2005). Constructions that would lead to absurd or unreasonably harsh results are disfavored. In re Daniel W., 145 Idaho 677, 183 P.3d 765 (2008). Statutory provisions cannot be read in a vacuum or in isolation, as all of the sections of applicable statutes must be construed together so as to determine the legislature's intent. Lockhart v. Dept. of Fish and Game, 121 Idaho 894, 828 P.2d 1299 (1992). Statutes must be read to give effect to every word and construed so no part is

rendered superfluous or insignificant. Moreland v. Adams, 143 Idaho 687, 152 P.2d 558 (2007). It is the general rule in Idaho that a statute should not be applied retroactively in the absence of a clear legislative intent to that effect. I.C § 73-101; Matter of Hidden Springs Trout Ranch, Inc., 102 Idaho 623, 636 P.2d 745 (1981). Finally, there is a strong presumption that legislative enactments are constitutional and courts are obligated to seek an interpretation that will save the statute from constitutional infirmity. State v. Richards, 127 Idaho 31, 896 P.2d 357 (Ct. App. 1995).

Water law is deeply enmeshed in the history of the State of Idaho and is governed by the Idaho Constitution, the Idaho Code, and caselaw. The code section at issue here was simply one amendment in a long development of the statutory scheme that regulates the exercise of the constitutional right to appropriate waters. It is assumed that when the legislature enacts or amends a statute it has full knowledge of the existing judicial decisions and case law of the state. George W. Watkins Family v. Messenger, 118 Idaho 537, 797 P>2d 1385 (1990). In addition, the legislature is presumed not to intend to overturn long established principles of law unless an intention to do so plainly appears by express declaration or the language employed admits of no other reasonable construction. Id.

The Department supports its contention that I.C. § 42-203B grants authority to insert Condition No. 3, essentially a term limit, into this license by suggesting that the legislature's use of the phrase "[s]ubsection (6) of this section shall not apply to licenses which have already been issued as of the effective date [July 1, 1985] of this act" evidences the legislature's intent that term limits could apply to **any and all** nonlicensed permits, whether issued before or after the 1985 enactment. In support

of that argument, the Department argues that the holder of a permit, as opposed to a license, has nothing more that an inchoate right or the hope of a water right. Therefore, goes the argument, the legislature took away nothing, other than a "hope", from those appropriating water under a non-licensed permit issued prior to the term limit enactment in 1985. The latter assertion is only partially born out by legal precedent. True, the cases are clear that a person who has **simply filed a permit application** has only an inchoate right. Hidden Springs Trout Ranch, supra. However, the cases so holding involve only those who have done nothing more than to apply for a permit or who hold a permit but are yet to appropriate the water. This Court believes that is a significant distinction. The Hidden Springs Court held that a new amendment to I.C. § 42-203 could be applied by the Department to a permit application that was pending when the amendment took effect. That case did not involve the same facts as this case, but that Court did note that an "applicant gains but an inchoate right upon filing of the application which **may ripen into a vested interest following proper statutory adherence.**" 102 Idaho at 625 (emphasis added).

Idaho water law has historically enshrined the act of appropriation of water to beneficial use as an act of paramount legal significance in relation to defining a property right in water:

> The consistent thread in Idaho's Constitution and water statutes is that the right to use water must be acquired by appropriation. The Idaho Supreme Court has long held that the method to acquire water in Idaho is by appropriation and the state may regulate the means of appropriating water within the State. Speer v. Stephenson, 16 Idaho 707, 102 P. 365 (1909).

1997 Idaho Op. Atty. Gen. 97-1. Historically, one could perfect a right in water through either a simple appropriation under the "constitutional" approach, or by applying for a

permit, appropriating under the permit, and obtaining a license. Under the latter, the priority date relates back to the issuance of the permit, but the right itself only is acquired upon appropriation. In 1971, the legislature mandated the permit/license scheme and no other. See Barber, STATUTORY WATER RIGHTS PERMITS: A NECESSARY PROBLEM IN REAL PROPERTY CONVEYANCING, Idaho Law Review Vol. 9, No. 1, 1972; United States v. Pioneer Irr. Dist., 144 Idaho 106, 157 P.3d 600 (2007). The Pioneer Irrigation District case did not involve the precise issue at bar, but in resolving the issues therein, that Court placed great reliance upon the significance of the act of appropriating water to beneficial use in acquiring a property right, noting that it is a "well-settled rule of public policy that the right to the use of the public water of the state can only be claimed where it is applied to beneficial use in the manner required by law." Id., 144 Idaho at 110, quoting Albrethsen v. Wood River Land Co., 40 Idaho 49, 231 P. 418 (1924). The Pioneer Court noted that under the so-called statutory method, "the appropriation is not complete and a license will not issue until there is proof of application to beneficial use for the purpose . . . originally intended." 144 Idaho at 110. "Under either the constitutional or statutory method of appropriation, the appropriator must apply the water to a beneficial use in order to have a valid water right in Idaho." Id. In Pioneer, the Court concluded that although the Bureau of Reclamation actually held the water right license, it was the landowners who actually apply the water to beneficial use who have an equitable interest that was "stronger than mere contractual expectancy" due to its conclusion that beneficial use determines water right ownership. Those principles date back one hundred years or more.

In Washington State Sugar Co. v. Goodrich, 27 Idaho 26, 147 P. 1073 (1915), the Court stated:

> The granting by the state engineer of a permit for the right to use the waters of this state, in and of itself secures to the applicant no right to the use of the waters applied for in said permit, unless there be a substantial compliance with each and every provision of the statute relating to or in any manner affecting the issuance of such permit and a fulfillment of the conditions and limitations therein, but a compliance with the conditions and limitations prescribed in such permit initiates a right to the use of the water in the applicant, and said right then becomes a vested one and dates back to the issuance of said permit.

147 P. at 1066. In the case of Speer v. Stephenson, 16 Idaho 707, 102 P. 365 (1909), the Court discussed the effect of what at the time was the new statutory scheme that replaced the "posting of notice" method of appropriation with the "permit" method:

> The permit thus provided for took the place of the posting of notice as required under the act prior to 1903, and merely gave the applicant an inchoate right which could ripen into a legal and complete appropriation only upon the completion of the works and the application of the water to a beneficial use.

102 P. at 368. That Court also noted another aspect of the 1903 permit statute that has a marked similarity to the one currently compiled at I.C. § 42-219. The Speer Court noted that the statute required the permittee to submit proof of beneficial use, and quoted the statutory procedure as:

> Upon receipt by the state engineer of all the evidence in relation to such final proof, it shall be his duty to carefully examine the same, and, if he is satisfied that the law has been fully complied with and that the water is being used at the place claimed and for the purpose for which it was originally intended, he shall issue to such user or users a license confirming such use.

102 P. at 368. The Speer court stated that under this permit/license scheme, "by pursuing the successive steps prescribed in the statute and completing his diverting

works and applying the water to a beneficial purpose, the appropriation is completed." Id. The license itself is prima facie evidence of a water right, confirming the water right, but it is upon proof of beneficial use under permit when the right, or entitlement, is created. Bassinger v. Taylor, 30 Idaho 289, 164 P. 522 (1917).

Given that historical precedent, the Court cannot accept the Department's contention that Idaho Power, in this case, holds only an inchoate right or the hope of a right, and is stuck in that legal limbo for as many decades as it may take the Department to complete the largely ministerial task of issuing the license. By completing a $39,000,000 project and beneficially appropriating water under that permit for 27 years, Idaho Power clearly holds something more than the mere hope of a water right. The question is, did the legislature intend to strip away whatever rights Idaho Power held, simply because the Department could have but did not issue the final "license" prior to the 1985 enactment? This Court is constrained to conclude that the legislature did not so intend.

The language of I.C. § 42-203B(7) is critical in and of itself, as well as its relation to the pre-existing statutes governing issuance of permits and licenses. There can be no question that the legislature mandated that any term limit be included in the permit (or as soon as practicable thereafter) **and** that the term of years **sha**ll commence upon application of the water to beneficial use. I.C. § 42-203B(7). The plain reading conveys the legislative intent that a term limit be included prior to appropriation of the water to beneficial use. Such construction is consistent with a reasonable approach under which a potential hydropower appropriator can obtain a permit with eyes wide open as to the conditions and restrictions **before** embarking upon an expensive water

project. Conversely, the notion that the Department can grant a permit and authorize a permitee to invest substantially in a project, and then after completion of the works and commencement of beneficial use, insert significant new restrictions, strikes the Court as an unreasonably harsh interpretation; the Court sees nothing in the statutory language evidencing an intent to work such a hardship or oppressive result. See, e.g. Lawless v. Davis, 98 Idaho 175, 560 P.2d 497 (1977). Idaho Power had completed all requirements for the final license by 1980. Were the Court to interpret the statute in the manner asserted by the Department, essentially stripping away Idaho Power's rights because the Department delayed issuance of the license for many years, during which time the law changed, the end result for Idaho Power would be oppressive.

The former interpretation is entirely compatible with the other sections governing the steps toward licensing. Section 202 governs the process by which a person must file a very detailed application for a water right permit. I.C. § 42-202. That was done in this case in 1975. Section 203A governs the Department's options for handling an application for a permit. I.C. § 42-203A. That section provides for public notice, public hearings, and lists a number of criteria such as "public interest" upon which the Department can base a denial of the permit. That section also grants authority for the Department to issue a permit for less water than applied for, or to issue a "permit upon conditions." In fact, that was done in this case; the Department issued a permit with two conditions, significant in scope, but not at issue here. Next, Sections 204 to 218 set forth a number of requirements that the permit holder must satisfy, culminating in his/her filing proof of beneficial use under the permit. I.C. § 42-204 – 218. If an applicant deems the conditions of the permit to be onerous, he can simply abandon or

forfeit it before making the substantial investment. See, e.g. Hardy v. Higginson, 123 Idaho 485, 849 P.2d 946 (1993). However, if the permitee proceeds according to law, I.C. § 42-219 describes the Department's obligations thereafter:

> Upon receipt by the department of water resources of all the evidence in relation to such final proof, it shall be the duty of the department to carefully examine the same, and if the department is satisfied that the law has been fully complied with and that the water is being used at the place claimed and for the purpose for which it was originally intended, the department shall issue to such user or users a license confirming such use.

In this case, it is undisputed that Idaho Power fully complied with the law and the terms of the permit. It appears, therefore, that the Department had little, if any, authority to deny a license confirming the use set forth in the permit. Reading Sections 203A, 203B, and 219 together, as the Court must, the Court is convinced that the legislature intended that significant restrictions such as a term limit on a permit/license based upon public interest be handled at the outset, in the permitting process, and not as an afterthought during the culmination of the licensing process.

Taking into consideration all of the relevant statutory provisions, the important public policies embodied therein, the long history of judicial decisions existing at the time of the relevant amendment to I.C. § 42-203B, the lack of a clearly expressed intention to overturn existing precedent or to apply the "term limits" retroactively to those who had filed proof of beneficial use under a permit prior to the enactment of the amendment, this Court concludes that the Department's attempt to include condition number 3 in the license exceeded the Department's statutory authority and/or violates those statutory provisions.

B. Whether Idaho Power has established a Constitutional Violation

Based upon the Court's resolution of the first issue, the Court concludes that it need not address the other issues raised by Idaho Power, including whether or not a violation of a constitutional right has occurred.

VI.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the matter is remanded to the Idaho Department of Water Resources and further, that the Department strike Condition Number 3 from the license and that the Department issue a license pursuant to the terms found within the permit and consistent with this opinion.

Dated this 13 day of January, 2010.

Susan E. Wiebe
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing order was forwarded to the following persons on this 13th day of January, 2010.

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